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Crime prevention through environmental design: A critical perspectives of environmental criminology

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Abstract
This paper examines an approach to crime reduction which differs from many others in that it focuses not on the offender or their reasoning for committing an offense but upon the environment in which an offense takes place. This approach also differs in its consideration of who should be held responsible for the reduction of crime, with a focus not solely upon the traditional criminal justice system agencies but also upon planners, architects, developers, and managers of public space. The approach is based on the presumption that offenders will maximize crime opportunities, and therefore, those opportunities must be avoided (in the first place) or removed (following the emergence of a crime problem). In the 2001 publication "Cracking Crime Through Design," Pease introduces the concept of design as a means of reducing crime, but more importantly the premise that it is the moral responsibility of many different actors and agencies to improve the lives of those who may fall victim to crime, those who live in fear of crime, and (less obviously) those who will, through the presentation of unproblematic opportunities, be tempted into offending. In the case of crime prevention through environmental design (CPTED), it is the planners, designers, developers, and architects who risk acting (as Pease paraphrases the poet John Donne) as the gateway to another man's sin.

Keywords: CPTED, defensible space, capable guardian

Introduction
If crime is rational and people choose to commit crime, then it follows that crime can be controlled or eradicated by convincing potential offenders that crime is a poor choice that will not bring them rewards but pain, hardship, and deprivation instead. Evidence shows that jurisdictions with relatively low incarceration rates also experience the highest crime rates [1]. Crime prevention through environmental design (CPTED) is an environmental criminology theory based on the proposition that the appropriate design and application of the built and surrounding environment can improve the quality of life by deterring crime and reducing the fear of crime. Security and crime prevention practitioners should have a thorough understanding of CPTED theory, concepts, and applications in order to work more effectively with local crime prevention officers, security professionals, building design authorities, architects and design professionals, and others when designing new or renovating existing buildings. This paper intended to provide the reader with the basic information required to understand and apply the theory and concepts of CPTED. I do not expect to make the reader an instant expert on crime; few people have a clear understanding about the true nature and causation of crime and criminal behaviour. However, CPTED is based on common sense and a heightened sense of awareness of how people are using a given space for legitimate and illegitimate criminal purposes

History of CPTED
Situational crime prevention was first popularized in the United States in the early 1970s by Oscar Newman, who coined the term defensible space. This term signifies that crime can be prevented or displaced through the use of residential architectural designs that reduce criminal opportunity, such as well-lit housing projects that maximize surveillance [2]. C. Ray Jeffery wrote *Crime Prevention through Environmental Design*, which extended Newman's concepts and applied them to non-residential areas, such as schools and factories [3]. According to this view, mechanisms such as security systems, deadbolt locks, high-intensity Street lighting, and neighbourhood watch patrols should reduce criminal opportunity [4]. In 1992 Ronald Clarke published *Situational Crime Prevention*, which compiled the best-known strategies and tactics to reduce criminal incidents [5]. Criminologists have suggested using a number of situational crime prevention efforts that might reduce crime rates. One approach is not to target a specific crime but to create an environment that can reduce the overall crime rate by limiting the access to tempting targets for a highly motivated offender group (such as high school students). Notice that this approach is designed not to eliminate a specific crime but to reduce the overall Crime rate. The subway system in Washington, DC, has used some of these environmental crime reduction techniques to control crime since it began operations in 1976. For centuries, historians and researchers have studied the relationship between the environment and behaviour. CPTED draws from a multidisciplinary base of knowledge to create its own theoretical framework including the fields of architecture, urban design and planning, landscape architecture, sociology,

1. George Rengert, "Spatial Justice and Criminal Victimization," Justice Quarterly 6 (1989): 543–564.

2. Oscar Newman, Defensible Space: Crime Prevention through Urban Design (New York: Macmillan, 1973).
3. C. Ray Jeffery, Crime Prevention through Environmental Design (Beverly Hills: Sage, 1971).
4. See also Pochara Theerathorn, "Architectural Style, Aesthetic Landscaping, Home Value, and Crime Prevention," International Journal of Comparative and Applied Criminal Justice 12 (1988): 269–277.
5. Ronald Clarke, Situational Crime Prevention: Successful Case Studies (Albany, NY: Harrow and Heston, 1992).

psychology, anthropology, geography, human ecology, criminology, and criminal justice. The first widely published studies of crime and the environment were done by a group of University of Chicago sociologists (Park, Burgess, Shaw, and McKay). The researchers viewed the social disorganization or lack of community control found in specific inner-city districts as generating high crime rates, which decreased in concentric circles away from the central business district [6]. In making this case, the University of Chicago sociologists rejected the tenets of early criminological theory that had focused on the characteristics of individuals as causal agents in crime. After the early works of Burgess, Park, Shaw, and McKay, urban planner Jane Jacobs (1961) developed the *eyes-on-the-street* theory [7]. Using personal observation and anecdote, Jacobs suggested that residential crime could be reduced by orienting buildings toward the street, clearly distinguishing public and private domains and placing outdoor spaces in proximity to intensively used areas. Jacobs's book *The Death and Life of American Cities* gave police and planners the awareness of the value of eyes on the street as a crime prevention tool. But having eyes (or windows) on the street is not enough to stop crime if there is no sense of community or involvement.

Contemporary Criminological Thinking on Crime, Criminals, and Potential Targets

The term *crime prevention through environmental design* first appeared in a 1971 book by criminologist and sociologist C. Ray Jeffrey. Inspired by Jacobs's work (1961), Jeffrey (1971) challenged the old guard of criminology theory to take an interdisciplinary approach to crime prevention. In this work, Jeffrey analysed the causation of crime from an interdisciplinary approach, drawing from criminal law, sociology, psychology, administration of justice, criminology, penology, and other fields. He also drew from relatively new fields at that time—including systems analysis, decision theory, environmentalism, behaviourism, and several models of crime control. Although different crimes are affected in different ways by the environment in which they occur, almost every type of *street crime*, crimes against persons or property, is influenced in some way by physical design, layout, or situational factors such as the presence of a victim or target, the lack of capable guardianship, and the lack of surveillance opportunities. Theories of crime, such as environmental criminology, focus specifically on analysing the environmental factors that provide opportunities for crime to occur. For this reason, most theories of crime can also be classified as *crime opportunity* theories. Environmental criminology, rational choice, situational crime prevention, routine activity, opportunity model, geography of crime, and hot spots of crime are all examples of criminological theories that explain factors that provide criminal opportunities (Sorensen *et al*., 1998). Studies conducted in the 1970s through 1990s (primarily by the National Institute of Justice in the United States) demonstrated that certain environments tended to encourage informal social gatherings and contacts, crime, and raised the fear of crime. These environments include poorly lighted areas, high-rise buildings with inappropriate tenant mix, and apartment buildings with large numbers of units that shared one primary entrance, and very heavily trafficked streets. Conversely, researchers found that the presence of community centres and well-maintained public parks, and so on, increased social interaction, natural surveillance, and other informal social controls, thus reducing both crime and the fear of crime. According to the *rational choice* theory approach, criminal behaviour occurs when an offender decides to risk breaking the law after considering personal factors (the need for money, cheap thrills, entertainment, revenge) and situational factors (potential police response, availability of target, lighting, surveillance, access to target, skill, and tools needed to commit the crime). Before committing a crime, most criminals (excluding drug-stupid impulse crimes, acts of terrorism, and psychopathic criminals) will evaluate the risks of apprehension, the seriousness of expected punishment, the potential value of gain from the crime, and how pressing is the need for immediate criminal gain. The decision to commit a specific type of crime is thus a matter of personal decision making based on an evaluation of numerous variables and the information that is available for the decision-making process. Burglary studies have shown that burglars forgo a break-in if they perceive that the home is too great a security challenge, that the value or rewards of the goods to be taken are not worth the effort, and the target might be protected by guards, police, *and capable guardians* [8]. The evidence suggests that the decision to commit crime, regardless of substance, is structured by the choice of:

1. Where the crime occurs
2. The characteristics of the target
3. The means and techniques available for the completion of the crime

In addition to crime prevention theory, security professionals should also understand contemporary criminological views on how criminals pick their targets and how criminal choice is influenced by the *perception of vulnerability* that the target projects

Target Selection

Studies of professional and occasional criminals have suggested that they choose their targets with a rational decision-making process. Criminals take note of potential targets every day: keys left in cars, open or unlocked residential or commercial establishments, untended homes while on vacation, etc. Studies of burglary indicate that houses located at the end of cul-de-sacs, surrounded by trees, make very tempting targets [9]. Some research indicates that street criminals use public transportation or walk so it is more likely they will gravitate to the centre of a city, particularly areas more familiar to them that also provide potential targets in easily accessible and open areas [10]. The environment shapes the factors, or cues that contribute to development of criminal

6. Robert Park and Ernest Burgess, the City (Chicago: University of Chicago Press, 1925).
7. "The Death and Life of Urban Design: Jane Jacobs, the Rockefeller Foundation, and the New Research in Urbanism, 1955-1965," Journal of Urban Design, 2006.
8. Brantingham, P.L. and Brantingham, P.J. (1993) Nodes, paths and edges: Considerations on the complexity of crime and the physical environment. Journal of Environmental Psychology 13(1): 3–28.
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10. Brown B, Bentley D (1993) Residential burglar's judge risk: the role of territoriality. J Environ Psychol 13:51–61.

opportunities, and to the formation of specific patterns of opportunities. Once the patterns of opportunities are created, patterns of crime soon follow. The crime prevention specialist analyses those opportunities, patterns of opportunities, and patterns of crime to devise and implement appropriate situational and crime-specific prevention measures. The Brantinghams' research hypothesized that criminal choices are influenced by the *perception* of target availability and vulnerability. The Brantingham's posited that individual criminal events must be understood as confluences of offenders, victims, criminal targets, and laws in specific set-tings at particular times and places. Criminals often choose certain neighbourhoods for crimes because they are familiar and well-travelled, because they appear more open and vulnerable, and because they offer more potential escape routes. Thus, the more suitable and accessible the target, the more likely the crime will occur.

Potential Offenders' Perspective

Research has shown that the features of the physical environment can influence the opportunity for crime to occur. The physical surroundings clearly influence the potential offenders' perceptions and evaluation of a potential crime site. Part of this evaluation also includes determining the availability and visibility of natural guardians (residents, passer-by, dogs, etc.) at or in close proximity to the site under consideration. Offenders, when deciding whether or not to commit a crime in a location, generally do so after considering the following questions *assuming* a *rational offender* perspective:

- How easy will it be to enter the area?
- How visible, attractive, or vulnerable do the targets appear?
- What are the chances of being seen?
- If seen, will the people in the area do something about it?
- Is there a quick, direct route for leaving the site after the crime is Committed?

Thus, the physical features of a site may influence the choices of potential offenders by altering the chances of detection and by reshaping the public versus private space in question. If a potential criminal feels the chances of detection are low, or if a criminal is fairly certain that he or she will be able to exit without being identified or apprehended, the likelihood of crime increases. In effect, if a location lacks a capable guardian, it becomes a more likely target for crime.

Concept of Capable Guardian

Routine activity theory suggests that the presence of capable guardians may deter crime. Criminals will generally avoid targets or victims who are perceived to be armed, capable of resistance, or potentially dangerous. Criminals will generally stay away from areas they feel that are aggressively patrolled by police, security guards, nosy neighbours, or live-in family members like grandparents. Likewise, criminals avoid *passive barriers* such as alarm systems, fences, locks, barking dogs, or related physical barriers. This avoidance is intuitively logical to the experienced law enforcement or security practitioner. Criminals will look for the easiest path rather than expose themselves to greater risk or challenge, unless they perceive the risk is justified enough to override their perception. The concept of natural surveillance and capable guardians are very powerful tools for reducing the *perceived and actual vulnerability* a site poses to a potential criminal. CPTED strategies employ the concept of capable guardians within the *organizational* (people) classifications of strategies

Criminal Choice

Criminals or potential criminals are conditioned by personal factors (Pezzin, 1995) that may lead them to choose crime. Research also shows that criminals are more likely to desist from crime if they believe:

- Future earnings from criminal activities will be low.
- Other attractive but legal income-generating opportunities are available.

Agnew (1995) believes people more likely to choose a life of crime over conformity to socially acceptable behaviour demonstrate the following personality traits:

- They lack typical social constraints and perceive freedom of movement, even in areas and spaces where they are uninvited or unwelcome.
- They have less self-control and do not fear criminal punishment.
- They are typically facing a serious personal problem that they feel forces them to choose risky behaviour (similar to the classic white collar criminal). At any given time, there are individuals who are capable of criminal behaviour, and will take advantage of vulnerable targets, whether they are people, buildings, or other facilities, and that the perception of vulnerability drives the criminal choice, in terms of which actual target they attack.

CPTED as Defensible Space

Oscar Newman published his study of CPTED in residential areas (1972) and demonstrated how design layout and architecture contributes to victimization by criminals in his work *Defensible Space, Crime Prevention through Urban Design*. In this work, Newman explored the concepts of human territoriality, natural surveillance, and the modification of existing structures to effectively reduce crime. Newman argued that physical construction of residential environment could elicit from residents a behaviour that contributes in a major way toward insuring their security [11]. The form of buildings and their groupings enable inhabitants to undertake a significant self-policing function. The primary function of defensible space is to release latent attitudes in the tenants, which allow them to assume behaviour necessary to the protection of their rights and property. Defensible space is a surrogate term for the range of mechanisms, real and symbolic barriers, strongly defined areas of influence, and improved opportunities for surveillance that combine to bring the environment under the control of its residents. Newman's work became the foundation for what we know today as CPTED. Oscar Newman coined the term *defensible space* as he studied the relationship between particular design features and crime that occurred in public housing developments in New York. The four components of Newman's study were:

- Defining perceived zones of territorial influence
- Providing surveillance opportunities for residents and their guests
- Placing residential structures (public areas and entries) close to safe areas

[11] Newman O (1973) Defensible space: people and design in the violent city. Architectural Press, London.

- Designing sites and buildings so those occupants are not perceived and stigmatized as vulnerable

Those sites and buildings that were perceived as most vulnerable and isolated had similar characteristics:

- Unassigned open spaces that were unprotected, uncared for, and provide opportunities for residents and outsiders to engage in illegitimate activities
- An unlimited number of opportunities to penetrate the site with uncontrolled access—the multitude of entry points provided offenders with easy entry and numerous escape routes
- The lack of territoriality and boundary definition that discouraged the legitimate residents from claiming space and taking control of the site—residents were often unable to recognize strangers from legitimate users
- Lack of opportunities for natural surveillance and supervision
- Design conflicts between the incompatible uses and users—incompatible activities are located next to one another

Newman used his theory to modify housing developments by implementing some of the most basic elements of CPTED design: high fences, designated paths, architectural treatment to distinguish private, semiprivate, semi-public, and public spaces, and improved lighting. Defensible space design should link territoriality and surveillance by creating designs where the observer feels the area under surveillance is under their sphere of influence, and part of their responsibility to actively prevent crime. The environment of the building should be designed so that the observer can recognize or identify the victim or target as part of their property and the observer has a vested interest to intervene and prevent the crime from occurring. Increased legitimate traffic of people and vehicles are positive experiences that are characteristic of a safe place. People who live, work, and play in an area will tend to feel a certain ownership and responsibility, and will try to protect an area. Proximity to areas with high volume of legitimate usage encourages the same sense of territoriality, responsibility, and effective surveillance. Newman's work came under criticism for methodological weakness, and academicians viewed his work as architecturally deterministic (Atlas, 1983) [12]. Architecture does not force people to engage in certain behaviours, but the environment and social controls can exert a strong influence on how people respond to their spaces. Not everyone in a slum is a criminal, and not everyone in an upper-class gated community is an outstanding citizen. Part of the problem of the Defensible Space theory was the assumption that the illegitimate users or criminals could be easily identified by the legitimate residents, but the reality was that the residents were often unwilling or unable to determine who legitimately belonged on the property, because of the high turnover in residents, and the additional challenge that many of the criminals were often residents, or their neighbours' children (Merry, 1981). Subsequent CPTED demonstration projects in the 1970s by the Westinghouse Corporation were generally unsuccessful as they attempted to extend the Defensible Space concept to school, commercial, residential, and transportation environments where territorial behaviour is much less natural than in the multifamily residential context.

[12.] Paul-Alan Johnson, the Theory of Architecture: Concepts, Themes, and Practices, 1994.

Basic Crime Prevention Assumptions

The need for CPTED in the design and planning process is based on the belief that crime and loss prevention are inherent to human functions and activities, not just something that police or security people do. What we do right or wrong with our human and physical resources produces a lasting legacy. Once the building concrete, brick, mortar, and glass is set, it becomes infinitely more difficult and expensive to make structural changes that would allow security to be designed into the building and site. CPTED is a specialized field of study focusing on:

1. ***Physical environments*** such as a building park office space, apartment, and so on. The physical environment can be manipulated to produce behavioural effects that will reduce the fear and incidence of certain types of criminal acts.
2. ***Behaviour of people*** in relationship to their physical environment. Some locations seem to create, promote, or allow criminal activity, incivilities or unruly behaviour, whereas other environments elicit compliant and law-abiding conduct.
3. ***Redesigning or using existing space more effectively*** to encourage desirable behaviours and discourage crime and related undesirable conduct. It is through the insight and framework of CPTED, which serves to develop and ensure a better-designed and used environment. CPTED practice suggests that crime and loss are by-products of human functions that are not working properly. Crowe suggested that CPTED involves the design of physical space in the context of the needs of the legitimate users of the space, the normal and expected (or intended) use of the space, and the predictable behaviour of both the legitimate users and offenders. In this regard, not only the proper function must match a space that can support it, but also the design must assure that the intended behaviour has the opportunity to function well and support the control of behaviour. In general, Crowe (1991) suggests that there are three basic *classifications* to CPTED measures:

- ***Mechanical measures*****:** Also referred to as target hardening, this approach emphasizes hardware and technology systems such as locks, and security screens, windows, fencing and gating, key control systems, access control systems, closed circuit television (CCTV), and similar physical barriers. Mechanical measures must not be relied solely on to create a secure environment but, rather, be used in context with people and design strategies.
- ***Organizational or human measures*****:** Aocus on teaching individuals and vested groups steps they can take to protect themselves, or the space they occupy, at home or work. Organizational methods of CPTED include block watches, neighbourhood watch, security patrols, police officer patrols, concierge stations, designated or capable guardians, and other strategies using people as the basis of security with the ability to observe, report, and intervene.
- ***Natural measures*****:** Designing space to ensure the overall environment works more effectively for the intended users, while at the same time deterring crime. Natural methods of CPTED use good space planning and architecture to reduce user and use conflicts by planning compatible circulation patterns. An example of natural design is the use of *security zoning*. By dividing space into zones of differing security levels, such as unrestricted, controlled,

and restricted, sensitive areas can be more effectively protected. The focus of access control strategies is to deny access to a crime target and create in offenders, a perception of risk and detection, delay, and response. Within these three CPTED classifications, there are several key concepts that allow CPTED to be implemented according to Crowe: natural access control, natural surveillance, and territoriality.

Displacement

Displacement was cited early on as one of the biggest problems with CPTED; however, long-term analysis of crime patterns shows that CPTED measures eliminate some activity and may displace other activities; however, the totality of displacement is usually significantly less than the original crime conditions. Consequently, it is a myth that CPTED merely moves crime from one place to another, offering no real solution to neighbourhood problems. On the contrary, a Meta study of U.S. Department of Justice crime prevention studies (Guerette and Bowers, 2009) showed that in nearly half the instances of CPTED interventions, crime was reduced without displacement of the crime activity to adjacent areas. This same Meta study showed that when crime was displaced, it was typically less crime in the adjacent area than the original location, so a net benefit is yielded. Further on displacement in the past decade criminal justice research has shown that displacement is not as damaging as previously thought. In fact, five different forms of displacement have been discovered and any one of them can be either positive or negative, depending on how they are used.

The five forms of displacement are:

1. *Place displacement*—a problem is moved from one place to another.
2. *Time displacement*—a problem is moved from one time to another.
3. *Target displacement*—The offender changes the target, while keeping the time and place the same, such as robbing drug dealers versus robbing seniors out for a walk.
4. *Method displacement*—the offender changes the method by which the problem is caused, such as displacing gun robberies to strong-arm robberies.
5. *Offense displacement*—an offense changes from one type (robbery) or another (burglary) [13].

An example of positive displacement would be displacing teens out of a schoolyard where vandalism is occurring, over to a nearby recreation centre where programs are established for them and the kids are supervised. If displacement is controlled, it can be the CPTED practitioner's best tool. The displacement of crime serves as a powerful crime prevention tool because it disrupts the flow and location of the criminal business enterprise. Patrons buying drugs known to go to certain people at certain locations. Signals, cues, and signs are used to advertise that drugs or criminal activity are available. With the continual shifting of drugs and crime, they are never able to root long enough to take over an area. Thus, crime displacement is an effective tool to disrupt the availability of crime activity by moving it to the next house, the next neighbourhood, the next city. The continual movement weakens the sustainability of the criminal behaviour

Applications of Situational CPTED

Applying CPTED requires a knowledge and understanding of basic crime prevention theory and practice. There are a number of operating assumptions for crime prevention officers that are relevant to security personnel and others engaged in loss and crime prevention planning and implementation, which are also relevant to CPTED:

- Potential victims and those responsible for their safety must be assisted to take informed actions to reduce their vulnerability to crime.
- The actions potential victims can take to prevent crime are limited by the control they can exert over their environment.
- Focus must be given to the environment of the potential victim rather than that of the potential criminal.
- Crime prevention is a practical versus a moralistic approach to reducing criminal motivation by reducing the opportunities to commit crime.
- Punishment and rehabilitation capabilities of courts and prisons, police apprehension, and so on can increase the risk perceived by criminals and have a significant, but secondary, role in criminal opportunity reduction.
- Law enforcement agencies have a primary role in the reduction of crime by providing crime prevention education, guidance, and information to the public, institutions, and other community organizations.
- Crime prevention can be both a cause and effect of efforts to revitalize urban and rural communities.
- Crime prevention knowledge is continually developing and is interdisciplinary in nature; thus, there must be a continual analysis of successful practices and emerging technologies and the sharing of this information among practitioners

Conclusion

While CPTED may lack some consistency in process and application, research suggests that the principles upon which it is based can work both alone and combined with other interventions, to reduce crime and the fear of crime and to maximize social, environmental, and economic sustainability. In moving forward, CPTED must evolve, but in the words of Ekblom (2009), it must lose its historical baggage first. While there is always room for further research, the CPTED community can begin to confidently challenge some of the debates which have dominated this field and which extensive, independent, and methodologically rigorous research has clarified. Attention should now be focused upon building upon examples of good practice both in terms of by whom and how CPTED is delivered on the ground. Implementation should be adapted to context and designed to suit the social and economic challenges of different communities. Future thinking should focus upon new models of delivery which can be implemented with limited public funding and within political environments which favor restricted legislation, regulation, and governmental interference. CPTED must also adapt to changing concerns regarding crime. The traditional focus upon acquisitive crime must widen to address public concern regarding low-level crimes and antisocial behavior and also governmental priorities such as terrorism and violent extremism. But these challenges can be seen as opportunities. Where there are problems, there is

[13] Robert Barr and Ken Pease, "Crime Placement, Displacement, and Deflection," in Crime and Justice, A Review of Research, vol. 12, eds. Michael Tonry and Norval Morris (Chicago: University of Chicago Press, 1990), pp. 277–319.

scope to develop solutions, and CPTED is a practical, cost-effective crime reduction measure which, research has shown, can adapt too many different problems and contexts.

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Right to privacy in Indian perspective

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Abstract
The right to privacy stands recognized in Indian Constitution. Article 21 as such protects the right to privacy as a necessary ingredient of the right to life and personal liberty. The right to privacy is also recognized under the law of torts, criminal laws as well as property laws as an essential element involved therein. However in the near future the Indian Judiciary and legislatures will be able to carve out the separate zone of privacy and will keep a proper balance between the competing interest of individuals and social interest.

Keywords: Individual Privacy, Personal Liberty, Freedom of expression

1. Introduction
The terms privacy and right to privacy can't be easily conceptualized. It has been taken in different ways in different situations. Tom Gaiety said [1] 'right to privacy is bound to include body' inviolability and integrity and intimacy of personal identity including marital privacy. Jude Cooley [2] explained the law of privacy and has asserted that privacy is synonymous to 'the right to be let alone'. Edward Shils [3] has also explained privacy is 'zero relationship between two or more persons in the sense that there is no interaction or communication between them, if they so choose'. Warren and Brandeis [4] has very eloquently explained that 'once a civilization has made distinction between the "outer" and "inner" man, between the life of the soul and the life of the body…. The idea of a private sphere in which man may become and remain himself'. In modern society privacy has been recognized both in the eyes of law and in common parlance. But it varies in different legal systems as they emphasize different aspects. Privacy is a neutral relationship between persons or groups or between groups and persons. Privacy is a value, a cultural state or condition directed towards individual on collective self-realization varying from society to society.

2. Constitutional Interpretation
The Indian Constitution provides a right to freedom of speech and expression [5], which implies that the person is free to express his will about certain things [6]. A person has the freedom of life and personal liberty, which can be taken only by procedure established by law [7]. These provisions improvably provide right to privacy. The privacy of a person is further secured from unreasonable arrests [8], the person is entitled to express his wishes regarding professing, propagating any religion [9]. The privacy of property is also secured unless the law so authorizes i.e. a person cannot be deprived of his property unlawfully [10]. The personal liberty in Art.21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty [11], secrecy [12], autonomy [13], human dignity [14], human right [15], self-evaluation [16], limited and protected communication [17], limiting exposure [18] of man and some of them have been raised to the status of fundamental right, viz, life and personal liberty, right to move freely, freedom of speech and expression, individual and societal right and given protection under Art.19. Article 21 as such protects the right to privacy as a necessary ingredient of the right to life and personal liberty. The Supreme Court of India has interpreted the concept of right to life to mean right to dignified life in Kharak Singh Case [19], especially the minority judgment of Justice Subba Rao. In Govind v. State of M.P. [20], Mathew J., delivering the majority judgment asserted that the right to privacy was itself a fundamental right, but subject to some restrictions on the basis of compelling public interest. Privacy as such interpreted by our Apex Court in its various judgments means different things to different people. Privacy is a desire to be left alone, the desire to be paid for one's data and ability to act freely. Privacy relates ability to control the dissemination and use of one's personal information.

3. Phone Tapping and Privacy
Right to privacy is affected by new technologies. Right to privacy relating to a person's correspondence has become a debating issue due to the technological developments. There are cases of intercepting mails and telephonic communication of political opponents as well as of job seekers. Section 5(2) the Indian Post Office Act and Section 26(1) the Indian Telegraph Act empower the Central and State Governments to intercept telegraphic and postal communications of the occurrence of public emergency in the interest of public safety. In R.M. Malkani v. State of Maharashtra [21], the Supreme Court observed that the Court will not tolerate safeguards for the protection of the citizen to be imperiled by permitting the police to proceed by unlawful or irregular methods. Telephone tapping is an invasion of right to privacy and freedom of speech and expression and also Government cannot impose prior restraint on publication of defamatory materials against its officials and if it does so, it would be violative of Art. 21 and Art. 19(1)(a) of the Constitution. Justice Kuldip Singh opined in People's Union for Civil Liberties v. Union of India [22] that right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as right to privacy. In this case Supreme Court had laid down certain procedural guidelines to conduct legal

interceptions, and also provided for a high level review committee to investigate the relevance for such interceptions. But such caution has been thrown to winds in recent directives from Government bodies as is evident from phone tapping incidents that have come to light. In State of Maharashtra v. Bharat Shanti Lal Shah [23], the Supreme Court said that interception of conversation though constitutes an invasion of an individual's right to privacy but right can be curtailed in accordance with procedure validly established by law. Court has to see that the procedure itself must be fair, just and reasonable and not arbitrary, fanciful or oppressive. An authority cannot be given an untrammeled power to infringe the right to privacy of any person [24]. In Neera Fadia tapes case [25] to use phone tapping as a method of investigation in a tax case seems to be an act of absurd overreaction. For so many journalists, politicians and industrialists to have their phone tapped without a rigorous process of oversight represents a gross violation of basic democratic principles.

4. Gender Priority on Privacy

The right to privacy implies the right not merely to prevent the incorrect portrayal of private life but the right to prevent it being depicted at all. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes [26]. The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless etc., [27]. The basic right of female is to be treated with decency and proper dignity. But if a person does not like marriage and lives with another the society should be able to permit it. Sense of dignity is a trait not belonging to society ladies only, but also to prostitutes [28].

Rape is not only a crime against the person of a woman, it is crime against the entire society [29]. As a victim of sex crime she would now blame anyone but the culprit. Rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely assault – it is often destructive of the whole personally of the victim [30]. Right to privacy is an essential requisite of human personality embracing within it the high sense of morality, dignity, decency and value orientation.

The question of relation between the right to privacy and conjugal rights arose for the first time in Sareetha v. Venkta Subbaiah [31]. Where in the A.P. High Court held the provisions of S.9 of the Hindu Marriage Act, 1955 i.e. the restitution of conjugal rights, as unconstitutional as it is violative of Art.21 of the Constitution of India vis-à-vis right to privacy. But in Harvinder Kaur v. Harmander Singh [32], the Delhi High Court held that though sexual relation constitute most important attribute of the concept of marriage but they do not constitute its whole content. Sexual intercourse is one of the elements but goes to make up the marriage but it is not sumsum bonum. In Saroj Rani v. Sudarshan Kumar Chandha [33], the Supreme Court agreed with Delhi High Court and thereby upheld the constitutionality of Section 9. This right is within the right to marry and it does not violate the right to privacy of wife. It has been generally felt that the Supreme Court in this case lost an ideal opportunity for changing law in this regard in accordance with the changing spirit of the times. The right of the husband or the right of wife to the society of the other is not a creation of statute.

5. Freedom of Press and Privacy

The freedom of press has not been expressly mentioned in Art. 19 of the Constitution of India but has been interpreted that it is implied under it. The Constitution exhaustively enumerates the permissible grounds of restriction on the freedom of expression in Art. 19(2), it would be quite difficult for Courts to add privacy as one more ground for imposing reasonable restriction. So, a female who is the victim of sexual assault, kidnapping, abduction or a like offence should not further be subject to the indignity of her name and the incident being published in press media [34]. The freedom of speech and expression as envisaged in Art.19(1)(a) of the Constitution also clothes a police officer to seize the infringing copies of the book, document or newspaper and to search places where they are reasonably suspected to found, impinging upon the right to privacy [35]. Newspaper or a journalist or anybody has the duty to assist the State in detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to right to privacy in itself and is not an absolute right [36]. Regarding protection of privacy vis-à-vis encroachment by press in the judicial approach is not very clear. There is no specific legislation in India which directly protects right to privacy against excessive publicity by press.

Electronics media include television channels, radio, internet broadcast, and all electronic journalism which are used by today's media. Main purpose of media is to bridge the gap between Government policy and public grievances. In Destruction of Public and Private Properties v. State of A.P. [37] the Supreme Court said that media should be based upon the principles of impartiality and objectivity in reporting, ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting woman and children and matters relating to national security; and respect for privacy. Casting couch is very popular tool used by media now a days which directly hammer the individual privacy. There is no guideline to handle this issue. Privacy frame will provide solution to solve this problem.

6. Health and Privacy

Health sector is the important concern in privacy. Your health information includes any information collected about your health or disability, and any information collected in relation to a health service you have received. Many people consider their health information to be highly sensitive. The right to life is so important that it supersedes right to privacy. Under medical ethics, a doctor is required not to disclose the secret information about the patient as the disclosure will adversely affect or put in danger the life of other people [38]. In Mr. 'X' v. Hospital 'Z' [39] it was held that doctor patient relationship though basically commercial, is professionally a matter of confidence and therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation public disclosure of even true private facts may sometimes lead to the clash of one person's right to be let alone with another person's right to be informed. In another case Court said that [40] the hospital or doctor was open to be concerned to reveal such information to persons relating to the girl whom he intended to marry and she had a right to know about the HIV-positive status of the appellant. The Court also held that appellant's right was not affected in any manner in revealing his HIV – positive status of the appellant. The Court also held that appellant's right was not affected in any manner in revealing

his HIV-positive status to the relatives of his fiancée. In matrimonial cases the petitioner would always insist on medical examination. If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Art.21. Narco-analysis, lie-detection and BEAP tests in an involuntary manner violate prescribed boundaries of privacy. A medical examination cannot justify the dilution of constitutional rights such as right to privacy [41]. If DNA test is eminently needed to reach the truth, the Court must exercise the dissector of medical examination of a person [42]. Though the right to personal liberty has been read into Art. 21, it cannot be treated as an absolute right. To enable the Court to arrive at a just conclusion a person could be subjected to test even though it would invade his right to privacy.

7. Conclusion

The right to privacy stands recognized in Indian Constitution. The right to privacy is also recognized under the law of torts, criminal laws as well as property laws as an essential element involved therein. The right to privacy assures and reassures a person's individuality. It is all about oneself, his feelings and emotion. Infringement of the right hurts the inner self, destroys one's confidence. The right to privacy celebrated as part of right to life and liberty should now be granted the status of independent constitutional right. Privacy is in danger, but some important progress has been made. Technology, policy, and education must work together to face important challenges ahead.

But let us hope that in the near future the Indian Judiciary and legislatures will be able to carve out the separate zone of privacy and will keep a proper balance between the competing interest of individuals and social interest.

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The concept of state immunity under international law: An overview

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Abstract
State immunity is the principle of international law that exempts a state from prosecution or suit for the violation of domestic laws of another state. Immunity does not confer solely in an individual per se, rather it attaches to an office, and the individual occupant of that office at any point in time enjoys the immunity attaching to that office. A state is immuned from all judicial processes of its courts and the courts of other states. This means that under the sovereign state immunity concept a foreign sovereign cannot be impleaded in the court of another state without its concepts. This rule is hinged on the international law maxim- par inparem non habet imperium meaning that equal have no power over an equal. It originated when the kings were considered to be the embodiment of state sovereignty. The principle of absolute immunity has now been abandoned in many jurisdictions to embrace the principle of restrictive immunity approach which does not attach immunity to the commercial acts of a sovereign. The courts of a country can only assume jurisdiction over a foreign sovereign or diplomat when that sovereign has waived the immunity. The waiver must be express, where a sovereign waives his immunity from jurisdiction of local courts, it does not affect the execution of judgement since it to settled in law that the waiver or immunity from jurisdiction does not amount to waiver of immunity from execution or attachment. If a sovereign immunity is violated may protest to other states and failure to remedy the violation may lead to an action in international court of justice. The aim of this work is to discuss in extensor the origin and extent of state immunity under the international law, the forms of state immunity, its waiver and exemptions in order to give a general overview to it and make recommendations.

Keywords: Immunity, Jurisdiction, Conventions, Judgement and Waiver

1. Introduction
In International Law, certain persons and institutions are immune, from the jurisdiction of foreign Municipal courts. The principal ones are sovereign states and foreign heads of state, diplomatic agents', consuls and International institutions, their officials and agents.

It is a basic principle of International Law that a sovereign state does not adjudicate on the conduct of a foreign state. This immunity extends to both criminal and civil liability. State immunity grew from the historical Immunity of the person of the Monarch. In *R v Bow Street metropolitan stipendiary Magistrate and others, exparte Pinochet Ugarte (Amnesty International and other intervening)(No.3)* [1], Lord Browne Wilkinson articulated the customary Law position as follows:

> *In any event, such personal immunity of the Head of state persists to the present day: the Head of State is entitled to the same immunity as the state itself. The diplomatic Representative of the foreign state in the forum state is also afforded the same immunity, in recognition of the state which he represents. This immunity enjoyed by a Head of State in Power and Ambassador in post is a complete immunity vested to the Person of the Head of State or Ambassador and rendering him Immune from all actions or prosecution whether or not they relate to matters done for the benefit of that State. Immunity is granted ratione personae.*

The Immunities ratione Personae or (personal Immunities) is predicated on the notion that; any activity of a Head of State or government, or diplomatic agents [2] must be immune from foreign Jurisdiction. This is to avoid foreign state from, either infringing Sovereign prerogatives of States, or interfering with the functions of a foreign state agent under the guise of dealing with an exclusively private act. Historically, this immunity stems from the time when Heads of States were seen as personifying the State or the State itself.

On the other hand, immunity ratione Materiae or (Limited Immunity) is very different, and is to be contrasted with Immunity ratione personae, which gave Complete Immunity to all activities, whether public or private. This immunity operates to prevent the official and governmental acts on one State from being called into question in proceedings before the courts of another and only incidentally confers Immunity on the individual. According to Lord Millet:

> *The Immunity is sometimes also justified by the need to prevent the serving Head of State or Diplomat, from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by International Law* [3]

Thus the question of immunity is at the same time a question of jurisdiction: Only when the court already has jurisdiction will it become meaningful to speak of immunity or exemption from it. For this reason, Sovereign Immunity is also referred to as 'Jurisdictional Immunity' or 'Immunity from Jurisdiction'. In other words "exterritoriality" and "extraterritoriality" were also used in the same sense.

2. Objectives of Study

This research work is aimed at analyzing the concepts of state immunity under international law with special focus on the extent of its application and forms of state immunity. The research will of necessity delve into cases of waiver of immunity to ascertain what amounts to it and also look into the exemptions and conditions in which state immunity can be bypassed or refused. Whenever immunity is applied the adverse party is always handicapped. Immunity is a complete defence to any action in court (both criminal and civil). Generally, this is to delineate the nature, scope, form and limit of the doctrine of state immunity under international law.

This work will equally look critically at the issue of whether every act of a head of state or his agent is immune or, if there are situations where the immunity will fail to avail the head of state or diplomatic agent as a defence. It's also within the objective of this work to look critically at the idea of state immunity, its essence and scope. This research work will look at the question of violation of immunity.

Finally, it would look at the issue of proof of immunity, burden and standard of proof and ingredient of proof of immunity in any action.

3. Research Methodology

To achieve an intellectual result in the course of this research, a doctrinal approach will be adopted. Both primary and secondary sources of material will be used. In this connection, the United States foreign sovereign immunity act 1976 and United Nations Convention on Jurisdictional immunities of states and Their Property serves as the primary source. The secondary sources include textbooks, internet sources, journals, essays and articles published on the subject matter together with the opinions of the courts in judicial decisions. This will no doubt give a holistic approach to the subject matter of discourse.

This research work evolves round the concept of sovereign immunity of states. It's also going to trace the origin of the concept and area of its application. It's also going to review the forms state immunity can take and the availability of plea of immunity to states in occasion of violation of human rights by the states.

In further analysis, this work delves into effect of waiver of state immunity by the state and legal implication of it in international law. The exemptions to state immunity are equally within the scope of this work followed by final recommendations and conclusion.

Generally, this research work will give an in-depth overview of the concept of state immunity under international law with apt conclusion and recommendation.

4. Statement of Problem

As earlier stated, the Diplomatic and privileges act 2004, confers a lot of powers on the Head of states and Diplomats in Nigeria.What is often missed in this concept (and this is very imperative) is the fact that diplomatic immunity is not for politicians and other officials to use for their personal gains or to prosecute a personal agenda, it is strictly meant to give such officials the latitude to perform their official duties without fear of persecution, blackmail, threats and the like. The import of this is amply imbedded and prescribed in The Vienna Convention on Diplomatic Relations of 1961 as well as The Vienna Convention on Consular Relations of 1963 of which more than one hundred and fifty (150) nations are signatories including Nigeria, the UK, US, Germany, Japan, Canada, Australia and much more.

However, it has been judicially noticed that the heads of state abuse these powers with impunity in the contemporary entity Nigeria. The court has held always that every power shall have limits or control. Where the courts find that the powers have been exercised oppressively or unreasonably or if there is a procedural defect in the exercise of the power, the act may be condemned as unlawful.A constitutive part of The Vienna Convention on Diplomatic Relations (1961) states categorically that those with any level of diplomatic immunity must obey the laws, regulations and customs of the host country. The fact that they hold such immunity does not give them the authority to violate the laws of their host country.

5. Concept of State Immunity

State Immunity is a principle of public International Law [4] that is often relied on by states to claim that the particular court or tribunal does not have jurisdiction over it or to prevent enforcement of an award or judgement against any of its assets [5]. In other words, it can create difficulties for a counter party seeking to enforce its contractual rights against a State, as such state Immunity should always be considered when dealing with States.

The concept of State Immunity is one hinged on equality of States. It therefore deals with the issues of a foreign Sovereign being impleaded in the local courts. This is often expressed by the maxim "*par in parem non habet imperium"* [6]

There used to be doctrine of absolute Immunity, which granted foreign sovereign absolute Immunity from the jurisdiction of local courts, irrespective of whether the transaction in which the Sovereign is involved, is an official transaction or his private transaction. The principles of International Law regarding jurisdictional Immunities of States, is derived mainly from the judicial practice of Individual nation [7]. This first articulation of the principle of state immunity was recognised by the United States Supreme Court in its famous 1812 judgement of the Schooner Exchange V McFaddon [8]. Chief Justice Marshall clearly enunciated the principle:" *that by the definition of sovereignty, a state has absolute and exclusive jurisdiction within its own territory but that it could also by implied or express consent waive jurisdiction.* One Sovereign being is in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its Sovereign rights within the Jurisdiction of another, can be supposed to enter a foreign territory only under an express license or in the confidence that the Immunities belonging to his Independent Sovereign nation, though not expressly stipulated, are reserved by Implication, and will be extended to him". Since then, the recognition of State Immunity became firmly established in the general practice of the United States and the majority of modern European States.

However, there has been a move away from the absolute Immunity doctrine to the doctrine of restrictive Immunity. By restrictive Immunity approach, there is now a distinction between the official act of the Sovereign and (act Jure Imperii) for which immunity should vest.

This restrictive approach has found judicial support in many cases including The Victory Transport V Commiseria General Transports [9]. It was held affirming the decision of the District

Court that applying the tate letter, the activity of the commisario General is more properly labelled on act jure gestionis than Jure Imperii and therefore not entitled to Immunity.

In this chapter therefore, the author shall be making an in-depth analysis of the concept of State Immunity, the Essence and Scope of the State Immunity, as well as the various approaches to the concept.

5.1 Essence of State Immunity

States, Individual, International Organisations have through the years been accepted as possessing rights and liabilities in International Law. Certain protections are accorded to these subjects to enable them function properly. As well as States, other entities enjoy immunity beginning with Heads of State and including International Organisations as well as diplomatic personnel [10].

The question of Immunity of Heads of State and governments is concerned with the issue of whether a Head of State (which includes in this context Presidents, Chancellors of a State, Prime Ministers, Sovereign King or Prince and such other terms) can be arraigned before an International court or tribunal and before the courts of another State without his consent.

In Mighel V Sultan of Jehore [11], the court held "… the courts of this country have no Jurisdiction over an Independent Foreign Sovereign, unless he submits to the Jurisdiction. Such submission cannot take place until the Jurisdiction is invoked".

The essence of State Immunity therefore is hinged on the idea or principle of Sovereignty of States as well as equality and non-interference. Foreign Sovereign are exempted from the jurisdiction of Local courts. This Immunity or exemption is based on the following principles:

i) Equality of Sovereigns

Since all states are Sovereign; they are also equal, so the Heads of the state must be necessarily equal and no Head of State should be subjected to the proceedings in the courts of another State. (Par In parem Non Habet Imperium [9])

ii) Independence

When a State becomes independent, it becomes free from external dictation; the Head of State, personifying the State should be Independent both in deed and in thought.

iii) Dignity

It will be *intra dignatum (*for a Head of State to be subjected to civil or Criminal Proceedings in an International Tribunal. The risk of by chance being found responsible for an International act greatly outweighed the need to treat all men equal.

The functional purpose of Immunity is that a Head of State should not have to worry about Lawsuits in carrying out his official responsibilities [12]**.** Domestic Jurisdiction as a notion, attempts to define an area in which the actions of the Organs of government and administration are Supreme, free from International legal principles and interference. Indeed, most of the grounds for Jurisdiction can be related to the requirement under International Law, to respect the territorial integrity and political independence of other States.

Immunity from jurisdiction whether as regards the State itself or as regards its diplomatic representatives is grounded in this requirement [13]**.** Although this could be viewed as a limit to the host country's jurisdiction, since for example, Nigeria cannot exercise jurisdiction over foreign diplomats within its territory. However, this is an essential part of the recognition of the sovereignty of Foreign States as well as an aspect of the legal equality of all states earlier stated in this work. The equality of States is a necessary concomitant of the Sovereignty of States. As Chief Justice Marshall of the United States Supreme court observed in the case of *Schooner Exchange V Mc Faddon* [14], the exclusiveness and absoluteness of a State's Jurisdiction within its own territory does not seem to contemplate foreign Sovereigns and their rights as its objects.

To subject a Foreign Sovereign to a local jurisdiction would be in breach of their Sovereign equality as expressed in the Latin Maxim *Par in parem Non Habet Imperium* ("an equal has no authority over an equal").

The classic doctrine of Sovereign Immunity was succinctly exposed by Marshall, C.J thus:

> *"One sovereign being in no respect amenable to another, and being bound by obligations of the highest characters, not to degrade the dignity of his Nation by placing himself or its Sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express License or in the Confidence that the immunities belonging to his independent Sovereign nation, though not expressly stipulated, are reserved by implication and will be extended to him."*

This perfect equality and absolute Independence of sovereigns, and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every Sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation [15]**.**

Authorities are legion where the Courts of various nations have given their judicial nod to this concept of Sovereign State Immunity E.g. I'congresso Del Porticlo [16] Holland V Lampen-Wolfe [17].

5.2 History and Application of State Immunity

The concept of State Immunity from Jurisdiction originated at a time when Kings were considered to be the embodiment of a State's Sovereignty and when diplomatic envoys were considered to be 'rulers' personal representatives. The prevailing view was that because they were of equal standing, one Sovereign Monarch could not be subject to the jurisdiction of another Sovereign Monarch (*par in parem non habet imperium*). Moreover, just as a King would not be Subject to the Jurisdiction of another state while visiting the state, so too is monarchs representatives were granted Immunity [18].

This privilege is based on reciprocity and comity [19]. Overtime the idea of an identity between State and ruler faded away, but States continued to extend to other States an absolute Immunity from Jurisdiction to adjudicate, and Jurisdiction to enforce. Governments justified these broad Immunities by reference to the dignity, equality and independence of States. However, while recent developments have restricted traditional notion of Sovereign, the concept and policies underlying Sovereign Immunity remain Important in much transnational litigation [20].

As already stated [21], Sovereignty until comparatively recently

was regarded as appertaining to a particular individual in a State, and not as an abstract Manifestation of the existence and power of the State. The Sovereign was a definable person whom allegiance was due. As an integral part of this Mystique, the Sovereign could not be made Subject to the judicial process of his country [22].

Accordingly, it was only fitting that he could not be sued in foreign courts. The Idea of the personal Sovereign would undoubtedly have been undermined, had courts been able to exercise Jurisdiction over foreign Sovereign.

This personalization was gradually replaced by the abstract Concept of State Sovereignty, but the basic Mystique remained. In addition, the Independence and equality of States made it philosophically as well as practically difficult to permit Municipal courts of one country to manifest their power over foreign Sovereign States without their consent [23].

It had been submitted that the view so often expressed in textbooks and elsewhere; that the Immunity of foreign States and their property from the Jurisdiction of courts of foreign states follows from a clear principle of International Law, namely, the principle of equality and Independence of States need re-examination [24]. Reason being that it finds no support in classical International Law. Grotius does not refer to it. Vattee after admitting it with regard to a person of foreign Sovereign is silent with regard to the position of Sovereign States as such and that it is rooted to same extent, in the doctrine of the personal Immunity of the Heads of States.

It is with regard to these that the distinction between *acts Jure qestionis* first attained prominence in the 18th century in Germany in the relations of the numerous German States and principalities. Although in various decisions given in the 19th century on the subject, much reliance was placed on the classical decision of Chief Justice Marshall in *Schooner Exchange V Mc Faddon* [25].

In that case, Chief Justice Marshall declared that the Jurisdiction of a State within its own territory was exclusive and absolute, but did not encompass Foreign Sovereigns[10]. Prof H. Lauterpacht, in his article, however stated that it is doubtful whether that decision can accurately be quoted as an authority in favour of the rigid principle of Jurisdictional Immunity of Foreign States. As it is clear from the language of that decision that the governing principle there is not the immunity of the foreign States but the full Jurisdiction of the territorial States and that any immunity of the foreign States must be traced to waiver express of implied of its Jurisdiction on the part of the territorial State.

It was argued that the principles of Independence, logically requires that the Court of a State should recognise as valid, legislative acts of another State so far as these are not contrary to International Law, and its fundamental principles of Justice, so long as they do not require other States to enforce Foreign public or Fiscal Law, and so long as they are not intended to have extra territorial effect. Beyond this it does not go. Thus no legitimate claim of Sovereignty, Independence and equality is violated if the courts of a State assume Jurisdiction over a Foreign State with regard to contracts concluded or torts committed in the territory of the State assuming Jurisdiction. And that claiming otherwise will amount to denial of that principle [26].

Further, Prof. H. Lauterpacht [27] stated that a clear examination of the origin and of the development of the doctrine of Immunity of foreign States from Jurisdiction shows that it is perhaps not so much the principles of the independence and equality which have nurtured the soil in which that doctrine has flourished but factor of a different kind. This includes:

1) Consideration of dignity of the sovereign State and
2) The traditional claim transposed into the International arena of the Sovereign State to be above the Law and to claim before its own courts, a privileged position compared with that enjoyed by the subject.

During the debates preceding the adoption of the Virginian Convention in 1788, John Marshall stressed the element of indignity inflicted upon a State by making it a defendant in an action [28]. In the leading case of Chisholm V Georgia [29], the main argument for the Defendants State was that it was a degradation of Sovereignty in the States, to submit to the Supreme Judiciary of the United States. The US courts had gone to the length of relying on the argument of dignity in the matter of Immunity of foreign States from Location [30].

In England, "dignity", coupled with Independence played an important part as an explanation of the doctrine of Immunity of Foreign States [31]. In the Cristina *Lord Macmillan* invoked "dignity", equality and Independence of Foreign States as the foundation of their Immunity. Remarkably, there is a close similarity between the manner in which the "dignity of the Sovereign" was used as a Justification of Sovereign Immunity within the State and the way in which it was relied upon for Jurisdictional Immunity of foreign States [32].

However, Prof LauterPacht [33] finally and critically noted that, these strained emanation of the notion of dignity are, an archaic Survival and that they cannot continue as a rational basis of Immunity. He pointed out that it is probable that as in the United States, so also in the Great Britain the somewhat rigid application of the doctrine of absolute Immunity of Foreign government was not uninfluenced by the Immunity of the Crown, and that a sustainable explanation of that doctrine will be found in the traditional Immunity of the Sovereign State, from suits in its own courts.

The entire concept of State Immunity whether of the Foreign State or of territorial State, is a survival of the period when the Sovereign, if he did Justice to the subject, did so as a matter not of duty but of grace. It is an inheritance, not as indirect as it may appear of the principle that the personal Sovereign and subsequently that the State is Legibus Solutus [34].

6. Scope of State Immunity

The scope of State Immunity covers both civil and criminal liabilities of a Foreign Sovereign until recently; the Immunity also covers both the official and private acts of the Foreign Sovereign. However, the current trend is that *acts Jure Imperri* (i.e governmental acts) attract Immunity, while *acts Jure gestions* (i.e commercial acts) do not. Foreign Sovereigns are now subjected to Local Jurisdiction for all their commercial activities. We shall discuss all these Seriatim.

6.1 Civil Immunity

The Immunity of Heads of States from legal process in civil law does not meet with much controversy. Apart from Customary International Law granting Immunity for public acts and denying Immunity for private acts of a Head of State, conventional International Law exists on the Immunity of Head of State.

The State Immunity act (1978) of the United Kingdom applies the restrictive Immunity approach to Heads of States as it does

to States. The Act gave some conditions under which a Head of State is not immune to include:

I. Proceeding in respect of which it has submitted to the Jurisdiction of the courts of the United Kingdom.
II. Proceeding relating to commercial transactions to which he has entered to
III. Proceeding relating to contract of employment between a Head of State and an individual where the contract is wholly or partly performed there in the United Kingdom.
IV. Proceeding in respect of death or personal injury or damage to or loss of tangible property caused by an act or omission in the United Kingdom.
V. Proceeding relating to any interest of the Head of State or his possession or use of immoveable property in the United Kingdom, or any obligation of a Head of State arising out of his interest in, or his possession or use of any such property.
VI. Proceedings relating to liability value added tax, any duty or customs or exercise or any agricultural levy or rates in respect of any premise occupied by it for commercial purposes.
VII. Proceeding as regards to an action in rem against a ship belonging to him or an action in personal for enforcing a claim in connection with such a ship [35].

The Immunities and privileges granted by the diplomatic privileges Act 1964 also apply to a Head of State, his family and private servants as well as the Head of a diplomatic Mission.

No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a Head of State to disclose or produce any document or other information for the purpose of proceedings to which he is a party.

6.2 Criminal Immunity

The recognition that individuals may be held criminally responsible for offences against International Law, goes back at least to principles stated in the charter of the International Military Tribunal of Nuremberg. This was re-echoed by the general Assembly of the United Nations in 1946, when directing the International Law commission to treat as a matter of primary importance plans for their formulation. The commission in 1950 set out the following principle and commentary in its paragraph [36].

> "*The fact that a person who committed an act which constitutes a crime under International Law, acted as Head of State or responsible Government official does not relieve him from responsibility under International Law"*

This principle is based on article 7 of the charter of the Nuremberg Tribunal. According to the character and the judgement, the fact that an individual acted as Head of State, or responsible government official did not relieve him from International responsibility. In addition, the 1954 International Law commission Draft code of offences against the Peace and Security of Mankind, provided in Article III:

> *"The fact that a person acted as head of State or as the responsible government official does not relieve him of responsibility for committing any of the offences defined in the code".*

Because of the internationalization of human right and the legion of conventions on human rights, there has arisen a debate on whether or not a Head of State and former Heads of State should enjoy Immunity for International crime. The debate took a new dimension with the rejection of Immunity for general Pinochet [37] in his capacity as Head of State, and the arrest of and trial of Slobodan Milosevil a serving head of State.

In Pinochet (N0.3), the ex-Head of State of Chile had been detained in London pending an extradition request from Spain. It was alleged that he had authorized acts of torture while in office against some Spanish nationals. Senator Pinochet claimed Immunity as an ex Head of State. One issue was whether he could be immune in respect of acts that might be regarded as crimes of Universal Jurisdiction under customary International Law, and which in any events attracted universal Jurisdiction under the torture convention. The House of Lords held that there could be no immunity. In fact, Lord Brownille-Wikinson and Hulton expressed their sentiment in the following words: "How can it be for International Law purposes, an official function to do something which Law itself prohibits and criminalizes [38]". It was pointed out that Senator Pinochet's' alleged tortures were not carried out by him in his private capacity, for his private gratification. For many years States have adopted the principle of Individual Criminal responsibility; whether the perpetrator of the crime may be or the rank or function he occupies.

There are some relevant treaties and conventions in this regard.

1) The treaty of Versailles of June 28 1919
2) The charter of the International Military Tribunal of Nuremberg
3) The convention for the prevention and punishment of the crime of Genocide 1949
4) The Geneva Conventions 1949 etc.

Another way through which a Head of State can become responsible for his criminal actions is through the doctrine of Superior responsibility. This is a well-established rule of International custom and conventional Law with respect to persons' in position of Superior authority. Justifying the doctrine, Rodney Dixon wrote;

> "*Indeed these persons who possess the most extensive powers to plan and order the political, military and Seemity policies and operations and to most effectively curb the excesses of such actions by and large"*

Under the Statute of the International Criminal Court in addition to other grounds of criminal responsibility; a Military commander or person effectively acting as a Military commander shall be criminally responsible for crimes within the jurisdiction of the court, committed by forces under his or her effective command and control or effective authority and control as the case maybe, as a result of his or her failure to exercise control properly over such force where;

i) The military commander or person either knew or owing to the circumstance at the time, should have known that the forces were committing or about to commit such a crime; and
ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigations and prosecution.

International attitude towards State Immunity vary. In general,

there are two approaches: the absolute doctrine and the restrictive doctrine.

6.3 Absolute Immunity

Initially, the first and only approach, the absolute doctrine still applies in some Jurisdictions, notably China and Hong Kong. Under this doctrine, any proceeding against foreign States are inadmissible unless the State expressly agrees to waive Immunity. This simply means that no sovereign State could be impleaded in the court of another without its consent. States based on this rule to enjoy absolute immunity in all their acts, be they public or private. Absolute Immunity thus refers to the privileges and exemptions, granted by one state through its judicial machinery to another, against whom it is sought to entertain proceeding, attachments of property or the execution of judgements.

The relatively uncomplicated role of the sovereign and of the government in the 18th and 19th century, logically gave rise to the concept of absolute Immunity whereby the Sovereign was completely immune from foreign Jurisdiction in all cases regardless of circumstances. However the unparallel growth in the activities of the State, especially with regard to commercial matters, has led to problems in most countries to a modification of the above rule. Furthermore, commercial activities like any other individual and the growth of the activities of the state in commercial matters, the concept of absolute immunity has been called to question: the base of the question is that granting Absolute Immunity to state will give them advantage over private enterprises that engage in commercial contract with that State.

Accordingly many states began to give their support for the restrictive Immunity approach, which shall be discussed later. Immunity was available as regards governmental (acts *Jure Imperii)* but not for commercial acts which are termed (*Jure gestionis)*.

The classical case of the doctrine of absolute Immunity is the case of *Schooner Exchange V Mc Faddon* where Marshall, CJ delivering the judgement of the United States Supreme court held; that the vessel of war of a foreign State with which the United States was at peace and which the government of the United states allowed to enter its harbours, was exempted from the jurisdiction of its courts.

Also in the case of Parlement Belge [39] which followed the decision in the *Schooner Exchange*, the English court of appeal held that a ship owned by the Belgian King and flying the Belgian flag which was used principally to transport mail, but also conveyed passengers and their luggage between Ostend and Dover was entitled to Immunity from Jurisdiction even though it was engaged in commercial activity. The House of Lords affirmed the absolute Immunity rules in Campania Naviera Vascongado V Cristina [40]. All the five Law Lords agreed that as the vessel was in de facto possession and control of the Spanish Government where the writ was issued, the writ impleaded a foreign Sovereign State and must be set aside.

Some of the other cases where the absolute Immunity rule were applied include the Krajina V Tass agency [41], where the court of appeal held that the agency was a state Organ of the USSR and was thus entitled to Immunity from local Jurisdiction; and Baccus SRC V Servico Naciennnal Del Trigo [42]. Where the court held that the defendants, although a separate legal person were in effect a department of State of Spanish government. How the entity was constituted was regarded as an internal matter and it was held entitled to immunity from Suit.

It could be observed from the fact of the above cases, that some of them involved pure commercial transactions and yet the courts were prepared to uphold the absolute Immunity of the State involved in order to avoid impleading a Foreign Sovereign.

6.4 Restrictive Immunity

Due to the increasing involvement of states in World Trade activities, led to the development of a more restrictive approach to State Immunity, where a distinction is drawn between acts of a foreign sovereign nature (*act jure imperii*) and acts of a commercial nature (*acts Jure gestionis*). Under the restrictive approach, Immunity is only available in respect of acts resulting from the exercise of a Sovereign power. As such, States may not claim immunity in respect of commercial activities or over commercial assets. Immunity from Jurisdiction is usually available in the case of Jure Imperii but usually denied in the case of Jure gestionis. A number of States in fact started adopting the restrictive approach to Immunity at early stage. The Supreme Court of Austria in 1950 concluded that in the light of the increased activity of states in the commercial field, the classic doctrine of absolute Immunity had lost its meaning and was no longer a rule of International law [43].

The Austrian Supreme court said in that case:

[3]

> *"Classic doctrine of Immunity arose at a time, when all commercial activities of State in foreign countries were connected with their political activities… Whereas today States engage in commercial activities and… Enter most competitions with their own nationals and with foreigners. Consequently, the classic doctrine … has lost its meaning and should be replaced by a doctrine restricting the Immunity of States.) "*

In 1952 the United States announced its official support for the restrictive theory through the letter of acting legal adviser. *Jack B Tate*, to the department of Justice on May 19, 1952 (The Tate Letter) wherein he intimated. Interalia as follows:

> *"…The department feels that the wide spread and increasing practice, on the part of government of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in courts. For these reasons it will hereafter be by the department's policy to follow the restrictive theory of Sovereign Immunity in the consideration of requests for a grant of Sovereign Immunity* [44]."

In 1958, Lord Denning expressed the desirability of embracing the restrictive Immunity approach in the case of Rahimtoola V Nizamof Hyderabad [45] he said

In all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own court; notably in England by the Crown proceedings Act 1947

Foreign Sovereigns should not be in any different position. There is no reason why we should grant to the department or Agencies of Foreign governments an Immunity where we do not grant our own, provided always that the matter in dispute arises without the jurisdiction of our courts and in properly cognizable by them"

In seeking to distinguish between acts Jure gestionis and act

jure imperii, the court have resorted to the "purpose of the act" and "the nature of the acts" tests, The purpose of the act test suggest that an act which is done for governmental purposes should be classified as jure imperii or jure gestionis.

If a foreign government act in another state was an industrial, commercial, financial or other business activity, in which private persons may engage in that other state when the act is jure gestionis. This text exerts a dominant influence on contemporary judicial attitude.

The restrictive immunity approach was upheld by the English court of appeal in the case of Trendex Trading Corporation V Central Bank of Nigeria (1977) 2 WLR 356. The approach was also followed by the Nigerian court of appeal. In the cases of Kramer Italo Ltd v. Government of the kingdom of Belgium & Anor and African Re insurance corporation v Aim consultants Ltd.

However, Awogu J.C.A. Said obiter in the Kramer Italo case"... It must however be borne in mind that the doctrine of restrictive Immunity is a recent development which one must be cautious in applying, particularly when the doctrine has no statutory backing". It must however be understood that the Restrictive Immunity Doctrine is not an affront on the Immunity of State, rather it is an avenue to ensure that private commercial activities between states and private entrepreneurs are carried out under a level playing ground without giving the state undue advantage to the detriment of the private investors.

6.5 Applicable Laws (Conventions).

The first attempt at providing a legislative solution to the issue of Immunity was in 1926. The effort gave birth to what is known as THE Brussels convention on the unification of certain rules relating to immunity of state owned vessel. Later, the council of Europe adopted the convention on state immunity and additional protocols, Basel (this bracket is not part of the work basel is a state in Switzerland, Europe) on 16th may 1972.

The first major national legislative initiative on this subject is the United States' foreign sovereign immunities act, 1976 (FSIA). In 1979, Britain also passed the State Immunity Act pursuant to the adoption of the European convention on state immunity, 1972.

The United Nations International Law Commission Draft Articles on Jurisdictional Immunity of States and their property also came in as an attempt to achieve a compromise between the Absolute and Restrictive Doctrine of Immunity. There is also the Canadian State Immunity act 1982 on the issue.

6.6 Forms of State Immunity

State Immunity under International Law arises in two forms which include: (1) Immunity from jurisdiction and (2) Immunity from execution.

7. Immunity from Jurisdiction

The principle of jurisdictional immunity asserts that in particular situations a court is prevented from exercising jurisdiction over a foreign State. Much has been said about the origin and application of Jurisdictional Immunity of State in the last chapter.

However, it would be apt to note that the traditional view of the jurisdictional immunity of state was set out by Chief Justice Marshall of the United States in Schooner Exchange V McFaddon (Supra) [46]. The case concerned a ship, the exchange, whose ownership was claimed by the French Government and by a number of US nationals. The US Attorney General argued that the Court should refuse Jurisdiction on the ground of Sovereign Immunity. Chief Justice Marshall stated that:

> *"The full and absolute territorial Jurisdiction being alike the attribute of every Sovereign being incapable of conferring extra territorial power would not seem to contemplate Foreign Sovereign nor their Sovereign rights as its objects. One Sovereign being is in no respect amenable to another: and being bound by obligation of the highest character not to degrade the dignity of his nation by placing himself or its Sovereign rights within the Jurisdiction of another can be supposed to enter a foreign territory only under an express license, or in the confidence that the Immunities belonging to his independent Sovereign Nation…are reserved by implication and will be extended"* [47].

State Immunity from Jurisdiction can also be linked to the prohibition in International Law on one State interfering in the internal affairs of another [48]. In Buck V A.G.I [49], the Court of Appeal was called upon to discuss the validity of certain provisions of the constitution of Sierra Leone and refused on the basis that it lacked Jurisdiction. In the course of his judgement, Diplock L.J stated:

> *As a member of the family of nations, the government of the United Kingdom observes the rule of the comity… one of those rules is that it does not purport to exercise Jurisdiction over the internal affairs of any other independent State, or to apply measures of coercion to it or the property, except in accordance with the rule of Public International Law* [50]

As extensive explanation has been given to jurisdictional Immunity of State earlier [51], emphasis will now turn to Immunity from execution.

7.1 Immunity from Execution

Immunity from Execution is to be distinguished from Immunity from Jurisdiction, particularly since it involves the question of actual seizure of assets appertaining to a Foreign State. As such it poses a considerable challenge to relations, between States and accordingly States have proved to restrict Immunity from enforcement Judgement in Contra distinction to the situation concerning Jurisdictional Immunity [52].

But in Europe initially, the emerging doctrine on execution against the property of Foreign States appears to follow closely the Law on Jurisdiction. *Acts Jure Gestions* are proper subjects for Jurisdiction; acts Jure Imperii are not properly used in private, commercial activities is subject to execution; that used in public government activities is not [53]

While this is not the only basis used in reaching decisions on enforceability, it is a predominant rationale. In Myrtoon Steamship Co V. Agent de Tresor [54]. The Court of Appeal of Paris denied enforcement Immunity to French Government itself. An agency of France had chartered a Greek ship under a contract providing for arbitration. When a dispute arose, Myrtoon appointed its arbitration but the French State defaulted. Predictably, Myrtoon's arbitrator, then rendered an award in its favour, which it sought to enforce in France. The French government claimed Immunity on the ground that the

Charter involved a public act. In denying the claim, the Court looked on the consent to arbitrate in the contract as compelling Evidence of the French Government's Election to submit the matter to private Law.This, the Court essentially found a waiver by the French State and used the agreement to determine the nature of activity involved.

However Article 23 of the European Convention on State Immunity, 1972 prohibits any measures of execution or preventive Measures against the property of a contracting State in the absence of written consent in any particular state. But, the Convention provides for a system of mutual enforcement of final judgement rendered in accordance with its provisions [55] and an additional protocol provides for proceedings to be taken before the European Tribunal of State Immunity consisting basically of members of the European Court of Human Rights.

By Article 18 of the International Law Commission (ILC) Draft Articles on Jurisdictional Immunities, no measures of constraint may be taken against the property of a State unless that State has Expressly consented by International agreement, or by an arbitration agreement or written contract or by a declaration before the court or by a written communication after a dispute between the parties had arisen. In addition, the State must have allocated property for the satisfaction of the claim in question or the property is specifically in use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection claim concerned or with the agency or instrumentality against which the proceeding was directed.

Section 13 (2) (6) of the UK State Immunity Act provides, for instance, that the property of a State should not be subject to any process for the enforcement of a judgement or arbitration award or, in an action in rem, for its arrest, detention or sale: such Immunity may be waived by written consent but not by merely submitting to the Jurisdiction of the Court [56] while there is no Immunity from execution in respect of property which is for the time being in use or for intended use for commercial purposes [57].

It is particularly to be noted that this later stipulation is not to apply to a State's Central Bank or other monetary institutions [58]. Thus a Trendex type of situation could not arise again in the same form. It is also interesting that the corresponding provision in the US Foreign Sovereign Immunities Act of 1976 is more restrictive with regard to Immunity from Execution [59]. Thus, for example there would be no immunity with regard to property taken in violation of International Law.

The principle that existence of Immunity from Jurisdiction does not automatically entail Immunity from execution has been reaffirmed on a number of occasions.

In 1977, the West German Federal Constitutions court in Philippine Embassy case [60] noted that

> "*Claims against a general current bank account of the Embassy of a Foreign State which Exists in the State and the purpose of which is to cover the Embassy's cost And expense are not subject to forced execution by the State of the forum"*

Also, this was referred to approvingly by Lord Diplock in *Alcom Ltd V. Republic of Colombia* [61] a case which similarly involved the attachment of a bank account of a diplomatic Mission. The House of Lords unanimously accepted that the general rule in International Law was not overturned in the State Immunity Act and held that such a bank account would not fall within the Section 13(4) exemption relating to commercial purposes unless it could be shown by the person seeking to attach the balance that the bank account was earmarked by the foreign State solely … for being drawn onto settle liabilities incurred in commercial transactions.

It is not worthy to state that similar provision on State Immunity from execution is provided in South Africa Foreign Immunity Act 198 [62], Pakistan State Immunity Ordinance 1981, and the Singapore State Immunity Act 1979 [63].

7.2 State Immunity and Violation of Human Rights by States

With the increasing attention devoted to the relationship between International Human Rights Law and domestic system, the question has arisen as to whether the application of Sovereign Immunity in Civil suits against Foreign State for violation of Human Rights Law has been affected. To date, State practise suggests that the answer to this is negative.

In *Saudi Arabia V Nelson* [64], the US Supreme Court noted that the only basis for Jurisdiction over a foreign State was the Foreign Sovereign Immunities Act 1976 and unless a matter fell within one of the exceptions, the plea of Immunity would succeed. It was held that although the wrongful arrest, Imprisonment and torture by the Saudi government of Nelson would amount to abuse of the power of its police by that government, 'a foreign State exercise of the power of its police has long been understood for the purposes of the restrictive theory as peculiarly Sovereign.

However, the US Foreign Sovereign Immunities Act was amended in 1996 by the Anti-terrorism and Effective Death penalty Act which created an exception to Immunity with regard to States designated by the Department of State as terrorist states, which committed a terrorist act or provided material support and resources to an individual or entity which committed such an act which resulted in the death or personal injury of a US citizen [65].

In *Bouzari V Iran* [66], the superior Court of Justice of Ontario Canada noted, in the light of the Canadian State Immunity Act 1982, that regardless of the State's ultimate purpose, exercises of police Law enforcement and security powers are inherently exercises of government authority and sovereignty and concluded that an international custom existed to the effect that there was an ongoing rule providing State Immunity for acts of torture committed outside the forum State.

The English Court of Appeal in *Al-Adsani V Government of Kuwait* [67] held that the State Immunity Act provided for Immunity for States apart from specific listed exceptions, and there was no room for for implied exceptions to the general rule even where the violation of a norm of *Jus Cogens*, such as the prohibition of torture was involved.

The European Court of Human Rights in *Al-Adsani V UK* [68] analysed this issue that is whether State Immunity could exist with regard to civil proceedings for torture in the light of *Article 6 of the European convention.* The Court noted that it could not discern in the relevant materials before it, "any firm basis for concluding that as a matter of International Law, a State no longer enjoys Immunity from civil suit in the courts another State where acts of torture are alleged and held that Immunity this still applied in such cases [69].

In the case of criminal proceedings, the situations is rather different, part 1 of the State Immunity Act does not apply to criminal proceedings, although part III (concerning certain

Status Issues) does [70]. Ibid, Para.66.

8. Exceptions to Immunity of States

Federal sovereign immunity is never without an exception. After World War II, many exceptions evolved in order to remove unfair commercial advantages provided to foreign nations through their immunity. This principle is known as restrictive immunity because courts now limit use of foreign sovereign immunity. The exceptions were originally codified in 1976 through the enactment of FSIA, though many revisions and amendments expanded that list.

The exceptions to state immunity are themselves based upon customary international law. The pattern of the U.K state immunity act 1978 is to provide general immunity [71] Subject to a list of exceptions [72] which accord (meaning: agree or tally) with the doctrine of restrictive immunity. As a result, the burden is upon the plaintiff to prove that the case fall within one of the listed exceptions [73].

These are some of the exceptions to the general rule of immunity which are set out in the Convention; if any of these exceptions apply in a case, a state will not be able to claim immunity in a foreign court. The most commonly invoked exceptions are waiver of immunity, commercial transactions, expropriations, non-commercial torts, arbitration, and state-sponsored terrorism. Some of these exceptions are addressed briefly in this part, and citations are provided to facilitate further research as needed [74].

It is emphasizing that "[a]t the threshold of every action in a District Court against a foreign state... the court must satisfy itself that one of these exceptions apply [75]."

Submission to the Jurisdiction of the English courts

The state immunity act 1978 [76] includes 10 provisions which create exception to rule of immunity established by the first section. Sec 2(1) provides that. From the above provision, submission may come about in four different ways.

(1) By prior written agreement,
(2) Submission may occur after the dispute giving rise to the proceedings has arisen. Here no formality would be required.
(3) Once there is a dispute even an oral statement accepting jurisdiction will be sufficient, a submission in proceeding actually pending does not seem to be required. If the state has intervened or taken any step in the proceeding, then it is deemed to have submitted.
(4) The fourth case is the obvious one in which the state itself has instituted the proceedings. In such event the state is exposed to a counter claim which arises out of the legal relationship or facts of the claim [77].

A state will not be immune from adjudication where it has either expressly agreed that the English courts have jurisdiction (i.e. the contract incorporates a jurisdiction clause or agreement is reached once a dispute has arisen), or the state itself starts proceedings or takes a step in any proceedings commenced in the English courts. 7 States rarely submit to the jurisdiction of other courts and so, in practice, express jurisdiction clauses are used. This can either be a stand-alone jurisdiction clause (the parties agree that the English courts have jurisdiction), or as part of a waiver of immunity clause. The added advantage of this exception is that the state is also prevented from arguing that the English courts do not have jurisdiction under general jurisdiction rules.

Waiver of Immunity

Waiver of Immunity connotes the willing submission of a foreign Sovereign or Sovereign representative to the Jurisdiction of the Courts in another State. Immunity belongs to the state and not to the Individual beneficiary, therefore it is only the state and not to the Individual beneficiary, hence it is only the State that has the capacity to waive the Immunity. In a Memorandum entitled: Department of State guidance for Law enforcement officers with regard to personal rights and Immunities of foreign Diplomatic and consular personnel, the point was made that waiver of Immunity does not belong to the Individual concerned, but is for the benefit of the sending state.

The issue of waiver is provided for in Article 32 of the Vienna Convention on diplomatic Immunities.

Section 1605(a)(1) provides an exception to immunity when the foreign state has waived its immunity "either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver [78]."*,* Like other exceptions, this provision operates to limit the statutory grant of federal question jurisdiction [79].

1) Explicit waivers

Explicit waivers are typically found in contractual provisions, although they could arise from independent statements (for example, by a duly authorized governmental official). They are normally construed narrowly by U.S. courts in favour of the sovereign [80]. In some situations, treaty provisions may also qualify, although the U.S. Supreme Court cautioned in *Argentine Republic v. Amerada Hess Shipping Corp*. that federal courts should not lightly imply a waiver based upon ambiguous treaty language [81].

2) Implied waivers

As a rule, courts are even more reluctant to find implied waivers, requiring strong evidence of the foreign state's intent [82]. As noted in *re Republic of the Philippines*, [83] implied waivers have traditionally been found only when:

(1) A foreign state has agreed to arbitration in another country [84],
(2) A foreign state has agreed that a contract is governed by the law of another foreign country, [85] or
(3) A foreign state has filed a responsive pleading in a case without raising the defence of sovereign immunity [86].

By comparison, a clause providing that "[t]he Courts in India and USA [sic] only shall have jurisdiction in respect of [sic] all matters of dispute about the [bonds]" has been held insufficient to waive immunity [87].

Allegations of implicit waiver by foreign government conduct in violation of the norms of international law (including acts alleged to be contrary to *jus cogens*, such as torture or genocide) have not been successful [88].

Waiver of immunity clauses

The easiest and most efficient way of dealing with state immunity is to seek an express waiver of that immunity. The following key considerations must be kept in mind when drafting waiver of immunity clauses:

(a) The waiver clause should be included in all transaction documents that involve state parties.
(b) The clause should be agreed by all states or state entities likely to be part of the transaction or which hold assets

relevant to the transaction.

(c) The clause has to be an express and clear waiver of both immunity from suit and immunity from enforcement: merely specifying the applicable law or waiving the state's immunity without express agreement to submit to the relevant courts is unlikely to be sufficient.
(d) The clause should state that it applies to interim measures (such as injunctions or orders for specific performance) as well as to final judgments and/or arbitral awards.
(e) The clause should extend to all of the state's assets or any separate entity's assets. Ideally, the waiver should be sufficiently general to cover all assets, even those which might be transferred from the state involved to other state entities. If not possible, the clause should at least specify the type of assets to which the waiver will apply.
(f) The clause has to have been agreed by a person who has the required authority of the state: check that they have authority to waive immunity.
(g) The waiver provisions should include express confirmation that the entity is not acting in a sovereign capacity: this will avoid issues when dealing with separate entities in particular.
(h) Check the enforceability of the waiver clause in all jurisdictions where you are likely to seek the enforcement of any judgment or award. For example, a reference to the United States Foreign Sovereign Immunities Act should be included in the waiver if proceedings in the US are likely.

Sample clause: the 2012 Model Form Joint Operating Agreement of the Association of International Petroleum Negotiators

Several sample clauses can be found in case law or in model clauses proposed by international organisations. For example, *the 2012 Model Form Joint Operating Agreement of the Association of International Petroleum Negotiators* includes the following sample clause.

Any Party that now or hereafter has a right to claim sovereign immunity for itself or any of its assets hereby waives any such immunity from either jurisdiction or enforcement to the fullest extent permitted by the laws of any applicable jurisdiction.

This waiver includes immunity from

(i) any expert determination, mediation, or arbitration proceeding commenced pursuant to this Agreement;
(ii) any judicial, administrative, or other proceedings to aid the expert determination, mediation, or arbitration commenced pursuant to this Agreement; and
(iii) any effort to confirm, enforce, or execute any decision, settlement, award, judgment, service of process, execution order, or attachment (including pre-judgment attachment) that results from an expert determination, mediation, arbitration, or any judicial or administrative proceedings commenced pursuant to this Agreement.

Each Party acknowledges that its rights and obligations subject to this Agreement are of a commercial and not a governmental nature**.**

Commercial Transactions

The denial of immunity is independent of the nature of the act from which the claim arises. If the transaction or activity into which a state enters or in which, for instance the breach of contract arising from an act done in the exercise of sovereign authority. All that matters is the character of the transaction or activity carried on by the state as opposed to the facts on which the defence is founded [89].

The US Foreign Sovereign Immunity Act 1978 [90] defines '*commercial activity'* as a regular course of commercial conduct or a particular commercial transaction or act. It is also noted that the commercial character of an activity is to be determined by reference to the nature of the activity rather than its purpose.

The issuance of foreign governmental treasury notes has been held to constitute commercial activity, but one which once validly statute barred by passage of time cannot be revived or altered.

In *Callejo v bancomer* [91], a case in which a Mexican bank refused to redeem a certificate of deposit. The district court dismissed the action on the ground that the bank was an instrumentality of the Mexican government and thus benefited from sovereign immunity. The US Supreme Court in *republic of Argentina v Weltover Inc*, held that the act of issuing government bonds was a commercial activity and the unilateral rescheduling of payment of these bonds also constituted a commercial activity. The court noting that the term "Commercial" was largely unidentified in the legislation took the view that its definition related to the meaning it had under the restrictive theory of sovereign immunity and particularly as discussed in *Alfred Dunhill v Republic of Cuba* [92] where it was stated a foreign state engaging in commercial activities was exercising only those powers that can be exercised by private person.

It is interesting to note the approach adopted in the International Law Commission (ILC) Draft on Jurisdictional Immunities [93]. Article 10 provides for no immunity where a state engages in a commercial transaction with a foreign natural or judicial person (but not another state) in a situation where by virtue of the rules of private international law a dispute comes before the courts of another state.

A large quantity of cement was supplied by a private contractor in the UK to the Nigerian Defence Ministry. Following a change of regime, the Nigerian government decided it no longer required the cement and refused to pay for it. The supplier brought proceedings against Nigeria in the UK courts. Nigeria's claim of state immunity was eventually dismissed and the action allowed proceeding [94].

A state cannot claim immunity from the jurisdiction of another state in legal proceedings which arise from a commercial transaction. This rule does not apply to commercial transactions between states or where the parties to the transaction have explicitly agreed otherwise. At the heart of this major exception to state immunity is the question of what is a 'commercial transaction'. The term as defined in the Convention includes any commercial contract or transaction for the sale of goods or supply of services, any contract for a loan or other transaction of a financial nature and 'any other contract or transaction of a commercial, industrial, trading, or professional nature, but not including a contract of employment'. The term '*transaction*' is much wider than '*contract*' and is capable of covering a broader range of activities. But it is the commercial character of a transaction that is likely to be in issue and it was this that caused most difficulty in reaching agreement among states on the text of the Convention.

The main question is whether the criteria defining a commercial transaction should relate to the nature of the

transaction or its purpose. If a state orders boots for its armed forces, the nature of the transaction is commercial, but its purpose (to kit out its army) is a sovereign state activity. The Convention's solution is that contracts for the supply of goods or services are defined as commercial transactions (for which there is no immunity); but then the Convention states that in deciding whether something is a commercial transaction reference should be made primarily to the nature of the transaction, but its purpose should also be taken into account if the parties have so agreed or if, in the practice of the state where legal proceedings are brought, purpose is relevant in determining the non-commercial character of the transaction.

The Convention test for determining the commercial or non-commercial character of a particular transaction is a compromise between competing views. Its meaning is not very clear, and it could encourage differences in approach from one country to another. The reference to 'practice' could be interpreted as much wider than 'law' and could allow administrative practice or preference to decide the immune or non-immune nature of the transaction.

Contracts of Employment

The immunity act 1978 [95] provides that a state is not immune in respect of proceedings relating to a contract of employment between the state and individual where the contract was made or where the work is to be performed wholly or in part thereof.

An Irish national formerly employed as an administrative assistant at the American Embassy in London sought re-employment with the Embassy by applying for two vacant posts. Both applications were unsuccessful and she brought a claim against the United States before a UK employment tribunal alleging sex discrimination. The US government's claim of immunity was allowed [96].

An Austrian national working at the United States Embassy in Vienna in its Information Service was dismissed on unspecified security grounds and began proceedings before the Austrian courts claiming severance pay but not reinstatement. The Austrian Supreme Court held that the United States did not have immunity [97].

Employment contracts are treated as a separate exception to immunity under the Convention and are not included within the term 'commercial transaction'. Unless otherwise agreed between the states concerned, a state is not entitled to immunity in proceedings which relate to a contract of employment between the state and an individual for work performed in the state where the proceedings are started. At first sight this might seem like quite a large exception to state immunity but there are many exceptions to the exception. First, the exception does not apply to employees who are nationals of the employing state unless they are permanently resident in the state where proceedings take place. Secondly, the Convention excludes from this exception proceedings relating to the recruitment, renewal of employment or reinstatement of an individual. Thirdly, the exception does not apply where the employee is a diplomatic agent, a consular officer or any other person enjoying diplomatic immunity. Fourthly, the exception does not apply where legal proceedings would interfere with the security interests of the employer state. Finally, it does not apply where the employee has been 'recruited to perform particular functions in the exercise of governmental authority'. In all these cases, therefore, the state will have immunity if a disgruntled employee or job applicant wants to bring legal proceedings.

Exceptions to Employment Exception

The exclusion of proceedings relating to recruitment, renewal of employment or reinstatement is significant. In practice, it is likely to limit the exception to cases involving dismissal, termination of employment, and claims for unpaid wages. The exclusion of diplomats, consular officers and those enjoying diplomatic immunity from the exception to immunity is well established under international law. But it does provide a contrast with the State Immunity Act. This sets out a wider exclusion and refers simply to 'members of the staff at a diplomatic mission', which would include not only diplomatic officers but also lower-grade administrative, technical and domestic staff, not all of whom are entitled to diplomatic immunities. It is unclear how national courts will interpret the reference to security interests. Will they be content to accept the assertion of the employer state that legal proceedings will interfere with its security interests? The annex to the Convention sets out an understanding that the term 'security interests' is intended to address 'matters of national security and the security of diplomatic missions and consular posts'. The exception relating to people performing functions in the exercise of governmental authority could cover a very broad range of employees in the public sector. In some countries the public sector is very large and may include post office workers, railway workers, teachers and many others.

Other Exception to Immunity.

A state does not enjoy immunity in legal proceedings connected with immovable property (land or buildings) in the state where legal proceedings are brought, or relating to other kinds of property where the rights arose from succession or gift. Additional exceptions relate to legal proceedings concerning a state's intellectual or industrial property rights or any alleged infringement by that state of rights protected in the other state; participation by a state in companies or other bodies incorporated or constituted under the law of the state where proceedings are brought; and the operation of commercial ships. All are well recognized exceptions to state immunity although, in all cases, immunity will be retained if the states concerned agree.

Enforcement of judgments

It is one thing to bring proceedings against a foreign state and get a judgment against that state but quite another to get that judgment enforced. The Convention makes a very clear distinction between a state's immunity from legal proceedings and its immunity from measures enforcing any judgment obtained as a result. On the former, it sets out the significant exceptions which are discussed in this work. On the latter immunity remains almost absolute. The difference in approach is based on the recognition that the seizure and sale of a state's assets in order to satisfy a judgment against it constitutes a particularly dramatic interference with its interests and could damage its ability to function properly.

Before judgment, no enforcement measures can be taken against the property of a state in the courts of another state unless the state has explicitly agreed. If a claimant fears that the state will try to avoid the consequences of any adverse judgment by moving its assets out of the country, there is not much he can do about it. After judgment, no enforcement

measures can be taken unless the state has explicitly agreed or the property which is the subject of the enforcement is 'specifically in use or intended for use by the state for other than government non-commercial purposes'. In addition, the property must be in the territory of the state where legal proceedings have been instituted and must have a 'connection with the entity against which the proceeding was directed'. An understanding in the annex to the Convention indicates that the 'connection' in this context is to be understood as broader than ownership or possession. The Convention lists some specific categories of property which are not to be considered as in use for 'other than government non-commercial purposes'; these include embassy bank accounts, property of a military character or property used in the performance of military functions and property of a central bank or other state monetary authority. However, the list is clearly not intended to be complete.

Violation of Immunity

There are however situations where these immunities have been violated. Whenever there is violation of immunity, the state whose immunity is violated usually protests to the other state through a diplomatic channel. if the diplomatic protest fails to yield any meaningful result, they may take the matter to the International Court for adjudication.

Illustration: In 1979, the United States embassy in Iran was taken over several hundred demonstrators. Archives and documents were seized and fifty diplomatic and consular staff were held hostage. In 1980, the international court declared that under the 1961convention, (and the 1963 convention on consular relations). Iran was placed under the most categorical obligations as a receiving state to take appropriate steps to ensure the protection of the United States embassy and consulate, their staff, their archives, their means of communication and the free movement of the members of their staff [98].

In 1999, china agreed to pay 2.876m dollars to the United States to settle claims arising out of rioting and attacks on the US embassy in baying, the residence of the US consul in Chengdu and the consulate in Guangzhu [99]

Again, in March 2000, diplomatic baggage destined for the British High Commission in Harare was detailed and opened by the Zimbabwean authorities. The UK Government protested vigorously and announced the withdrawal of its High Commissioner for consultation.

There are also situations where a state could be justified for violating the immunity of another. For example in 1973 the Iraq ambassador was called to the Pakistan ministry of foreign affairs and told them that arms were being brought into Pakistan under diplomatic immunity and that there was evidence that they were being stored at the embassy of Iraq. The ambassador refused permission for a search. The armed policemen entered the place and huge consignments of arms were found to be in crates. The Pakistan government then sent strong protest to the Iraq government, declared the Iraq ambassador and other staff persona non grata and recalled its own ambassador.

Again on July 5, 1984 following the kidnap of a former Nigerian minister, Umaru Dikko in the uk, the British authorities opened a diplomatic crate destined for Nigeria and found Umaru Dikko inside.

Another case of justification occurred on April 17, 1984. A peaceful demonstration took place outside the Libyan embassy in London. Shots were fired that resulted in the death of a police woman. After a siege, the Libyans inside left and the building was searched in the presence of such Arabian diplomat, weapons and other forensic evidence were found.

Proof of Immunity

It is trite law that he who asserts proves. Therefore it is the duty of the party claiming immunity to satisfy the court that it actually enjoys such immunity.

The court of appeal in *Maclaine Watson v Depart of trade and industry* [100] held that wherever a claim of immunity is made the court must deal with it as a preliminary issue and on the normal test of a balance of probabilities.

However the party claiming immunity discharges that onus of proof, the burden then shifts to the other party to prove that such immunity does not exist or that an exception to immunity applies in that case.

9. Conclusion

Historically the principle of State immunity as originally applied by courts was intended to protect the political activities of States as a sovereign entity. However, that has created inconveniences and injustices during the time when the State extended its activities into commercial, industrial and similar spheres because both States and private individuals become involved in international trade. Like private individuals, States also buy and sell good and manage or charter ships or commission works.

Consequently, this had an impact on the approach taken by the courts. They had to move away from the absolute to the restrictive doctrine of immunity because of the growing participation in business matters by the Government.

The first step taken by the courts was in relation to an action in rem in the *Phillipine Admiral case*. The next step was taken in the *Trendtex case* and it was obvious that legislation was necessary for purposes of clarifying the issue of State immunity. Thus, the UK passed the State Immunity Act 1978 to clearly show its position in relation to State Immunity followed by Australia and other Commonwealth countries.

However, in Nigeria it is apparent that there is no specific locally enacted legislation or case law on state immunity to clearly show its position. While the existing laws of Nigeria may assist in determining the extent to which the State, its officials or agencies can be sued or be held liable, non-of them addresses the doctrine of state immunity. For example, the Crown Proceeding Act 1947 UK covers areas where proceedings by and against the Crown can be made but it provides no help for determining what is Nigeria position on state immunity. This is because the Act is outdated since it does not reflect the current Common Law position on State Immunity. Even with the common law, what it does is provide the law on state immunity but it does not determine the kind of immunity approach that Nigeria should take.

Therefore, as a means to get around this problem it is suggested that Nigeria should have its own enacted legislation that deals with State Immunity. With that, the law regarding immunity in Nigeria can be clearly established in order to determine the situations where the independent State of Nigeria can either be immune or not. Otherwise a similar problem faced by Papua regarding the Sandline issue where it had to pay millions of dollars because its position on state immunity was not defined

properly might be repeated.

In cases where Nigeria is involved in a transaction with a foreign State or individual the rule of immunity can be well established once Nigeria has an Act of its own. This is important because Nigeria needs to maintain its independence, equality, and dignity both domestically and internationally. By having an Act, the presumption of immunity and the exceptions to it can be well defined.

Also, a clear distinction can be made between government departments and official who can claim immunity in the same way, as the state and state owned or state-managed enterprise that may be treated as private corporations.

These distinctions can clearly be made once Nigeria has an Act of its own because it would make it easier to determine the responsibilities and obligations of Nigeria domestically and internationally.

State immunity is a concept that concerns a State, its governmental officers and agencies. The basic issue that this concept addresses is whether a state is immune from judicial processes of its own courts and courts of other nations.

Traditionally, courts had no power to rule on any matter that a State is a party to because of the absolute rule of state immunity. This approach was later restricted when the issue of state immunity arose in the Trendtex case.

Afterwards, the restrictive approach became well- founded in common law. Thus, today only acts of sovereign nature (i.e. juri imperi) are subject to immunity while acts of commercial nature (i.e. jure gestionis) are not.

In Nigeria, there are no available case law or enacted legislation to show its position on state immunity. Although there are existing legislation in Nigeria that determine areas where the State, its officials or agencies can be sued, none of them draw the line between the common law approach and Nigeria's position on state immunity.

Frankly, it is necessary for Nigeria to have a State Immunity Act in order to reflect its legal position on state immunity both domestically and internationally. Until there is a reform the contention that this research holds is 'there is a state immunity vacuum in Nigeria and its position remain unsettled'.

10. Recommendations

These are this writer's contention on why state immunity should be retained by States.

Firstly, immunity is genuine because it signifies the principles of independence, equality and dignity of States that have been embedded in international law. It is from these principles that the maxim "*par in parem non habet imperium"* is derived. That is, "all sovereigns [are] considered equal and independent." Therefore, in order to safeguard the independence, equality, and dignity of States it is important that immunity should be upheld in order to clearly outline what are the responsibilities and obligations of States internationally?

Secondly, the rule of sovereign immunity is a principle of international law. It is well established as part of a customary rule of international law. Thus, making it valid and binding. The validity of immunity as part of customary international law is derived from two elements;

a) material element and
b) Psychological element.

The material element refers to acts and practices of States and the psychological element refers to the subjective conviction held by States that the behaviour in question is compulsory and not discretionary.

Therefore, since immunity is a well-founded principle under international law this gives it the force to be valid and binding upon States. Thus, a clear distinction can be made regarding when a State can be held responsible or liable.

Finally, with the increase of State activities in the economic circles it has influenced the rule of immunity to be well established unlike in the past where there were difficulties because of the application of immunity without restriction. It may not be wholly justified if the state enjoyed immunity in all circumstances because that would be unfair to its trading partners.

However, given the current trend where countries have restricted the possibility of immunity for a foreign State in their jurisdiction either by way of legislation or court decisions, there is justification that it has now become well founded. This gives an added impetus for clearly determining State responsibility and international liability because the principle of state immunity has become well defined because of the restrictive approach.

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Previous conviction: A call for fair procedure

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Abstract
The criminal law focuses upon the gravity of the unlawful act of the offender by awarding maximum penalty thereby induces the courts to judge that act call under maximum punishment or not. The cardinal principle of criminal jurisprudence which speaks up that the accused persons shall be presumed innocent until proved guilty beyond reasonable doubt but this has been misconceived while framing charge under section 75 IPC.

Keywords: Conviction, subsequent offence, *Ambiguity*

1. Introduction
The real test for a Judge comes in determination of the right measure of punishment which ought to be inflicted upon the accused for the offence committed and proved. There is often a great difficulty in determination of sentence. Since, hard and fast rules cannot be laid down in determining the parameters for sentencing, therefore, decision is left to discretion of the Court, and such discretion has to be guided by a variety of considerations. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and if so, by how much.

2. Previous Conviction in sentencing process.
If a person has shown from his past actions that he intends to adopt a criminal career, three things should be borne in mind while sentencing him; first, it is necessary to pass a sentence upon him which will make him realize that a life of crime becomes increasingly hard, and does not pay; secondly, the sentence should serve as a warning to others who may be thinking of adopting a criminal career, and thirdly, the public must be protected against people who know that they are going to ignore the rules framed for the protection of society [1].
It is with this object in mind, the framers of Indian Penal Code (referred to as IPC for short) enacted S.75. IPC [2] with an intention to provide for sentence more severe than those provided in the Code for the particular offence charged, if the accused happens to have suffered previous conviction for the similar offence. The words "subsequent offence" u/S.75, IPC mean an offence committed subsequently to previous conviction. Section 75, IPC does not constitute a separate offence [3], but it only imposes a liability to enhanced punishment for the subsequent offence committed by the accused. The enhanced punishment as provided u/S.75. IPC can be seen as an exception to the limit of punishment prescribed under Chapter XII (Offences relating to coin and Government Stamp) or Chapter XVII (Offences against property) wherein the Court could impose punishment more than the statutory prescription for the offence falling under Chapter XII or Chapter XVII if the offender was previously convicted for the offence under those Chapters punishable with three years' imprisonment.
To bring an offence within the terms of this section:
(1) The offence must be one under either Chapter XII or XVII of Code.
(2) The previous conviction must have been for an offence therein punishable with imprisonment for not less than three years; and.
(3) The subsequent offence must also be punishable with imprisonment for not less than three years [4].

3. Procedural Ambiguity
While S.75, IPC is a principle of punishment that provide for enhanced punishment for the offence falling under Chapter XII or Chapter XVII, IPC, the procedural aspects for implementation of this substantive procedure can be found under Code of Criminal Procedure, 1973. Under S.211 (7) [5]. S.248 (3) [6] and Second Schedule in Form No 32 [7] of Cr. P.C., one could find the procedure that deal with the cases of previous conviction. It is stated that a separate charge under S.75, IPC must be framed and recorded if the accused is to be tried for an offence punishable under it [8]. However, it should not be misconceived that a separate sentence has to be passed for charge u/S. 75, IPC, it is to be observed that S.75, IPC provides for enhanced sentence for subsequent offence and not a separate sentence. [9] As such a person convicted u/S, 392 and 75. IPC is not convicted of distinct offence within the meaning of S.31 or Cr. P.C [10].
With this understanding, it is clear that Section 75, IPC does not constitute an independent offence as such no distinct sentence of imprisonment is awarded on account of a previous conviction as it is not in itself an offence. It is merely a circumstance rendering the offender, convicted of a subsequent offence, liable to a larger measure of punishment. The legal position is settled with regard to the aspects of S.75, its applicability and effect. However, still an ambiguity lies in the procedure that is to be adopted for framing charge u/S. 75, IPC.

4. Charge Frame u/S 75. IPC
The stage at which charge u/S.75 IPC is to be framed lingers in doubt. This lack of clarity is giving scope for taking recourse to procedure that goes squarely against the cardinal rules of criminal jurisprudence which stand on the principle that

"Accused shall be presumed innocent until proved guilty beyond reasonable doubt".

The literal interpretation by conjoint reading of S.211(7), S.248(3) proviso and second scheduled Form No.32 of the Code of Criminal Procedure, 1973, one gets to understand that charge under S.75, IPC has to be framed along with the subsequent offence. An illustrative approach would be better in communicating the idea; Say Mr. X is charged with offence u/S. 379, IPC and S.75, IPC, as per the general understanding and the practice prevailing in majority of the Courts, charge u/S.75, IPC is framed along with charge u/S. 379, IPC, however same is not read over to the accused asking him to plead thereto on the charge of S.75 [11]. Reference to S.75, IPC is made to accuse only after conviction is recorded for the offence u/S.379. IPC, wherein charge under Section 75 is read out to accused explaining him of his previous conviction and if accused denies the charge, evidence is led to prove previous conviction.

5. Charge frame under Cr.PC.

The purpose of framing the charge is as to give first notice to the accused of his offence and it should convey to him in sufficient clearness and certainty what the prosecution intends to prove against him [12].

However, with the reading of S.211(7) and S.248(3) Proviso, it is understood that charge has to be stated along with subsequent offence but such charge shall not be read over to the accused unless conviction is recorded for the subsequent offence. It is noted that the words "framing the charge" is divided into two parts for convenience of understanding the above assumption, part one consists of stating a charge which could be inferred as putting the charge into writing and other part is reading over the written charge to the accused. It is the combination of these two process which culminate into saying that charge is "framed", if this understanding is taken as true, than the question is what purpose would be served if previous conviction charge is stated (taken down in writing) along with subsequent offence and not being read over the same to accused? Is such procedure adopt the fair rule of practice?

Further if a careful reading is given to S.248 (3) proviso, it states that no previous conviction charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under sub-section (2) of S.248. As such, the reading over of previous conviction charge comes into play only after conviction is recorded for the subsequent offence. Therefore, it would be absurd to say that charge u/S.75, IPC has been stated along with subsequent offence but such charge shall not be read over to accuse unless conviction is recorded for subsequent offence. The interpretation of S.211 (7) and S.248 (3) proviso if read in consonance with criminal jurisprudence, it only leads to a conclusion that charge u/S.75. IPC need to be framed after conviction is recorded for the subsequent offence.

6. Conclusion

Therefore, it would be better to frame charge u/S.75, IPC after conviction is recorded for the subsequent offence. In a wayS.211(7), S.248(3) Cr.P.C. provide the powers to a Magistrate to again conduct trial after recording conviction for the subsequent offence, therefore no irregularity would be caused if charge u/S.75. IPC is framed after recording conviction. On the other hand, if charge u/S.75.IPC is framed along with subsequent offence, prejudice would be caused to the accused affecting his fundamental right provided under the criminal law. As such it is better to err on right by framing charge u/S.75.IPC after recording conviction for subsequent offence.

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3. Refer to S.40. IPC for definition of the word offence.
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5. S. 211 (7), Cr. P.C. states that previous conviction charge has to be distinctly framed.
6. S.248 (3) provides procedure as to when evidence of previous conviction to be taken by Court.
7. Form No.32 under Second Schedule gives the contents of previous conviction charge (Proforma).
8. Refer S.211 (7) and Second Schedule Form No.32 of Cr.P.C.
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The idea of human rights in ancient Indian society

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Abstract
The idea that every individual, by the virtue of being a human, is entitled to a set of basic rights that are inalienable is fairly new, although this idea has its roots in various ancient cultures of the world. It was only after the two World Wars that the idea of human rights was centre-staged in the international arena. Human Rights were only then explicitly mentioned in a formal document, that we know as the Universal Declaration of Human Rights.
The historical evolution of the human rights is complex as the idea of Human rights already existed either in oral or written form. Many concepts of religious or philosophical origin, when analysed carefully, would seem to be based on the ideals on which the Human Rights are based. Its evolution is the result of philosophical, spiritual, cultural and legal developments throughout the world history. The value of human dignity and belief in justice is found in almost all the religious texts or practices of the world. The inviolability of these fundamentals is stressed in the religious traditions of Hinduism, Buddhism, Judaism and others. The underpinnings of the modern day international human rights jurisprudence is actually influenced by the moral foundations that were laid by the practices of various religions across the world.

Keywords: Cyrus Cylinder, Natural Law, Human dignity, *Dharma*, Justice, Human rights

1. Introduction
The revolutions around the world- British, American, French, Chinese and Russian were developed around the concept of natural law and natural rights that later on came to be known as Human Rights. The struggle against discrimination, inequalities and injustice has been at the core of all the human civilizations. The early demands made by the people were for basic civil liberties like right to life, liberty and pursuit of happiness, and later demands for rights of higher order like the social, cultural and economic or the collective rights came to be realised.
The evolution of the Human Rights is closely linked to the developments that took place in the relationship of an individual and the society. The changes from the absolutist state to that of the liberal or the state of *laissez-faire* and then to the welfare or socialist state has aided in the evolution of the idea of the Human Rights. As the societies evolved, the masses demanded for physical safety and inviolability of the person and property. Eventually, the concept of 'welfare state' paved way for the demand of rights such as rights against the arbitrary action of the state. The ideals of human rights and fundamental freedoms, thus, started being used as a safeguard against the lawlessness as well as arbitrariness of the governments. Of late, human rights have been used as a parameter of measurement of how a State treats its people. Although international documents on human rights such as Universal Declaration on Human Rights are not legally binding, but their authority is unparalleled. And this is one of the reasons as to why the members of the international community unanimously are critical of the states that fail to protect their subjects from human rights abuses.
Although the *Cyrus Cylinder* is regarded as the earliest source of human rights in the academia, especially by the western thinkers, but many other thinkers regard *Rig Ved*, one of the four canonical sacred texts of Hinduism, as the earliest document that mentions the idea of human rights. Many Pan-Indian authors and others as well regard a strong possibility in the roots of the today's Human Rights in the oldest texts of Hinduism, the most significant one being, the *Rig Ved*.

Human Rights in Ancient Indian Society
The earliest traces of the idea of Human Rights date back to more than 4,000years. *Rig Ved* is considered as one of the oldest sources of Human Rights in the world. In the words of Lukman Harees,
"The earliest attempts of literate societies to write about the rights and responsibilities date back to more than 4,000 years to the Babylonian Code of Hammurabi. This Code, the Old and New Testaments of the Bible, the Analects of Confucius, the Quran and the Hindu Vedas are the five oldest written sources which address questions of people's duties, rights, and responsibilities [1]*."*

i) Human Dignity in Hindu Tradition
Human dignity is an integral part of Right to life, not only under the International covenants and conventions of Human Rights, but also at municipal levels. The Right to life under Article 21 of the Constitution of India includes, by way of wide interpretation, right to live with 'human dignity' as well. Human dignity finds an important place in various religious texts. In his book, Lukman Harees further mentions,
"*Religion has always played a central role in the protection of the human rights and especially in the promotion of human dignity* [2]*."*
This is easily done by the religion as it draws a moral code in which every human is treated as a child of God, thereby imposing a moral obligation on every human to respect others. Often, individuals who may not be so law-abiding, follow their religions firmly. Many times, religion as a firm moral code deters more individuals from a wrongdoing than law can do.

Hinduism by laying stress on universal brotherhood, rejection of hatred and emphasis on the spiritual and eternal aspect of all human, promotes and furthers the conception of human dignity.

ii) Idea of Human Rights in *Rigveda*

There are various theories on the origin and evolution of Human Rights. Positive law approach explains the origin and development of human rights from law while natural law approach explains it as being embedded in basic human nature. Similarly, the explanation for human rights finds place in almost all the religious and cultural traditions of the world [3]. There are religious theories that maintain that human rights developed within a moral context. Such moral ground as the foundational stone of human rights is found in the various ancient Hindu texts, one being, the *Rig Ved*.

'Amritasya Putrah Vayam'
(Translation- 'We all are begotten of the immortal')
- *Svetasvatara* Upanishad

The idea of according a spiritual as well as divine value to a human being is peculiar of Hinduism. Hinduism does not regard human as mere material beings but an element of spirituality and divinity is attributed to all the human beings. Man is treated as the 'son of the immortal', where immortal is used for the almighty. On this aspect, all human beings are kept on the footing. A basic sense of non-discrimination, which is the cross-cutting principle in all the today's international conventions on human rights, was pre-eminent in the ancient Hindu texts.

Rig Ved is considered as one of the oldest texts in any Indo-European language [4]. Evidences of philology and linguistics reveal that it most likely dates back between c. 1500 and 1200 BC [5]. References to different kinds of human rights that we find in various international instruments on Human Rights can easily be found in the texts of *Rig Ved*.

It is believed that every human body consist an *aatma* or the soul that travels from one life to the other. That way, a man of lower financial or social status may embody a soul which in earlier life embodied in a woman of effluent class. That is to say that the *aatma* had been connoted under Indian legal philosophy, an indiscriminatory stature. Nevertheless, it cannot be denied that there evolved social structure based on division of labour in the ancient Indian society that later transformed into a discriminatory caste system, the shackles of which exist even today. Although the ancient texts do not mention such discrimination; it essentially was the manifestation of the people and their misinterpretation of the ancient texts. Furthermore, *aatma* has another dimension that establishes a close connection to the idea of human rights-invisibility. *Aatma* is regarded as invisible, probably so that the human agencies become incapable of giving it a status based on any of the discriminatory consideration. This non-discrimination is a cross cutting principle in all the treaties, covenants and conventions on Human Rights.

RigVeda mentions about a primal man- *purush*- who destroyed himself to create the human society and from his body parts, four different *varnas* were created. When his body was offered at the primordial sacrifice, the four *varnas* came from his mouth (This class was accorded the status of a priest), arms (a warrior), thighs (a peasant) and feet (a *shudra* or servant).This marked the starting of *varna* system in the ancient India. But this *varna* system was devised for the need of division of labour in an evolving society. Later, human agencies misconstrued it, according to their own selfish needs, to be transformed into an inflexible and illogical caste system that prevailed for centuries. Even the *Arya Samaj* believes that the ancient *vedic* texts originally were casteless and non-discriminatory. They have maintained "a notion of dharma based on universal, rather than caste-specific, obligations to social values [6]."

'Aatma' that all the human beings embody is regarded as the integral part of the divine whole- '*parmaatma'*- which is constituent of '*param'* (penultimate) and *'aatma'* (soul).

"Ajyesthaaso Akanisthaasa Yete
Sam Bhraataro Vaavrudhuh Soubhagaya"
-Rig Ved, Mandala-5, Sukta-60, Mantra-5

'No one is superior or inferior; all are brothers; all should strive for the interest of all and progress collectively'.

The caste-system that strongly held the social institutions of life in India would discourage one to believe that an element of 'equality' was inherent in *Rig Ved*. Mitra also affirms that Despite the immense powers that a king, *Raja*, had over his subjects in his empire, the Hindu texts recognised the fundamental sense of 'equality' by ruling that no one is superior or inferior, thereby bringing everybody at the same platform. This can also be inferred from the fact that although the king of the land was awarded a powerful and significant stature, but his subjects could easily reach them and discuss their problems with the *Raja* in his '*darbar'*. Even a common man could reach the highest authority of the state. For instance, a financially marginalised man, *Sudaama*, reaches out to meet his childhood friend, *Krishna*, who was now a *Raja*. There are many other such instances in history where a common man can meet the King without much difficulty.

Rig Ved talks about three rights that are civil in nature *i.e. Tan* (body), *Skridhi* (dwelling place) and *Jibhasi* (life), thereby relating to the right to physical liberty, right to shelter and right to life as we know them today.

Arthvar Ved also provides for Human Rights such as right to food and water.

Samani Prapaa Saha Vonnabhagah
Samane Yoktre Saha vo Yunajmi
Aaraah Nabhimivaabhitah

(Translation- "All have equal Rights to articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together in harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and hub".

-Atharva Veda – Samjnana Sukta)

iii) Right to Happiness

The pursuit of happiness that was one of the fundamental rights sought for in the British Bill of Rights finds a special status in Hinduism. The right to happiness is considered to be the highest fundamental right. The holy prayer in Hinduism which is believed to be inspired from the Brihadāraṇyaka Upanishad is as follows:

"Sarvepi Sukhinah Santu
Sarve Santu Niramayah
Sarve Bhadrani Pashyantu
Ma Kaschid Dukhabhag Bhavet"

(Translation- Let all be happy
Let all be free from diseases
Let all see auspicious things
Let nobody suffer from grief)

Even the fundamental document of international acclaim on Human Rights, the Universal Declaration of Human Rights, is silent on right to happiness. Although, the right to live along with pursuit of happiness has been laid stress in the American Declaration of Independence.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness [7]*."*

Further, a prayer finds mention in *Taittareya* Upanishad in the chapter- *Sikshavalli* which emphasises on happiness of entire mankind.

Om Sahanavavatu
Saha Nau Bhunaktu
Sahaviryam Karavavahai
Tejaswi Navadhitamastu
Ma Vidmishamahai
Om shantih shantih shantih

Right to happiness is also emphasised in the *Kautilya*'s *Arthashashtra-*

"Prajasukhe Sukham Rajnah Prajanam cha Hite Hitam
Naatmapriyam Hitam Rajnah Prajanaam tu Priyam Hitam"

(Translation- "In the happiness of the subjects lies the happiness of the King; in their welfare his welfare. The King shall not consider what pleases himself as good; whatever pleases his subjects is only good for him")

iv) The Concept of '*Dharma'*

'*Dharma'* or '*Dhamma'* is the key concept that has been accorded multiple meanings and that has no single word translation in any of the western languages [8]. It is a fundamental concept that is treated as a cosmic law and order that relates to the orders and customs that make life and a universe possible [9] and connotes duties, rights, laws, conduct, virtues and "right way of living [10]". The concept can be differently interpreted, for instance, in religious context, it can be used as to perform one's religious duties. It can also be taken as the performance of duties by all irrespective of their social, economic or cultural status [11]. It is on account of this *dharma* that the weak is protected against the strong. A fundamental sense of law, order and morality is maintained by *dharma.*

As per the ancient Hindu philosophy, the ideals of happiness, justice and social harmony can only be achieved through *dharma.*

A remarkable feature Hinduism is that it lays emphasis on duties in contrast to the rights. Hinduism does not see any right as absolute. It does not support the idea of rights being alienated to the concept of duties. *Karma* is considered as one's highest duty in Hindu tradition.

In Hinduism, it is often maintained that there is no word for 'rights' [12]. The closest word in Hindu tradition to the word 'rights' is *adhikar* which is used by Manu to describe a just claim or a right. In the words of Kana Mitra [13], *"Dharma implies justice and propriety as does the word 'right' of the U.N. Declaration, although the connotation of a 'just claim' is not explicitly present."*

Raimundo Panikkar [14] argues that the Hindu notion of *dharma* requires:

- That human rights are not only the rights of individuals or even humans,
- That human rights involve duties and relate us to the whole cosmos, and
- That human rights are not absolute but are relative to each culture.

Ancient Hindu philosophy lays as much stress on rights as on duties, and sometimes, even more. Even in the international instruments on Human Rights in the contemporary era, we do not find a mention of the duties along with the rights. Hindu philosophy believes that an individual can have an entitlement to a right only when he has fulfilled his duty or *Karma.*

Conclusion

Western thinkers are often attributed for their thoughts and theories to the making for the international Human rights jurisprudence. This view largely does not take into account the contribution of the non-western philosophies. And this is turn, poses a question on 'universality' of human rights that is emphasised time and again as the basic feature of the Human Rights. While studying Hinduism, one would find a strong foundational theory for the idea of Human Rights.

It is often maintained that there is an antagonistic relationship between the Hinduism and the ideas of Human rights, given the hierarchical system of caste that clinched the Indian society for ages. This perception about the status of human rights in ancient Hindu tradition seems to be biased and erroneous. What most thinkers ignore is the fact that a hierarchical caste system was essentially and purely a misinterpretation of the few classes of the Hindu society. There is definitely a room for the relation between the classical Hindu thoughts and the concept of Human rights. The concept of *dharma* or *dhamma* is a remarkable feature of Hinduism which is of unparalleled significance value. It is relatable to the idea of law, justice, duties and rights. Many other *sholkas* of ancient Hindu texts deliberate the concepts of equality, non-discrimination and right to happiness which are some basic human rights contained in almost all the international instruments on Human Rights. The ancient Hindu texts not only provide for traces of the ideas on the human rights but they do also lay special emphasis on the duties. This can definitely help in developing and enriching the International Human Rights jurisprudence, as in most of the international instruments on the subject, even today we do not find mention of fundamental duties, but only of the fundamental rights.

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Felony of female Foeticide – Role of judiciary in implementation of PCPNDT act in India

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Abstract
The worst manifestation in our country is the gender discrimination. India is one of the several countries where higher sex ratio is observed and equally patriarchal in nature. Maharashtra was the first state to adopt law against the practice in the 1988. With the increasing availability of sex screening technology in India, the government of India passed Pre-natal Diagnostic Techniques Act (PNDT) in 1994. This law was further amended into the Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) PCPNDT Act in 2004, to deter and punish parental sex screening and female feticide. However there are concerns that PCPNDT Act has been poorly enforced by authorities. God is the author of life and nobody should have right to take it. The unscrupulous murder of female feticide has no ground for justification. More and more people are in urban as well as rural parts all over the community getting involved in this malpractice. The author of this article clearly explains the reasons for the heinous crime of female feticide and role of judiciary in implementation of PCPNDT Act and explains analytically the lacunas and their remedies for controlling and restricting the female feticide.

Keywords: Female feticide, gender discrimination, sex determination, techniques, son preference, judiciary

1. Introduction

India is one of the several countries where higher sex ratio is observed and equally patriarchal in nature. A set of hierarchical systems prevails in all tiers of the social order. Right from the ancient scriptures, men are glowingly praised as the key to continue the family lineage. A girl is forced to undergo multiple pregnancies/abortions, until she fulfills her lifelong goal of being a breeding machine that produces male offspring as per the needs of the family.

According to the Tribuen, 66109 cases of female feticide as a result of sex selective abortions were reported in the country in the year 2001, where as in 2000 the number was 69298. Fatehgarh Sahib (Punjab) has lowest female sex ration in the country [1]. According to UNISEF, India has less than 93 women for every 100 men against the world's average of 105 women for every 100 men. Due to which today there are 1.4 million missing girls in the age group of 0 – 6 years [2]. Infanticide and feticide are like a part of life in both urban and rural India therefore, the provisions of a progressive law like the pre-natal Diagnostic Technique (Registration and Prevention of Misuse) Act 1994 remain a worthless scrap of paper. The deep seated bias in India against the girl child, with the availability of the most modern scientific technique to determine the sex of the fetus and abort thereby has resulted in large scale female feticide in India. Feticide is one of the most common causes of maternal mortality. The female infanticide in the past and feticide in the present are two sides of the same coin.

The unscrupulous murder of female feticide has no ground for justification. More and more people are in urban as well as rural parts all over the community getting involved in this malpractice. God is the author of life and nobody should have right to take it. The author of this article clearly explains the reasons for the heinous crime of female feticide and role of judiciary in implementation of PCPNDT Act and explains analytically the lacunas and their remedies for controlling and restricting the female feticide.

1.1 Factors responsible for female foeticide.

In the Vedic age 1500-1000 BC women in India were worshipped as goddesses. However, with the passage of time, the Muslim age 1026-1756 witnessed a sharp decline in their status and in the British regime they were looked upon as slaves of slaves [3] There are so many factors responsible for the decline of the girl child in Indian population.

1. It is a general perception that a woman is considered a financial obligation as money spent on bringing her up, educating her, marrying her will not be repaid back. As Justice YK Sabharwal, Chief Justice of India, rightly said [4] that investing in a daughter is like "watering your neighbor's lawn".
2. Dowry system is widely prevalent in all communities and castes and is illegal in India under the Dowry Prohibition Act. As a result the daughters are considered to be the economic liability.
3. Hinduism allows only a son or male relative to light the father's pyre. Believing that father gets salvation after his death. On the other hand, Hindu books and Rig Veda hold women in a much respected light. Many women, in these texts, were highly regarded and respected. This may be one of the main important factors to have the male child.

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[2] N.S.Bawa, *Female Feoticide: A Crime Let us fight it out*, 81 (Harijit Printing Press, Mohali, India 2002).
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4. The people are well educated but the mindset and attitude of the people yet to be changed in order to curb the female feticide in Toto.
5. Advance in technology like ultra-sonography is now conveniently available at the clinic next door. The easy availability of mobile scanning machines and doctors are doing brisk business in rural areas. It has been estimated that there are 25,770 officially registered pre-natal units in India [5].
6. Another reason for female feticide is parents much worried about the safety of the daughter rather than son.

The above said factors are one way or the other directly or indirectly are responsible for female feticide. Government passed laws from time to time to curb the heinous crime but the Government itself can't bring down the crime at once unless the mindset/attitude of the people changed it is sheer waste of time and money to further passing of the laws. Now let us understand the existing laws on female feticide and its importance.

In 1988, the State of Maharashtra became the first in the country to ban pre-natal sex determination through enacting the Maharashtra Regulation of Pre-natal Diagnostic Techniques Act. At the national level the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted on September 20, 1994. This act came into force in the year 1996. The Pre-conception & Pre-natal Diagnostics Techniques (PC & PNDT) Act, 1994 was enacted in response to the decline in Sex ratio in India, which deteriorated from 972 in 1901 to 927 in 1991. Female infanticide had been prohibited through legislation in pre-independence period and certain provisions were included in the Indian Penal code, 1860 for punishing causing miscarriages and other such offences, but with the advent of diagnostic technology to detect the sex of the fetus very early during pregnancy, a need was felt for a specific law to prevent the misuse of technology which could lead to female feticide.

The Act was amended in 2003 following a PIL filed in 2000 to improve regulation of technology capable of sex selection and to arrest the decline in the child sex ratio as revealed by the Census 2001. With effect from February 14, 2003, due to the amendments, the Act is known as the Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The Hon'ble Supreme Court, taking a serious view of the onslaught of sex-selective discriminatory practices by medical fraternity, and connection it may have with the use of pre-natal sex determination, directed the Centre to implement the PC & PNDT Act in all its aspects [6]. The order came following a public interest petition filed by the centre for the Enquiry of Health and Allied Themes (CEHAT), the Mahila Sarvangeen Utkarsh Mandal (MASUM) and Dr. Sabu George, who had done extensive research in this area.

The basic purpose of the Act is three-fold, with a focus on averting further decline in sex ratio:

1. Regulation of Pre Natal Diagnostic Techniques only for legitimate uses as prescribed under the Act;
2. Complete ban on misuse of pre-conception diagnostic techniques' (PCDT) and pre-natal diagnostic techniques' (PNDT) for sex selection / determination;
3. Absolute prohibition of selection of sex of the fetus, both before and after conception, except for detecting sex linked diseases

1.2 Amendments to the Act mainly covered

i) bringing the technique of pre-conception sex selection within the ambit of the Act,
ii) Bringing the use of Ultrasound Machines within the purview of the Act more explicitly,
iii) Further empower the Central Supervisory Board for monitoring the implementation of the Act,
iv) Constitution of State level Supervisory Boards and a multi-member State Appropriate Authority for better implementation,
v) More stringent punishments,
vi) Empowering the Appropriate Authorities with the powers of the Civil Court for search, seizure and sealing the machines/equipments/records of the violators, including sealing the premises and commissioning of witnesses,
vii) making mandatory the maintenance of proper records in respect of the use of ultrasound machines
viii) Regulate the sale of ultrasound machines only to the registered bodies.

In order to stop female feticide and declining the sex ratio, the parliament passed the PCPNDT Act 1994 and amended from time to time to have effective implementation of the act and misuse of the parental diagnostic techniques for sex selection. However the act has not been properly and effectively implemented throughout the country. The judiciary plays very important role for effective implementation of the said act.

1.3 The role of judiciary

The judiciary has also taken serious note of the matter which is reflected in a number of judgments. Dr. Mrs. Suhashini Umesh Karanjakar V. Kolhapur Municipal Corp [7] Wherein the Hon'ble Bombay High Court held that words "any other material object" used in Section 30 of the Act and Explanation (2) to Rule 12 clearly provide that Appropriate Authority is empowered to seize and seal ultra – sound machine, other machines and equipments capable of aiding or assisting in sex selection. Considering declining sex ration in Maharashtra from 913 in 2001 to 883 in 2011, the directions were given for expedite disposal of the pending cases under the Act with utmost priority preferably within one year.

In another case Dr. Pradeep Ohri V. State of Punjab and others [8] the ration laid down in this case is that removal of the name of medical practitioner from the register of the Medical Council for a period of 5 years (before the amendment of 2years) on his first conviction is in nature of penalty imposed on him due to his conviction under the Act.

In the case of Ajith savant Majagvai V State of Karnataka [9] The court held that "it is unfortunate that in an age where people are described as civilized, crime against female is

[5] Female feticide continues unabated in India, available at www.dailymail.co.uk. 4th july, 2006.
[6] AIR 2003 SC 3309.
[7] 2011 (4) AIR Bom R 326 (F.B.)
[8] AIR 2008 P & H 108
[9] 1997, 7 SCC 110.

committed even when the child in the womb as the female fouts is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature in unthinkable. To torment a wife can only be described as the most hated and derisive act of a human being."

In M.C. Mehatha V State of Tamil Nadu and others [10] a three judge bench, while dealing with the magnitude of the problem in engagement of the child labour in various hazardous factories or mines, commenced the judgment thus, when the female foeticide takes place every women who mothers the child must remember that she is killing her own child despite being a mother that is what abortion would mean in social terms. Abortion of female child in its conceptual eventuality leads to killing of women."

In Center for Enquiry into Health and Allied Themes (CEHAT) and others V Union of India and others [11] The two judge bench commenced the judgment starting that the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has soothing effect on the parents. The court also commented on the immoral and unethical part of it as well as on the involvement of the qualified and unqualified doctors or compounders aborts the fetus of a girl child. In this case the court had noticed the misuse of the pre-conception and pre natal diagnostics techniques act and gave various directions for its proper implementation.

Keeping the ineffectiveness of the pre-conception and pre natal diagnostics techniques act and the non-compliance of the directions of the apex court given earlier decisions in view., an NGO in the name of voluntary health association of Punjab filed a writ petition before the Supreme Court in the name of voluntary Association of the Punjab V Union of India [12] and others. In the response to the writ petition Supreme Court on 4th March, 2013 has passed the following orders providing more teach to the act for better affectivity.

1. All courts must dispose cases filed under the act within 6 months.
2. State governments must set up special cell to monitor the progress of the cases filled under the act.
3. State governments must map all registered and unregistered ultra-sonography centers within 3 months.
4. State and district and advisory boards must ensure that manufacturers and sellers of ultra-sonography machines do not sell the machines to any and unregistered centers.
5. All genetic clinics and laboratories must maintain statutory records and forms. Action will be taken against them if they fail to do so.
6. Central and State Supervisory boards must meet every six months to oversee the effective implementation of the act.
7. They must gather information on breach of the act and initiate legal proceedings.
8. The state Advisory Committee and District Advisory must report details of the changes framed and the convictions given under the act of the state medical councils so that they may take appropriate action.
9. The authorities should take steps to seize the machines which have been used illegally and contrary to the provisions of the act and its rule. These seized machines can also be confiscated under the provisions of the code of criminal procedure and be sold in accordance with law.

Petitions challenging constitutional validity of the Act: -

In the case of Vinod Soni and Anr. -Vs- Union of India [13] a very interesting argument was advanced in this case by the Petitioner that the right to life guaranteed under Article 21 of the Constitution includes right to personal liberty which in turns includes the liberty of choosing the sex of the offspring and to determine the nature of the family. Therefore, it was contended that the couple is entitled to undertake any such medical procedure which provides for determination or selection of sex. The High Court however exposed the fallacy of this argument by observing that, "right to personal liberty cannot be expanded by any stretch of imagination to liberty to prohibit to coming into existence of a female or male foetus which shall be for the nature to decide." After making reference to the decisions of the Supreme Court, which explain that Article 21 includes the right to food, clothing, decent environment and even protection of cultural heritage, the High Court held that "these rights, even if, further expanded to the extremes of the possible elasticity of the provisions of Article 21, cannot include right to selection of sex, whether preconception or post-conception." It was observed by the High Court that "this Act is factually enacted to further the right of the child to full development as given under Article 21. A child conceived is, therefore, entitled under Article 21 to full development, whatever be the sex of that child." Accordingly High Court dismissed the Petition by holding that it does not even make a prima facie case for violation of Article 21 of the Constitution.

In the case of Vinod Soni and Ans. Vs. Union of India, [14] The petitioners, who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994. The Hon'ble Apex Court held that, "cases are permitted as mentioned in sub clause 3 of section 4, where certain dangers to the pregnant woman are noticed. A perusal of those conditions which are five and which can be added to the four, existence on which is provided by the Act. It will therefore be seen that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at preconception stage or post conception stage. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomenon. It need not take place on copulation of every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That being a factual medical position, claiming right to choose the sex of a child which is come into

[10] AIR 1997 SC 699,

[11] 2001 5 SCC 577,

[12] 2013 (3) SCALE 195; Decided on 4-3-2013 (SC) [K.S. Radhakrishnan and Dipak Misra, JJ.]

[13] 2005 Cri.LJ 3408.

[14] 2005 Cril. L.J. 3408.

existence as a right to do or not to do something which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination, to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right."

Mr. Vijay Sharma and Mrs. Kirti Vs. Union of India [15] while upholding the constitutional validity, the Hon'ble Bombay High Court has held that the section 4 cannot be called that it violates Art 14 of constitution of India. Section 4 regulates use of the said techniques. Section 4(2) states that the said techniques shall not be conducted except for the purpose of detection of (i) chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) heamoglobinopathies; (iv) sex linked genetic diseases; (v) congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board that too on fulfillment of any of the conditions laid down in subsection 3. Thus the said techniques are to be used only to detect abnormalities in the foetus and not for sex selection or sex selective abortions to couples who are desirous to have a male child even after birth of daughter.

The Judiciary in India observed 2007 as 'Awareness year of female foeticide' and will deal in a strict manner against those responsible for this crime, Chief Justice of India Y k Sabharwal while delivering his presidential address at the state level seminar on 'Eradication of Female Foeticide', jointly organized by the Punjab Department of Health and Family Welfare and Punjab Legal Services Authority, he called upon the people to get rid of themselves of the son-obsession "as our lives will be just as fulfilling, if not more, if our children were to be girls". The law can play an important role in checking this menace of female foeticide, he added. The CJI suggested that all sections of society must work together to ensure that each and every baby girl was given her due in society. Warning the medical fraternity, there ought to be stricter control over clinics that offer to identify the sex of a foetus and stronger check on abortions to ensure that these are not performed for the wrong reasons. Doctors must also be sensitized and strong punitive measures must be taken against those who violate the law,

Justice Sabharwal said further that if this unhealthy trend continued for some more time, then probably it would disturb the demographic composition of the society, giving rise to many matrimonial problems. "It requires the commitment, devotion and sensitivity of all to eradicate this deep rooted social problem," he noted. The "son syndrome and obsession" must be wiped out from the minds and we must give equal importance to the girl child, otherwise this trend would lead us nowhere. "I would just like to say that this is not so much a legal problem but it is a social disease", he added.

Evil of female feticide is not creation of tomorrow but lies in root of Indian Society and worsening day by day due to which Indian Judiciary should come forward with new laws/amendments to the existing laws to control the practice.

1.4 Conclusion and Suggestions

The legislations enacted in this behalf are not sufficient to curb the heinous crime. Orthodox views regarding women need to be changed. The PCPNDT Act is to penalize and punish the violators of this crime strictly. There is necessity of mobilizing the political will to ensure proper and better implementation of the provisions of the Act. The pernicious acts of female feticide and coercive abortions have to end before women becomes endangered species.

The prenatal diagnostic Technique (Prevention and Misuse) 1994 is a master piece of legislation which prohibits female feticide in India. The object behind this act is to maintain the balance the sex ratio. There is a need to take protective measures by the legislature, administrator, non-governmental organization and society. The provisions of PCPNDT Act 1994 should be strictly implemented. Legal measures will not bring about revolutionary change in existing women's conditions but it acts as supplement. Media both print and electronic plays a very significant role in removing gender bias and developing a positive image of the girl child in the society. It is not easy to change overnight the attitude of women towards female feticide. It takes time to change the mindset of the public. The government has initiated many programs like Beti Bachao, Beti Padhao and Sukanya Samridhi Account to encourage the birth rate and education of girl child and also end gender discrimination practices Government should see these schemes should be properly implemented and finally the directions of the courts regarding the prevention of female feticide should be strictly followed by the Central Advisory Board and Appropriate Authority.

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Environmental law and governance as antecedent factors to sustainable development in developing states

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Abstract
In facing ever increasing complexities regarding our planet, people everywhere view environmental rights, environmental law and jurisprudence and environmental governance as becoming increasingly central to resolving problems of environmental justice. Admittedly, 'governance' has acquired the status of a hackneyed concept and has since 1990 been applied by institutions, states, policy-makers, researchers and other commentators to diverse 'zones' of human endeavor (Graham *et al*., 2013). When placed within the environmental context, the concept is generally defined as encompassing the relations and interplay among government and non-governmental entities, processes and normative frameworks, where powers and functions directly or indirectly influence the use, management and control of the environment. Environmental governance thus concerns how legal and policy decisions are made, with particular emphasis on participation by the human beings who will thereby be directly affected by the outcome of such decisions. Even though this concept originated within the purview of the international community's concerted responses to the environmental challenges of the mid-1980s and the decades following, there has been an unmistakable recognition that international responses and initiatives would only thrive when effective normative, institutional and policy frameworks are established at the domestic level. This thinking has even gained added relevance through the prevalent idea that environmental governance holds the potential of promoting the goals of sustainable development. In connection with the United Nations Conference on Sustainable Development, Rio+20, UNEP organized the World Congress on Justice, Governance and Law for Environmental Sustainability. Through the World Congress, over 250 of the world's Chief Justices, Attorneys General and Auditors General seized a generational opportunity to contribute to the debates on the environment and declare that any diplomatic outcomes related to the environment and sustainable development, including from Rio+20, will remain unimplemented without adherence to the rule of law, without open, just and dependable legal orders. This paper explores the significance of environmental law and governance as key factors to sustainable development with particular focus on developing states where sustainable development remains elusive.

Keywords: Environmental Law, Environmental Governance, Sustainable Development, Developing State

1. Introduction

"Our biggest challenge in this new century is to take an idea that seems abstract-sustainable development - and turn it into a reality for all the world's people"

-Kofi Annan (2001), Secretary General of the United Nations

Admittedly, 'governance' has acquired the status of a hackneyed concept and has for long been applied by institutions, states, policy-makers, researchers and other commentators to diverse 'zones' of human endeavor (Graham *et al*., 2013) [3]. When placed within the environmental context, the concept is generally defined as encompassing the relations and interplay among government and non-governmental entities, processes and normative frameworks, where powers and functions directly or indirectly influence the use, management and control of the environment (Norichika, 2014) [8]. Environmental governance thus concerns how legal and policy decisions are made, with particular emphasis on participation by the human beings who will thereby be directly affected by the outcome of such decisions.

Even though this concept originated within the purview of the international community's concerted responses to the environmental challenges of the mid-1980s and the decades following, there has been an unmistakable recognition that international responses and initiatives would only thrive when effective normative, institutional and policy frameworks are established at the domestic level. This thinking has even gained added relevance through the prevalent idea that environmental governance holds the potential of promoting the goals of sustainable development (Regina, 2010) [11].

While enormous amounts of literature have been circulating on the subject of environmental law and governance, what seems not to be keeping pace is the linkage of national challenges in legal and policy to current multilateral approaches and thinking? Kanie and Haas capture this scenario in the following words:

> There is growing interest in identifying the ways and means of creating a more effective synergy between the multitude of environmental institutions that exist at the local, national, regional, and global levels, and between those levels. The need for a common understanding of the interrelationships between different elements and dimensions of the environment, and sustainable development, extends well beyond the limitations of current scientific knowledge. The multilateral approach to these issues remains fragmented in terms of methods and mechanisms of scientific assessment and the development of consensual knowledge. This is also the case in regard to human capacity-building and the arts of domestic-regional international interfacing in policy making (Kanie & Haas, 2009) [6].

Apart from the challenge of synergy, there are also peculiar weaknesses and constraints within national jurisdictions that global efforts are not adequately responding to. In the case of the developing countries of the African continent, the body of scholarly literature has remained quite scanty, and in some cases nonexistent, in the investigation of the theoretical and practical parameters of environmental governance and in charting the path for synergizing critical environmental governance issues with global discourses. It is against the backdrop of the foregoing that this essay emerges as a modest attempt at providing insight into an otherwise recondite terrain.

2. The Concept of Sustainable Development

Sustainable development, which is often used as a "trademark" for "promoting environmentally sound approaches to economic development" (Pezzoli, 2007, p. 549) [10], is interpreted ambiguously and the debates on definitions deserve special attention. The concept of sustainable development is the outcome of scientifically influenced and socio-economic development, the discussion beginning in the 1970's, when a large number of papers were devoted to the issues of natural resources and environmental pollution. The analysis of national legal sustainable strategies and other policies would be more efficient with background knowledge of the historical roots of the concept.

Several major milestones, which were made within the UN system, could be identified as important ones in the forming of the concept of sustainable development: United Nations Conference on the Human Environment in Stockholm (1972), World Commission on Environment and Development (1987) that spread the term, Rio Conference on Environment and Development (1992) and finally the Johannesburg Earth Summit (2002). The United Nations Conference on the Human Environment, which took place in June 1972 in Stockholm (Sweden), has played the decisive role in the primary formation of the concept of sustainable development. The principles of Stockholm Declaration on the Human Environment contained a set of "soft laws" for international conservation efforts. The Stockholm conference formulated the right of people to live "in the environment of a quality that suggests a life of dignity and prosperity" (UNCHE, 1972).

Since that time, a significant number of international organizations and governments of various countries have adopted the basic documents and national constitutions that recognize the basic human right to a healthy environment. Moreover, the environment was included in the list of priorities at regional and national levels. The conference confirmed the necessity of a long-term development strategy, taking into account the interconnection and interdependence of contemporary issues. The term sustainable development became widespread in 1987, when a report "Our Common Future" was published by the World Commission on Environment and Development. Steurer and Martinuzzi (2007, p.149) [17] evaluated the report as "the first global sustainable development program or strategy in a broader sense that explored the future of both "what?" and "how?" of policy making".

Hopkins (2007) [5] argues that the report helped to promote the expression "sustainable development" in general, but he estimates that the impact materialized only in this century. The definition of sustainable development stated in "Our Common Future" can be summarized as the "development that meets the needs of the present time, but does not jeopardize the ability of future generations to meet their own needs" (WCED, 1987). The definition of "sustainable development" proposed by the Brundtland Commission is widely used. However, it reflects only the strategic objective, rather than pointing the way for concrete action and can also be criticized for its vagueness as it should explicitly include the idea of preserving the environment.

Official recognition of the sustainable development view was made at the UN Conference on Environment and Development in Rio de Janeiro in 1992, when a new principle of development of the world's productive forces was set. According to Elkington (2007) [2], the globalization processes turned the ideas of policy-makers towards the necessity of sustainable development. Together with globalization changes in social, economic and environmental areas started to happen in step and these processes resulted in the competitive relations between "environmental protection" and "economic development" (Martens & Raza, 2010; Gamage & Boyle, 2008) [7]. The adopted document "Agenda 21" starts with a point that "integration of environment and development concerns (…) will lead to the fulfillment of basic needs, improved living standards for all and (…) more prosperous future" (UNCED, 1992) [18]. Hopkins (2007) [5] agrees with the point that sustainability itself is developed to improve human lives but argues that nowadays it is more devoted to the future. The Earth Summit, or the World Summit on Sustainable Development (WSSD), held in September 2002 in Johannesburg (South Africa), reaffirmed the devotion to the ideas of sustainable development. Whereas at the conference in Rio de Janeiro the problem was dominated by the environment to achieve sustainable development, in Johannesburg this problem has been given the same attention as the discussion of social and economic issues. It was noted that the problem of global degradation of nature was exacerbated by poverty and unequal distribution of benefits; the task of "environment for development" was committed in the first place.

Therefore, in the two documents adopted by the Johannesburg Summit (The Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development), priority has been given to social issues for achieving sustainable development, particularly poverty eradication, promotion of health and, especially, sanitation, including provision of clean drinking water. It is important to notice that not only governments but also non-governmental and intergovernmental organizations and commercial structures took part in the Johannesburg commitment. These organizations came up with initiatives for greater access to water and sanitation, energy development, increase agricultural production, the proper use of toxic chemicals, maintenance of biological diversity and better management of ecosystems. It was seen that environmental and economic aspects of sustainability are not sufficient to implement the concept of sustainable development in practice: they must now be complemented by other aspects: social, information, management (The Johannesburg Declaration on Sustainable Development, 2002).

Environmental issues started to be seen in the context of sustainability and were discussed, e.g. the maintenance of the natural resource's base for economic and social development and management, stating the impossibility to separate solutions for environmental, economic and social problems (ibid). Thus,

global actors accepted a new paradigm of development. It was mentioned for the first time that measures to address degradation of the environment should be adopted at the governmental level. Guiding principles of SD include balance between nature and society, balance within the society at the present stage of development, balance between current and future state of mankind as a "target function" of development ("Our common future", 1987). Such definitions were transformed into the three-pillar approach, which shows the links and interconnections between economic, social and environmental parts. Some authors as Elkington (2007) [2] give this approach another name - "triple bottom line" which still has the same meaning and includes "environmental responsibility, social awareness and economic profitability".

Referring to the scientific debates, sustainable development can be characterized as a controversial but an effective concept which is on the agenda of different governmental institutions. The guiding idea of collective cooperation towards sustainability is still an ongoing process of building efficient cooperative structures. However, the new scientific debates have changed significantly the meaning of sustainable development since the Brundtland report. It is worth mentioning, that some scholars nowadays are trying to avoid this three-pillar approach and transform it into the more comprehensive theory (Ott & Thapa, 2013) [9]. Seghezzo (2009, p. 540) [15] underlines limitations of the Brundtland definition and invents an "alternative sustainability triangle formed by "Place", "Permanence" and "Persons". He demonstrates the higher sensitivity of the new approach and explains how the exploration of space, time and persons could help to improve the formulation of regional or national policies. Pezzoli (2007, p. 558) [10], for example, points out the ideas of scholars from political ecology, where "societies and environments are the mutually interactive co-evolving systems". According to that the impact of human action and the emerging climate change and other global environmental problems are interconnected, thus sustainable development requires environmental learning, planning and research of "human understandings".

From this point of view authors in Pezzoli's overview blame the Brundtland Commission for expanding world's attention on the economic growth to "provide sustainable solutions to interlocking problems of environment and development" (Pezzoli, 2007, p. 566) [10]. Smith and Stirling (2010) [13, 14] emphasize the role of socio-technical solutions to sustainability problems. They argue that technologies with positive effects are considered to be useful instruments for sustainable development. In this case new green technologies bring results to the "social, economic, and political systems" (Smith & Stirling, 2010, p. 2) [13, 14].

With the example of carbon emissions, authors highlight the need of overall changes in the energy infrastructure worldwide. However, the issue is controversial. Gamage and Boyle (2008) [4] outline sustainable development from the consumerist point of view. In regard to globalization and growing use of resources negative outcomes appear in the globalized economy. Consumerist changes and threats are connected with sustainable development and with "the welfare of the social and environmental dimensions" (Gamage, Boyle, 2008, p. 55) [4]. That is why national strategies for sustainable development could not be created on the basis of the traditional universal ideas and values, patterns of thinking. They require the development of new scientific, political skills and philosophical approaches that are appropriate not only to modern realities, but also the prospects for the development in the new millennium.

3. Background and Contextual Issues to Global Environmental Governance

Over the past decade, concerns about the environment have converged on the concept of global change. In this context, 'global change' refers to the tendency for the rapidly expanding and economically active world populations to alter the basic physical and biological processes of the planet Earth. Of particular concern are artificial changes in the chemistry of the atmosphere that cause acid deposits, depletion of the ozone layer, and climate changes. Beyond these concerns, however, numerous other environmental problems demand attention, such as the spread of deserts, water scarcity, destruction of forests, loss of biodiversity, pollution and depletion of marine resources, and dumping of toxic wastes.

In the context of this paper, focus is on the legal and policy initiatives towards the establishment of an effective regime of environmental protection and the promotion of sustainable development in developing countries. Neither the turning of the global spotlight on developing nations in Africa nor the robust discussion of international environmental law framework in this essay is abstract or esoteric. After all, the interrelatedness of the universal environment is beyond disputation. Indeed very few people would differ that synchronized international action is essential to protecting the earth, its climate, conserving biodiversity, and managing aquatic and other shared resources. In short, the need for an articulate system of international environmental governance is clear. However, constructing such a system and maintaining its efficiency in the face of the many competing interests among developing states has proven very complicated.

The difficulty in pursuing environmental governance at a universal scale is compounded by the fact that there is no central institutional 'sovereign' to craft sweeping environmental protections at the international level and to insist on compliance. In the absence of such an arrangement, therefore, a fluid system of international environmental governance persists. The current system largely reflects the strengths and dysfunctions of international politics and shows the complexity of stimulating efficient collaboration among the divergent community of nations; not the least in environmental matters that demand universal action.

The unbridled movement and dumping of permitted pesticides, polychlorinated biphenyls (PCBs), general industrial chemicals, laboratory chemicals, oil, bitumen, timber treatment chemicals, and fertilizers, many of which have been proven capable of causing adverse health effects on people, animals and marine life in in developing nations becomes a major subject of investigation (UNCED, 2011). This concern is not bogus or negligible. Way back in 1992, the United Nations Conference on Environment and Development (UNCED) had sought to conscientise the international community to the critical challenges confronting developing states, and in particular those in Africa. In the UNCED's own words:

> Although the total volumes of waste produced may not be large compared to other countries, the effects of the disposal of increasing amounts of waste on fragile small islands environments in Africa are likely to be extreme

> and constitute a very serious constraint to sustainable development. This is particularly true for atolls with limited fresh water supplies and inshore lagoon marine ecosystems that are easily contaminated (UNCED, 2009) [18].

While observing that there yet remains the need for greater coherence in the applicable legal and policy frameworks, this paper emphasizes the need to maximize the benefits of the existing frameworks in fostering environmental governance.

4. International Policy and Legal Frameworks for Environmental Governance

A substantial evolution in global environmental governance has occurred since the landmark United Nations (UN) Conference on the Human Environment held in Stockholm in 1972. A series of single-theme world conferences have also discussed specific environmental problems and drawn action plans for addressing them. New international institutions have been created, the most notable being the United Nations Environment Program (UNEP) and the United Nations Commission on Sustainable Development, and previously existing organizations such as the Food and Agriculture Organization (FAO), the World Meteorological Organization (WMO), the International Maritime Organization (IMO), United Nations Educational, Scientific and Cultural organization (UNESCO), the European Union (EU), and the World Bank have expanded their activities in the environmental realm. Furthermore, hundreds of international treaties and other international agreements have been concluded on subjects ranging from the marine environment to outer space and from species preservation to protection of the ozone layer (Redgwell, 2007) [12].

Particularly significant among these legal and policy frameworks are the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972), the United Nations Convention on the Law of the Sea (UNCLOS) (1982) (Part XII), the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (1989), the Convention on Biological Diversity (1992), the UN Framework Convention on Climate Change (UNFCCC) (1992), the UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (1995), and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) (Cullet & guatieri, 2009). To these must be added the numerous non-binding policy statements emanating from the international community since the UN Conference on the Human Environment held in Stockholm in 1972.

The underpinning theme of all these normative and policy instruments is the increasing global recognition that the conservation of biological diversity and the protection of the environment is about more than plants, animals and micro-organisms and their ecosystems–it is also about human beings and their need for food security, medicines, fresh air and water, shelter, and a clean and healthy environment in which to live (Alexander & Dinah, 2008) [1].

5. Strategies for Strengthening Environmental Governance in Developing States

The importance of law in promoting effective environmental governance cannot be underestimated. The legislative arm of government can be a useful tool and a powerful agent of change in sustainable environmental governance. There is a need for a principal statute for the management of the environment in developing states. Developing states in Africa are in need of an integrated and coherent framework for their environmental management. Such countries need a strong legislative system if they are to achieve their environmental commitments and goals. Consideration for a reformed regime, taking into account both the economic and social benefits of preserving the environment needs to be looked into. Developing states therefore need a more robust all-encompassing and well-focused environmental regime to serve as a core principal legislation on the management of their environment. The capacity of the developing states legislature needs to be strengthened not only to enable it legislate for sustainable environmental governance, but also to enable it promote institutional reforms that will bring about sustainable environmental governance.

Environmental sustainability should be made an integral part of economic planning at all levels of governance and integrated into all policies in developing states. Economic policies which aim at balancing sustainability initiatives backed by conscious efforts to safeguard and protect the environment should also be made use of. It is also important to have adequate institutional machinery for supervising implementation of environmental obligations/commitments. The legal and political frameworks for environmental governance require effective enforcement mechanisms. There is a need for the full utilization of the law as an instrument of social change or social engineering to achieve a balance between environmental protection and development activities. Public participation, which is a central element of sustainable development, has a role to play in achieving sustainable environmental governance.

Developing states should encourage broad based participation to enable them deal effectively with their environmental challenges. Such public participation should include local communities and their representatives as well as indigenous people and other marginalized groups who should be given opportunities to inject their knowledge and understandings into policies for sustainability as a matter of rights. Local governments should be assigned a greater role in the administration of environmental management. They should also concern themselves with the consultation of members of their communities. Stakeholders at all levels have a critical role to play in strengthening environmental governance. Good environmental governance which takes into account the role of all actors that impact on the environment should be explored.

Civil society offers a wealth of expertise, knowledge and implementation experience. The contribution of the participation of civil society in environmental governance needs to be enhanced particularly through a strengthened and more formalized structure to engage them. There is therefore a need to ensure the strengthening of the roles of civil society and especially non-governmental organizations within a new or a restructured national environmental governance system in order to facilitate the participation of civil society in national environmental governance in developing states. Improved access and participation of civil society would also improve the transparency and accountability in environmental governance. Legal measures should be taken to ensure the full and effective participation of civil society in environmental governance at all

levels and in the decision making processes that lead to its reform.

6. Conclusion

This paper has attempted to examine the role of environmental law and governance in fostering sustainable development in developing states. As acknowledged at the onset, developing states encounter formidable challenges in institutional, normative and policy terms. This paper has particularly dealt with the issue of pollution and its long- and short-term implications for these nations. An underpinning reality highlighted in this paper is the state-centric approach to the totality of environmental governance issues in developing states. While noting the abundance of significant treaties, municipal laws and diverse policy mechanisms, this paper has been able to identify gaps and weaknesses, making suggestions for their reform and enhancement. Recognizing that the path to the future lies in a synergy of initiatives and inputs among the government, the people and all other stakeholders in the environmental well-being of developing states, therefore, this paper proffers some viable trajectories for strategic responses. Far from being an *ex-cathedra* pronouncement on all the dynamics of environmental governance in developing states, this paper will have served its purpose if it stimulates further discourses on the promotion of environmental protection and sustainable development efforts in developing states and the world as a whole.

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The right of establishment under the ECOWAS protocol

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Abstract
The Right of Establishment as enshrined in the 1990 Supplementary Protocol on the implementation of the Third Phase of the ECOWAS Protocol on Free Movement of Persons, Goods and Services, entitles nationals of member states to settle or establish in ECOWAS states and carry out business activities under the same conditions that apply to nationals of the host state. The purpose of this is to achieve the overall goal of the ECOWAS Treaty, which is to generate robust economic activities in the region in pursuit of regional prosperity. This would require the creation of a conducive climate for professionals and other business men, including corporate bodies, to harness the economic resources of the region and create a huge regional market. Unfortunately, the reality is far from satisfactory. The member states have in place, discriminatory legislation and regulations that make it well-nigh impossible for nationals of other member states to settle and establish business in the host state. For example, in 2010, discriminatory and virtually punitive levies were imposed on foreign companies in Ghana. Globacom, a Nigerian company even threatened to pull out. In Nigeria, there are rules and regulations that impose stringent conditions for foreign companies who want to establish businesses. The inevitable conclusion from the foregoing is that, the right of establishment as envisaged by the Treaty/Protocols is yet to be fully enjoyed by community citizens and corporate bodies. In fact, they are still being treated as foreigners, which negates the letter and spirit of the Treaty. This paper therefore advocates for the exercise of more political will on the part of member states to implement the Treaty to the hilt. In addition, the ECOWAS Commission should be more proactive in ensuring that member states comply with the Provision of the Treaty.

Keywords: Right, Establishment, Protocol, Discrimination, Regulations, Economic activities

Introduction
The Supplementary Protocol was formulated in furtherance of the implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment and was adopted at the thirteenth session of the Authority of Heads of State and Government of ECOWAS held at Banjul, the Gambia on May 28 and 29 1990. The Right of Establishment is enshrined in the 1990 Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol.

In Article 1, the Right of Establishment is defined as;

> The right granted to a citizen who is a national of the Member State to settle or establish in another Member State other than the State of origin and to have access to economic activities to carry out these activities as well as to set up and manage enterprises and in particular companies, under the same conditions as defined by the legislation of the host Member State for its own national.

Under Article 2 of the Supplementary Protocol, the Right of Establishment includes access to non-salaried activities and the exercise of such activities as well as the creation and management of enterprises and companies subject to the same conditions stipulated by the laws and regulations of the country of establishment for its own nationals. With respect to companies, those formed in accordance with the laws and regulations of a Member State whose headquarters, central seat of administration or principal establishment are within the Community shall be considered in the same category as individual nationals of Member States. If the statutory headquarters of the company are established in a Member State, the activities of such a company should have effective and sustained links with the economy of the Member State [1].
According to Oba, "it cannot be overemphasized that the right of establishment of Community Citizens under the ECOWAS Treaty… is the ultimate expression of economic integration" [2]. The Protocol seeks to encourage the ingress of liberal professions and businesses. In the words of Gasiowku, "like the other phases of the Protocol the spontaneous liberty for establishment which existed before 1975 for the ECOWAS countries of the West African sub-region is also replaced by a system of organized liberty" [3]. The Right of Establishment targets professional and business people and aims at creating a conducive atmosphere for individual businessmen and corporate organizations to survive and thrive. Such natural and legal persons enjoy equal treatment with the nationals of Member States.
The placement of companies in the same category as individual nationals is a further step towards enabling them to function and move freely within the host Member State for the purpose of pursuing their economic activities. The aim is to give absolute freedom to ECOWAS citizens as a way of motivating them to contribute to the economic development of the Member State in particular and the region, by necessary implication. It is another question entirely as to whether the letter and spirit of the Protocol is being observed but suffice it to say that if implemented, the aims of the Community in drafting the Protocol would be actualized. Such a regime and climate envisaged by the Protocol would facilitate 'the

optimum use of human resources within the community." [4] Creating a conducive climate for professionals is an appropriate action because economic expansion requires States to look beyond the confines of their territories, to benefit from the advantages of international specialization [5].

The right of establishment is aimed at facilitating a transition from an ECOWAS of states to an ECOWAS of peoples, where citizens enjoy the benefits of a borderless, peaceful, prosperous and cohesive region built on good governance [6]. In addition, the vision 2020 programme promises a regional resource with an inclusive society achieved through human capital development and empowerment [7]. This is to translate to a peaceful and healthy environment where women, children and youth are offered full opportunities for development, no matter where they live within the region.

Furthermore, regional integration leads to expansion of markets which would favour "industries and business." [8] At the 2006 International Conference on ECOWAS, [9] Ogwu urged West African leaders to commit themselves to the objectives of economic integration and the development of the sub-region, which is the underlying goal of the Protocol. The right of establishment was also aimed at enabling citizens to "harness (the region's) economic resources for …massive growth and development." [10] In addition, a BBC Report in 1992 stated pointedly that 'the imminent financial bankruptcy facing several West African countries may be averted if concerted efforts are made towards real economic integration." [11] It also stated that real economic growth could not be achieved from narrow national frontiers.

The ramifications and scope of the right of establishment are outlined in Article 4 of the Protocol. By this, Member States are obliged to accord non-discriminatory treatment to nationals and companies of other Member States [12] except where they are unable to do so, whereupon they "must indicate as such in writing to the Executive secretariat." [13] Where this happens, other Member States "shall then not be bound to accord non-discriminatory treatment to nationals and companies of the State concerned." At first glance, it may seem that the right given in Article 4(1) has been eroded in Article 4(2) but a second look reveals that the injection of the reciprocal condition constitutes an effective check on States which would otherwise be inclined towards non-compliance with Article 1. It must be remarked that it was a well thought through provision. It is pertinent to point out the delayed second phase (Right of Residence) of the Protocol came into force in July 1986, when all Member States ratified it but it is a negative factor that the Right of Establishment, which was to have come into effect in 1994 is yet to be implemented. In fact, Alistair Boulton is of the view that only the first of the rights has been implemented [14]. The revised Treaty of ECOWAS reiterated the right of Community citizens to entry, residence and settlement and Member States were urged to recognise and implement these rights in their domains. These rights have however become victims of the chequered economic dynamics characteristic of the region.

Take the case of Cote d'Ivoire. By 1995, there were about four million immigrants in a population of fourteen million people. The country's immigration policy experienced a dramatic shift and anti-immigrant sentiment took a sometimes violent turn. Non-indigenes were forced to flee and in 1999, the Government had to expel foreigners (including ECOWAS citizens). In March 1999, Ghana also requested all aliens in the country to register and be issued with identity cards. This reflected the simmering anti-immigrant feeling which has not abated. In 2010, Globacom, a Nigerian company threatened to close its Ghana branch because of hostile economic policies targeted at "foreign" businesses. It is not only Nigeria, Ghana and Cote d'Ivoire that have expelled Community citizens. Sierra Leone did (in 1968); Chad, (in 1979) Equatorial Guinea (in 1974); Senegal (in 1967); Guinea, (in 1968); Liberia (in 1983) and Benin, (in 1998).

The right of establishment has been enjoyed by ECOWAS citizens especially during times of armed conflict. ECOWAS countries have been havens for refugees many of whom settled in the countries they found themselves in, by the happenstance and spectre of conflict, which is hardly foreseeable. Enefiok Essien has opined that "refugees from ECOWAS states are covered by (ECOWAS) Treaty provisions, quite apart from, or additional to their rights under other refugee protection regimes." [15] It is worthy of note however that despite these treaty obligations, in 1997, Ghana denied entry to refugees who were fleeing from Liberia during the Liberian Civil War. In the words of Essien, ECOWAS appeared incapacitated in the face of this clear non-compliance with International Humanitarian Law (IHL). There was no sanction against Ghana [16].

Conditions stipulated by the laws and regulations of the country of establishment and the application of legislative and administrative provisions (which provide for special treatment for non-nationals, justified by the exigencies of public order, security or public health), vest the Member States with power to make "discriminatory regulations." These discriminatory regulations are a clog in the wheel of the full enjoyment of the right of enjoyment. In exercise of this power, Member States have gone ahead to make such regulations. Examples are regulations forbidding ECOWAS citizens from taking up certain types of jobs.

Member states are also allowed to place restrictions justifiable by reasons of public order, public security and public health [17]. It is hereby submitted that discriminatory regulations defeat the purpose and spirit of ECOWAS and the dream of the founding fathers, to create an ECOWAS of peoples and not of countries. In Mohammed B. Davany's words, "the ECOWAS Commission, since its transformation from a Secretariat to a Commission has developed a vision to have an ECOWAS of peoples as opposed to an ECOWAS of member States" [18].

The dream of an ECOWAS of peoples and not of countries depends greatly on a proper administration of the right of establishment. ECOWAS citizens have to be made to feel at home in member countries. This will remain a dream in the face of discrimination, restrictions and regulations targeted at them-as if to say "you are welcome, but….." with respect to doing business, in the exercise of their power to make discriminatory laws, Member States have enacted legislation restricting community citizens from engaging in certain types of business.

Thus, there are two discernible contradictory stances in the provisions under review. Article one of the Protocol Relating to Community Enterprises provides that legal persons are institutions or companies in which Member States or their nationals own not less than 51% of the equity capital. Article 1 of the Supplementary Protocol [19] is more elucidatory on the meaning of 'company', wherein it is defined as "any company, including cooperative societies or any other legal entity governed by public or company law. The foregoing clearly

indicate that a company duly registered in a Member State enjoys the rights of access, residence and establishment for the purpose of carrying on economic activities, as well as the creation and management of enterprises and companies subject to the same conditions stipulated by the laws and regulations of the country of establishment for its own nationals.

The Protocol's intention is clear, that the target group of community citizens to enjoy the right of establishment is that which commutes for the purpose of involving in activities that are economically beneficial to the host States. The thinking therefore is that if companies establish within the community, such companies or enterprises are also free to operate without restrictions [20]. But on the contrary, the Protocol has given host Member States the power to make discriminatory provisions in favour of their own nationals.

Implicit in Articles 2 and 3 of the Protocol (on the right of establishment) is the creation of an avenue for the mobility of non-wage-earners. In this vein, non-professionals are not supposed to suffer any discrimination based on their nationality. However, as laudable as this provision may seem, the Protocol envisaged some challenges thus;

> There shall exist practical problems that need to be solved if this objective is to be realized. This is because the exercise of many professions may be dependent on the approximation and harmonization of national laws and customs as far as educational qualification and professional status are concerned [21].

For example, in Nigeria, bodies like the Architects Association of Nigeria, the Chartered Accountants Association of Nigeria and others, have by-laws that discriminate against aliens. So long as those restrictions are in place, Community citizens will continue to be discriminated against. The doctrine of reciprocity in Article 4(2) entrenches a regime of discrimination because it means that if Member State A discriminates against the nationals of Member State B, the latter would follow suit. In practical terms, it is very difficult to create a scenario that is different from this because it would seem absurd and unrealistic to place Member States under an obligation to absorb Community professionals unlimitedly. A State can only absorb so much, as its ability to do so is determined by its economic, social, cultural and political capacity. However, it would help if national laws respecting issues of common concern are harmonized. But the problem is that "the (West African) sub-region is one of the least active in the world in the field of law harmonization." [22] Since there is no other way out of the conundrum, ECOWAS States require harmonization crucially and urgently. The reason for the *status-quo* of indolence in legal progress as it relates to harmonization is of course the hackneyed issue of sovereignty and nationalism which ECOWAS States give more consideration to than the interests of the Community.

To achieve harmonization, Lateef Adegbite has proffered the view that "each Member State would have to promulgate a Constitutional Law that any instrument emanating from the organs of the Community would have a legal effect, *ipso facto* within each State'. [23] This is in order, but the snag is in getting the organs to make these 'instruments' to address divergent *status quos* with respect to issues such as the right of establishment. In the absence of this, the right suffers from a severe limitation.

The leeway given to States to make discriminatory legislation is prone to and has been abused. In fact, as Chukwurah has so pungently asserted, "in spite of all the talks about" unity, many States were not ready to tolerate the presence of successful aliens in their territory [24]. 'He further opines that it is not easy for non-nationals to enter into another country in West Africa as a matter of course. New rules and regulations have been enacted in several countries aimed at preserving employment opportunities for citizens of the country even at the expense of aliens of long residence' [25]. The Ghanaian Aliens Deportation Order, affected several Nigerians who had lived in Ghana for a very long time and knew no other home. In Nigeria, the Nigerian Enterprises Promotions Act 1972 (and its successor, the Amended Nigerian Enterprises Promotion Act 2004), reserves certain types of businesses for Nigerians. The list is winding. By the time one "sweats" through the list, the question is, what then is left for the Community "brethren"? In like manner, the Ghanaian Business Promotion Act No. 334 1970 reserved certain sectors of the economy for its nationals and stipulated the categories of enterprises exclusively reserved for them.

In addition, the Ghana Investment Decree 1975 further solidified the *status quo*, despite assurances by the Ghanaian government that the Decree would be scrutinized closely so as not to have any 'adverse effects on Nigerian businesses in Ghana", and that it would 'ensure that the provisions of the decree were not understood by Nigerian or any other African nationals in such a way as to lead to a second mass exodus of Nigerians from Ghana." [26] Needless to say, the assurances were never kept. With respect to the Nigerian and Ghanaian laws, one could argue that they were pre-ECOWAS instruments but that observation can be controverted very easily by the fact that, none of those laws have been abrogated or even amended to reflect the spirit of ECOWAS. This demonstrates that while at the macro level, integration and establishment are talked about with gusto, at the micro level, States are busy shutting doors here and there. Thus the spectre of super-nationalism remains a veritable conundrum and a hamstring on the drive towards integration.

This is unquestionably the reason why Gasiokwu is of the view that, Article 4(2);

> Is defeatist in nature because instead of strengthening the mechanisms for the implementation and realization of the objectives of the phase (i.e. phase three on the right of establishment), it creates such a loophole which uncooperative states may exploit to the disadvantages of the citizens of other states while at the same time engaging in bilateral agreements with some in respect of such services [27].

No such bilateral arrangement is within these writers knowledge but that does not extenuate the potential for factionalisation inherent in the Article, as Gasiokwu has so aptly portrayed. Certainly, no one expected that integration would be a roller coaster ride but it is obvious that a lot more needs to be done. At least, the Protocol has provided a blueprint.

In the words of Chukwurah;

> If the Economic Community of West African States (ECOWAS) is to succeed as a regional functional organization, then its Charter provision on "the abolition

> as between Member State of obstacles to free movement of persons, service and capital has to be generally accepted and guaranteed across the whole of West Africa' [28].

Indeed, the Community needs to take a look at the provisions of the Treaty relating to free movement of persons, residence, establishment and capital as well as those relating to harmonization of common polices. This is because of their implications for labour and social policies in such areas as the harmonization of national labour legislation, and the role of employment exchanges in the machinery for facilitating the geographical mobility of workers and for equating labour supply with demand without seriously endangering standards of living and levels of employment in Member countries [29]. Unless this is done, the ECOWAS Protocol under discussion will remain a well-intentioned effort without much practical utility. Regional integration is a salutary irreversible phenomenon. Professor Asiwaju [30] has said that regional integration "could provide the impetus needed to solve problems encountered on the continent." [31] He observed further that important decisions are taken but these are often contradicted by observable action on the ground.

The ECOWAS Treaty with particular reference to the Protocol under discussion foster "the promotion of economic development of the sixteen Member States through the integration of their economies." [32] At its inception, it held a lot of promises as one of the dynamic strategies through which economic under-development could be surmounted and the all-pervading poverty in the sub-region eliminated [33]. Undoubtedly, the process of integration is "complex and arduous" [34], and the "need for the ECOWAS in the sub-region is even stronger today (1991) than it was when it was founded…"[35] Super nationalism and sovereignty need to be reviewed and extenuated and States must be prepared to make sacrifices at several levels if the goal of integration as exemplified by the Protocol on Free Movement, Residence and Establishment are to crystallize into reality. It is trite to say that the main objective of integration is economic but, the process is political and requires the surrender of the major national economic instruments to the supranational (and regional) authority. This, it must be stated, is easier said than done. Unless development in the region becomes uniform and various States undertake to build strong institutions that will engender infrastructural and economic development, making the "supranational authority" really supranational would unleash a vice-grip on the nations that will have the 'misfortune' of employing their resources for national development. They will unfairly have to bear the brunt of the regional and integrative scheme of the sub-region. Corruption plays a big role here but that is outside the scope of this work.

Phase 1 of the Protocol was ratified by Member States and as stated in the ECOWAS 2006 Annual Report, became effective in 1980. In the view of these researchers, the words "became effective' are misleading because they imply satisfactory implementation but, as the foregoing shows, this is far from being the case. For example, many of the States are yet to introduce the ECOWAS Travel Certificate – the basic travel document required for free movement. With respect to phase II, the situation is largely the same. Residence formalities have not been harmonized. On phase III, the Report states clearly that:

> The formal operationalization is still pending. To facilitate the implementation process Member States have been urged to strengthen the relevant administrative services, while the community would take steps toward the harmonization of national legislations and procedures [36].

As at the time of this writing, those steps were still in the egg. This is obviously what prompted Omonobi to state thus:

> Since the leaders of the Economic Community of West African States decided to bury individual pride and put the interest of their people in the front burner and target real growth and development for the sub-region under the aegis of the Protocols on free movement of persons and goods and rights of residence and establishment, implementation of these mobile articles have not been forthcoming… The lack of progress in the implementation of these protocols and its attendant debilitating consequences for the sub-region has… become a challenge to the present leadership [37].

The purpose of this thesis is not to design scenarios of West African integrative and cooperation schemes but to define and determine their scope, efficacy and utility. How the Community tackles the "challenge" highlighted above will determine whether the Treaty/Protocol under review will deliver the goods or remain documents containing copious good intentions and nothing more.

To make matters worse, the right of establishment is severely threatened by the persuasive insecurity in the region. One of the main causes is the proliferation of small arms and light weapons. The prevalence of armed groups and militias, such as Boko Haram in Nigeria, the Janjaweed Militia in Sudan are the underlying factors. The robust International Black Market in arms has made the procurement of arms to become as easy as procuring salt. International illicit arms dealers are always on the prowl, offering weapons to dissident groups. At times, the weapons used by these "armies" are even more sophisticated than those used by the regular army. Some of the groups make money by the sale of forcefully acquired mining fields, such as in Liberia and Sierra Leone. Some such as Boko Haram are supposedly funded by AL Quaeda, which is funded by masquerade charities around the world. This is what led the U.S to freeze the accounts of many charities in the U.S with known ties to AL Quaeda.

In order to address this problem, ECOWAS birthed the Arms Trade Treaty (ATT) and formulated the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (hereinafter referred to as Protocol on Conflict Prevention) (1999) and the ECOWAS Convention on Small Arms and Light Weapons which came into force on June 14, 2006, (hereinafter referred to as the Convention on Small Arms).

The ATT was birthed for the purpose of preventing uncontrolled and illegal procurement and sale of small arms and light weapons and to improve security [38]. In the words of Essien [39]

> ATT is a legally binding instrument on the highest possible common International Standards for the responsible transfer and brokering of all conventional weapons. ECOWAS puts in much effort to ensure compliance with…international standards…in order to

ensure the blockage of transfer of arms and ammunitions whose nature are such that can be used to commit serious violations of International Humanitarian Law.

However, inspite of all these efforts, small arms and light weapons are still as available to militants and armed groups as coke. In fact, 60-90 per cent of deaths arising from armed conflicts in West Africa have been attributed to the illegal sale and proliferation of small 'arms and light weapons' [40].

When armed conflict breaks out in a country, the worst hit are the non-nationals, who have no roots in the country and are made to float around in terror, without any hiding place. Devoid of any social or economic, safety net, they lose everything and are left to the vagaries of harsh circumstances and many do not survive. During the conflict in Liberia, many non-nationals were forced to flee the country, leaving many of their businesses behind. Some of the conflicts do not even simmer any warning-they have the tendency to erupt spontaneously, giving no time for those concerned to tidy up their affairs before departing. This often leads to loss of fortunes.

In fact, the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA) has pointed out that, insecurity at the border posts has led to a 60% drop in trade among ECOWAS member states [41]. The Director-General of NACCIMA has called on the governments of the region to tackle these challenges [42].

Furthermore, the 10th Annual Development Partners Coordinators Meeting of the ECOWAS Commission which held in Nigeria [43], discussed issues bordering on regional economic growth among five member states and concluded that addressing security issues was important for steady growth and development [44]. The Commission identified the issue of security as a cardinal one for development partners to give urgent attention to: Members "were confident that concerted efforts of member states and development partners as demonstrated during the deliberations would translate into actions that would transform the ECOWAS region in the days ahead.

At the time of this writing, the insecurity situation in the region has hardly abated. The Boko Haram insurgency group has spread its tentacles to Cameroon and Chad. There has been a coup in Guinea and threatened security in Burkina Faso and Mali, where Islamic separatists have battled state forces for years. ECOWAS expressed concern that if not checked, the insecurity could spread [45]. With the revived pounding of Boko Haram enclaves by the Military under General Mohammadu Buhari and the concerted military efforts of the member states, it is hoped that the situation might improve. Until this happens, cross border settlement within the region will remain a risk.

Other serious factors militating against the right of establishment are poverty and its twin brother, underdevelopment. Development has been described by Esso and Ukwayi as "orderly social change from pre-colonial primitive and primordial mode of production to attempts towards pulling resources for the greater good of the greatest number in the spirit of utilitarian theorists." [46] Underdevelopment in the context of this paper is the absence of modern infrastructure which translate into the socio-economic transformation of the society which makes for a standard of living that approximates to that of the civilized world. As Yella and Austin have pungently opined, "the stability of a country in terms of physical security is necessary for economic development, when considered within the context of interstate rivalry and competition. However, the relationship between security and development reverses when the sources of insecurity emanate from within the borders of a country" [47].

There is hardly any ECOWAS country whose standard of living for the majority of its population is above poverty level. Thus, there is hardly greener grass anywhere else, such that the pull factors that would naturally attract foreigners to a country are absent. When Nigeria was enjoying the oil boom, there was a large influx of foreigner, to her shores. As a result, the unbridled migration over stretched the country's socio-economic infrastructure, leading to the infamous Ghana-Must-Go episode.

Today, there is hardly any ECOWAS country that is enjoying any type of "boom". To attract migration, residence or establishment, poverty and underdevelopment are the pervasive vogue and are the fodder for conflicts. Deng Boquing, the Chinese Ambassador to Nigeria and ECOWAS shares the view that poverty and underdevelopment are the major causes of conflicts in ECOWAS. During the International Conference on Traditional Methods of Dispute Resolution organised by the Chinese Embassy and the Institute for Peace and Conflict Resolution in Abuja in November, 2013, the Ambassador charged the Federal Government of Nigeria to "tackle poverty and under development and root them out" [48]. Precisely, it is only when this is done that the climate conducive for ECOWAS citizens to traverse borders and settle down for business or other occupations as the Treaty envisages, will be created.

In summary, the ECOWAS treaty, with particular reference to the Protocol on Free Movement, Residence and Establishment, as envisaged by the founding fathers was primed as the ideal instrument for generating economic activities in the region by fostering cross border movement and establishment. However, in light of the current realities, that expectation remains unrealized. The founding fathers also expected that the Protocol on Free Movement of Persons, Residence and Establishment would cement the region into a homogenous entity of peoples, united in the pursuit of economic 'nirvana." But the prognosis is disheartening.

Terver Atsar, in his online article "Nigeria Must Go" [49], a new luggage bag will soon be on sale in Ghana. It is targeted at Nigerians who are recipients of quit notices or whatever else necessitates their sudden, compulsory return to Nigeria. He states that "Nigeria Must Go" is the fitting equivalent of the Nigerian version of the same type of bag which emerged in the Nigerian society two and half decades ago when the Nigerian Government gave marching orders to illegal Ghanaian Immigrants to leave. They needed those bags to pack their loads as they had to leave in a hurry like the Israelites fled from Egypt.

The preceding development is a real cause of worry for those with high expectations for the actualization of the dreams of the promoters of the ECOWAS Treaty. This is especially so as it relates to the context of the right of residence and establishment. The "Ghana-Must-Go" incident remains a blight in the template of ECOWAS inter-state relations not just as per the two major players, Nigeria and Ghana, but also the entire region. In 1983, over three hundred thousand aliens [50], were given 14 (fourteen) days to leave Nigeria, by a Presidential Expulsion Order. Majority of the expelled were Ghanaians, and

this was regarded as a retaliatory move for Ghana's 1969 Aliens Expulsion Order which affected thousands of Nigerians who abandoned their livelihoods and property in Ghana.

From the recent "Nigeria-Must-Go" development, it is obvious that the countries have not forgotten or forgiven each other for the incidents. One can only imagine the trepidation under which Nigerians in Ghana are under now. If the development comes to seed and the requisite rancour and vitriol is generated, with its attendant xenophobia which triggers another exodus of Nigerians, after a few years, Nigerians will find an excuse to retaliate. It would then become a ding-dong affair which will further belabour the already tenuous comity in ECOWAS.

In view of the foregoing, this paper recommends that the ECOWAS should, as a matter of urgency, transform itself from a talk shop to an action oriented body. Since its inception in 1975, a lot of clichés, slogans and programmes have been formulated, launched and re-launched over and over again. Despite all these, movement across the borders remains a nightmare and residence/establishment also remain a tortuous experience.

Second, discriminatory practices against non-nationals of ECOWAS countries should be abolished. Rather, policies and regulations which make it easier for non-nationals to reside and do business in member states should be put in place for legal documented migrants. Host countries should consider making their nations as commodious as possible, by relaxing tax regimes, beaureancrafic bottlenecks and administrative processes.

Third, a compulsory regime (supervised by the African Union and the UN) should be put in place by ECOWAS for the purpose of compensating non-nationals who lose their property and businesses in the event of the eruption of crisis or terrorist attacks. These are ECOWAS citizens who have left their natural habitats and have found themselves in a place where they lack the cushions of friends, extended family or peers. Any loss they suffer would therefore be severe, without any compensatory safety net. With respect to Nigeria and Ghana, as major leaders in the ECOWAS, they should work out modalities for mutual compensation and knock a final nail in the coffin of the "Must-Go" poltergeist. This will go a long way to balance of the tension between the two countries and open a new chapter in their relationship. The region should be able to look forward optimistically to a post "Must-Go" era in the two "giant" and "semi giant" nations.

Fourth, poverty and underdevelopment have to be deliberately and methodically tackled by the gestation of a community-wide industrial revolution. More industries would create more jobs, increase productivity and a better standard of living. This will enable the Member States to make the conditions for settlement in their domains less stringent. Skilled personnel and artisans will be 'pulled' to areas of need, thereby reducing unemployment. The export regime of the community will become more robust and economic growth will be engendered.

The potential for the economic transformation of ECOWAS is so real, such that should compel the Member States to draw up a template for the creation of a conducive climate for the Protocol to be actualized. The Member States are enjoined to muster the requisite political will to make this happen. If this is done, the days when the ECOWAS region will become the desired prosperous community of peoples and not of States would crystallize into reality.

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The powers of international criminal court in prosecuting crimes; war crimes, crimes against humanity and genocide

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Abstract
The emergence of International Criminal Court had been a welcome development owning to its contribution to the protection of minorities, children and unarmed citizens during armed conflict. The importance of International Criminal Court cannot be overemphasized owing to the fact that the peace and security of the human race depends on this court. Owing to the excessive importance of protecting human rights the International Criminal Court has been mandated to ensure its enforcements. It will be noted that the International Criminal Court is not a domestic court but an Intergovernmental and International court which sits in The Hague, Netherlands. The International Criminal Court is designed to complement the existing national judicial structure as it prosecutes states as well as individuals for international crimes. However this paper seeks to examine the complementary nature of the International Criminal Court, the role of the Security Council of the United Nations in prosecuting international crimes and the methods of evaluating the proper functioning of International Criminal Court. This paper will hereby suggest the review of international personality and the review of sanctions for disobeying the court's order.

Keywords: Humanity, Genocide, Court, Prosecution, Jurisdiction and Conviction

1. Introduction
The idea of some kind of internationally arbitrated justice system to preserve peace and punish crimes against humanity has become a popular one, spawning the creation of the International Criminal Court (ICC) in The Hague, which was enacted in 1998 and opened in 2002 [1].
International Criminal Court established as a global response to the problem facing humanity was saddled with a lot of responsibilities. Such as powers: These powers includes but not limited to: The power to investigate, the power to prosecute, the power to arrest and the power to punish crimes within the court's jurisdiction.
The international body operates on the principle of complementarity. It can only prosecute when states won't or can't prosecute crimes within the jurisdiction of the court.
Some of the crimes within the jurisdiction of the court include crimes against humanity, war crimes, genocide and aggression.
Global peace and security was really threatened at the historic development of the human race. Battles and wars destroyed a lot of lives and property. Some wars were fought even without obeying the rule of engagement because there was no such strong body to compel obedience to such rules [2]. Crimes against humanity were rampant and even genocides were witnessed in some states. Rwanda genocide was a real example to the great evils of the notion of ethnic cleansing [3]. The Geneva Conventions of 1949, granted protections to soldiers, sailors, prisoners of war, and civilians after the conclusion of World War II but an international court with real criminal jurisdiction was necessary for the maintenance of world peace and security.
However the emergence of the United Nations was seen as a real solution to the problem of world peace and security. Thus the birth of this child called the United Nations was heralded with great pomp and pageantry. The UN Charter gave to the General Assembly the responsibility, among other things, to initiate studies and make recommendations for "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." The International Law Commission (ILC) is a body of experts named by the UN General Assembly and charged with codification and progressive development of international law. After the Second World War, the General Assembly had asked the Commission to prepare what are known as the 'Nuremberg Principles', a task it completed in 1950, and the 'Code of Crimes Against the Peace and Security of Mankind', a job that took considerably longer time and resources. Much of the work on the draft statute of an international criminal court and the draft code of crimes went on within the Commission in parallel, as if the two tasks were hardly related. The General Assembly also established a committee that was in charge of drafting the statute of international criminal court. Composed of seventeen States, it submitted its report and draft statute in 1952.
In 1989, Trinidad and Tobago introduced a suggestion in the General Assembly for the establishment of a specialized international court to combat drug trafficking. The General Assembly requested that the ILC complete the draft statute.' This draft became the basis for the negotiating text for the treaty of the International Criminal Court ("ICC") that would be approved by 120 nations in Rome in 1998 and subsequently known as the Rome Statute [4].
Thus the International Criminal Court became a reality after many struggles and it was charged with the enormous duties of prosecuting crimes within her jurisdiction. Such crimes includes crime against humanity, genocide, war crimes and others. However this work will examine the power of the

International Criminal Court to prosecute crimes, the power to arrest offenders and above all the complementary nature of the court.

The aim of this work is to present the International Criminal Court as a permanent court with criminal jurisdiction clothed with the power to prosecute crimes under her jurisdiction, the crimes includes war crimes, crimes against humanity, genocide and aggression. In pursuant to the powers given to the court by the Rome Statute the court has the power to investigate crimes, the power to arrest and even the power to punish offenders. It is of essence to note here that both states and individuals are subject of the international Criminal Court.

It will also be important to highlight that one of the objectives of this scholastic work is to elucidate on the complementary nature of the International Criminal court thus the court's power starts when state parties are unwilling or unable to prosecute crimes within the jurisdiction of the court.

And finally this work has the mission of revealing the problems of the International Criminal Court and how it will be solved. One of such problem is that world powers like USA had refused to be a signatory to the Rome statute that created the court and thus it is recommended that the Rome Statute will be reviewed to accommodate states like the United States of America.

This research deals with the history of international criminal prosecution, the pre International Criminal courts, the drafting of the Rome Statute of the International Criminal Court and the principles of its operation, including the scope of its jurisdiction and the procedural regime.

It considers the Court's complementary nature, the subjects of the court, the judges of the court and the role of the prosecutor. It also addresses the problem created by US opposition and it deals with the rights of the accused before the court. However it is limited to the power of the court to prosecute crimes such as war crimes, crimes against humanity and genocide within her jurisdiction, it is also limited to the court's power to investigate crimes within her jurisdiction, the power to arrest and the power to punish the offenders after convictions.

An important literature worthy to be reviewed owing to its contribution to the development of this scholarly work is "Lessons from the Special Court for Sierra Leone in the Fight against Impunity"

[5] This paper discusses the lessons from the Special Court for Sierra Leone and their ramifications for ongoing efforts at combating impunity for heinous crimes across the world. In a broad sense, it also discusses how the international and national political context at the time of establishing the Court, its constitutive statute, and other operational arrangements impacted on its work as a "genuine" model of combating impunity for the crimes that took place in Sierra Leone. It briefly discusses the impact of the Court's verdicts on victims.

Also it will be important for this writer to do a brief review of the book, understanding the International Criminal Court. It defines International Criminal Court as a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

It also explained Rome Statute that Rome statute came into existence on 17th July, 1998, a conference of 160 States which established the first treaty-based permanent international criminal court. The treaty adopted during that conference is known as the Rome Statute of the International Criminal Court. Among other things, it sets out the crimes falling within the jurisdiction of the ICC, the rules of procedure and the mechanisms for States to cooperate with the ICC. The countries which have accepted these rules are known as States Parties and are represented in the Assembly of States Parties.

2. Historical development of international criminal court

Sanctity of human life has always been an idea cherished by mankind. Blood is seen as sacred and ancient city states that were governed by natural law and divine law saw it as their responsibility to punish war crimes [6] The Hammurabi code of ancient Babylonian Empire outlined rules that will govern war crimes. Idealists and moralists like Aristotle, Plato and Socrates regarded the protection of lives as sacred. However it is Emperor Constantine the Great of Roman Empire that classified the maltreatment of women and children as crime. Before he won the battle of the [7] Milivian Bridge, women and children were seen as mere chattels that can be easily conquered during war. But his laws made it a crime for women and children to be abused during war era and outside the time of wars. Thus maltreatment of women was seen as a major crime that is punishable with death.

However the first individual who was tried for breaking international criminal rules [8] was Peter Von Hagenbach [9]. Legal historians generally cite the 1474 case of Peter von Hagenbach as the first ever international criminal trial, or the first trial that considered the theoretical concept of what would come to be known as a war crime. "In 1474, while occupying the town of Brisach, the troops of Peter Von Hagenbach pillaged the town and murdered civilians." Von Hagenbach was accused of crimes against the laws of God and humanity and was tried by a tribunal which included judges from Alsace, judges from Switzerland and judges from elsewhere in the Holy Roman Empire.

Two international law scholars, Michael Scharf and William Schabas described Von Hagenbach's trial as a major stepping stone in the history of international law but it was not entirely the only foundation for the development of international criminal jurisdiction [10].

However the "Lieber Instructions" represent the first attempt to codify the laws of war. They were prepared during the American Civil War by Francis Lieber, then a professor of Columbia College in New York, revised by a board of officers and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extent to the laws and customs of war existing at that time. The "Lieber Instructions" strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the work of an international convention on the laws of war presented to the Brussels Conference in 1874 and stimulated the adoption of the [11] Hague Conventions on land warfare of 1899 and 1907.

The Lieber Code codified 'that branch of the law of nature and nations which is called the law and usages of war on land' regulating 'action between hostile armies' [12] (Art. 40). A succinct compilation of the existing rules and custom, it addressed a wide range of topics. Several core principles of modern international humanitarian law are discernible in the text, albeit with significant differences as to their scope: the

principles of humanity (Humanity, Principle of) and military necessity, the distinction between civilians and combatants, and certain inviolable rules such as the prohibitions of perfidy or torture (Torture, Prohibition of) (see below). Conversely, the Code also included norms that are no longer considered admissible in modern international humanitarian law, for instance giving no quarter to the enemy (Arts 61–63, 66), starvation of non-combatants (Art. 17), or executions of prisoners of war (Art. 59 in fine) [13].

2.1 Tracing the Birth of the International Criminal Court

Gustave Moyiner of Switzerland played a great role in the creation of a permanent international criminal court. He was one of the founders of the International Committee of the Red Cross and a man who believe in world peace. Initially he was against the establishment of a permanent international criminal court because he firmly believed in the decency and commitment of states to adhere to conventions and the laws of war as well as a public and press system guided by moral principles of international solidarity and peace.

[14] The Franco-Prussian War 1870-71 tarnished his convictions and was a turning point in Moynier's writings. Both belligerents were signatories to the Convention, but things went terribly wrong when confusion and ignorance regarding the application of the new rules reigned on the battlefields. French medics refused to treat the enemy and civilians painted the Red Cross on bed sheets at random to protect their homes. The Germans - reacting to the poor behavior of the French - kidnapped French doctors and accused them of espionage. In the course of the war, the press and the public opinion became evermore nationalistic. The Geneva Convention was close to foundering altogether and the only solution according to Moynier was the creation of a strong punitive system in the form of an international tribunal.

The next serious call for an internationalized system of justice came from the drafters of [15] the 1919 Treaty of Versailles, who envisaged an ad hoc international court to try the Kaiser and German war criminals of World War I. Following World War II [16], the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals.

In 1948 [17, 18] the United Nations General Assembly (UN GA) adopted the Convention on the Prevention and Punishment of the Crime of Genocide in which it called for criminals to be tried "by such international penal tribunals as may have jurisdiction" and invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide." While the International Law Commission drafted such a statute in the early 1950s, the Cold War stymied these efforts and the General Assembly effectively abandoned the effort pending agreement on a definition for the crime of aggression and an international Code of Crimes.

In June 1989, motivated in part by an effort to combat drug trafficking, Trinidad and Tobago resurrected a pre-existing proposal for the establishment of an International Criminal Court and the United Nations General Assembly asked that the International Law Committee to resume its work on drafting a statute. The conflicts in Bosnia-Herzegovina and Croatia as well as in Rwanda in the early 1990s and the mass commission of crimes against humanity, war crimes, and genocide led the UN Security Council to establish two separate temporary ad hoc tribunals to hold individuals accountable for these atrocities, further highlighting the need for a permanent international criminal court.

In 1994, the ILC presented its final draft statute for an ICC to the UN GA and recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the Statute. To consider major substantive issues in the draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995.

After considering the Committee's report [18], the UN GA created the Preparatory Committee on the Establishment of the International Criminal Court to prepare a consolidated draft text. From 1996 to 1998, six sessions of the United Nations Preparatory Committee were held at the United Nations headquarters in New York, in which Non-Governmental Organization's provided input into the discussions and attended meetings under the umbrella of the Non-Governmental Organization Coalition for an International Criminal Court (CICC). In January 1998, the Bureau and coordinators of the Preparatory Committee convened for an Inter-Sessional meeting in Zutphen, the Netherlands to technically consolidate and restructure the draft articles into a draft.

Based on the Preparatory Committee's draft, the UNGA decided to convene the United Nations Conference of Plenipotentiaries on the Establishment of an ICC at its fifty-second session to "finalize and adopt a convention on the establishment" of an ICC. The "Rome Conference [20]" took place from 15 June to 17 July 1998 in Rome, Italy, with 160 countries participating in the negotiations and the NGO Coalition closely monitoring these discussions, distributing information worldwide on developments, and facilitating the participation and parallel activities of more than 200 NGOs. At the end of five weeks of intense negotiations, 120 nations voted in favor of the adoption of the Rome Statute of the ICC, with seven nations voting against the treaty (including the United States, Israel, China, Iraq and Qatar) and 21 states abstaining.

The Preparatory Commission (PrepCom) was charged with completing the establishment and smooth functioning of the Court by negotiating complementary documents, including the Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Financial Regulations, the Agreement on the Privileges and Immunities of the Court.

On 11 April 2002, the 60th ratification necessary to trigger the entry into force of the Rome Statute was deposited by several states in conjunction. The treaty entered into force on 1 July 2002.

Following the completion of the PrepCom's mandate and the entry into force, the Assembly of States Parties (ASP) met for the first time in September 2002 [21].

3. The Ad Hoc International Criminal Tribunals

3.1 The International Criminal Court for Former Yugoslavia

[22] During the Bosnian war in the early 1990s ethnic cleansing, genocide and other serious crimes were committed on all sides. [23] In May, 1993, the UN Security Council established the International Criminal Tribunal for Yugoslavia (ICTY) to try those responsible for violations of international humanitarian law in the territory of the former Yugoslavia since 1991. The purpose of the tribunal was to bring justice to the victims of the conflict and deter future leaders from committing similar

atrocities. The ICTY has also taken on cases from the Kosovo crisis of the late 1990s.

The ICTY was the UN's first special tribunal and came under intense scrutiny. It has been criticized for being politicized, biased, unfair and very costly. Lengthy trials and controversial decisions have led to a growing loss of faith in the tribunal, and critics question the tribunal's ability to ease tensions and promote reconciliation in the Balkans. Despite its shortfalls, the tribunal has however been instrumental in the creation of the first permanent international criminal court [24].

The key objective of the ICTY is to try those individuals most responsible for appalling acts such as genocide, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political-racial and religious grounds-and other inhumane acts. The ICTY has jurisdiction over natural persons extended to the territory of the former Socialist Federal Republic of Yugoslavia, including land surface, airspace and territorial waters beginning on 1 January 1991. The ICTY has primacy over national courts and has convicted 160 individuals to date [25].

Jurisdiction

In accordance to this resolution, the tribunal has multiple objectives. The main goals are: to judge persons responsible for serious violations of the humanitarian laws, to bring justice to the victims, to prevent new violations of the humanitarian laws, to hinder revisionism by seeking and imposing the judiciary truth, to help build back peace and reconciliation in former Yugoslavia.

Its jurisdictions read as follows:

Temporal jurisdiction: Crimes committed since 1991.

Territorial jurisdiction: Crimes committed in the territory of former Yugoslavia.

Personal jurisdiction: The tribunal has jurisdiction over physical persons excluding moral persons.

Competence: the ICTY has competence to judge four types of crimes, the serious violations of [26] the 1949 Geneva Conventions, violations of the laws and customs of war, crimes against humanity and genocide.

Remarkable is the fact that the ICTY doesn't hold the monopoly of prosecution and sentencing violations of the humanitarian laws committed in former Yugoslavia, it shares this competence with national jurisdictions. Though the ICTY has priority on these latter and can, in the interest of justice, ask a national jurisdiction to desist at any step of the procedure.

From the beginning of its activities, the Tribunal has indicted 161 persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.

By March 2012, 126 procedures have been concluded: 64 persons have been found guilty and sentenced, 13 acquitted, 36 had their indictments withdrawn or are deceased and 13 procedures have been referred to a national jurisdiction. 35 criminal proceedings are still ongoing. In 2011, after many years on the run, the last remaining fugitives [27] Ratko Mladić and Goran Hadžić, were arrested and transferred to The Hague, thereby ensuring that none of the 161 individuals indicted by the Tribunal remain at large [28].

The ICTY is a bold experiment. It tracks to some degree the earlier Nuremberg and Tokyo World War II war crime trials but it goes far beyond those precedents in important ways. It is performing three functions: adjudicating international crimes, developing international humanitarian law, and memorializing important, albeit horrible, events of modern history. Except for Nuremberg and Tokyo and subsequent isolated war crimes prosecutions in national courts of figures such as [29] Adolph Eichmann and Klaus Barbie, the Tribunal has very little case law to rely upon. Its procedures are a hybrid of common law and continental practice and its judges speak a dozen native languages more fluently than the official French and English of the Tribunal [30].

Judges

There are nine ICTY trial judges who sit in panels of three, usually five days a week for four to seven hours a day. Trials have lasted between two weeks and two years, with one of the judges, usually the senior judge on the panel, acting as presiding officer. This regime produces problems when one judge is absent for sickness or urgent personal matters. The Rules are quite rigid. A judge may not be absent from trial for more than three days in a row without defense counsel's consent once the trial has begun, no matter the reason. Some chambers have obtained counsels' consent to treat a regular trial day as a deposition when one of those members of the panel is absent for reasons other than sickness or emergency.

At the ICTY the sixteen judges are elected for four-year terms by the General Assembly of the UN, based on the nomination of member countries. The ICTY Statute says only that candidates must be qualified to serve on the highest judicial level in their own countries. The new ICC law is somewhat more specific, requiring a proportioned mix of judges expert in criminal procedure and international law. Judges come to the Tribunal at all ages (a few in fragile health) and with widely different careers as politicians, scholars, diplomats, and practicing lawyers or judges. They are assigned to trial or appeals work by the President of the Tribunal, largely based on vacancies.

3.2 International Criminal Tribunal for Rwanda

In the spring of 1994 more than 500,000 people were killed in Rwanda in one of the worst cases of genocide in history. The slaughter began on 6 April 1994, only a few hours after the plane bringing the Presidents of Rwanda and Burundi back from peace negotiations in Tanzania was shot down as it approached Kigali Airport.

It would seem that the genocide had been planned long in advance and that the only thing needed was the spark that would set it off. For months, [31] Radio-Télévision Libre des Mille Collines (RTMC) had been spreading violent and racist propaganda on a daily basis fomenting hatred and urging its listeners to exterminate the Tutsis, whom it referred to as Inyenzi or "cockroaches".

According to one source:

> "*The genocide had been planned and implemented with meticulous care. Working from prepared lists, an unknown and unknowable number of people, often armed with machetes, nail-studded clubs or grenades, methodically murdered those named on the lists. Virtually every segment of society participated: doctors, nurses, teachers, priests, nuns, businessmen, government officials of every rank, even children*".

In Rwanda, a person's ethnic identity became his or her death warrant or a guarantee of survival. The crusade was led by the Rwandan armed forces and the [32] Interahamwe (those who

stand together) and Impuzamugambi (those who fight together) militias. Its main targets were Tutsis and moderate Hutus. Surprisingly, these killings took place while a contingent of UN peacekeeping forces - the United Nations Assistance Mission to Rwanda (UNAMIR) - was in the country trying to facilitate the peace negotiations between the Hutu government of the time and the Tutsi-dominated Rwanda Patriotic Front (RPF). The International Criminal Tribunal for Rwanda (hereinafter referred to also as the Rwanda Tribunal or simply as the Tribunal) was set up to prosecute those involved in instigating, leading and perpetrating the genocide.

[33] The International Criminal Tribunal for Rwanda is not the first of its kind. In fact, it is almost a branch of the International Criminal Tribunal for the Former Yugoslavia, established in 1993. The two Tribunals share certain facilities and officers; in particular, they have the same Chief Prosecutor and Appeals Chamber. That is why some commentators argue that the Rwanda Tribunal was grafted onto the Yugoslavia Tribunal.

Further examples of tribunals such as the Rwanda Tribunal can be pointed to in modern times. They include the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo, both of which were set up in 1945 to prosecute and punish major Axis war criminals in Europe and Japan. The main difference between those earlier tribunals and the recent ones is that while after the Second World War it was the victors who set the rules for punishing the vanquished, today it is the international community as a whole which is seeking to bring perpetrators of genocide and other crimes against humanity to justice. In doing so, the international community, acting through the United Nations, has taken into account the development of both international law and international humanitarian law since 1945. That is why, for example, the Statute of the Rwanda Tribunal takes note of both the Geneva Conventions of 1949 and their 1977 Additional Protocol II.

The International Criminal Tribunal for Rwanda was established by the [34] UN Security Council Resolution 955 of 8 November 1994. The purpose was to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January and 31 December 1994. At the same time, the Security Council adopted the Statute of the Tribunal and requested the UN Secretary-General to make political arrangements for its effective functioning.

On 22 February 1995, [35] the Security Council passed resolution 977 designating the town of Arusha in the United Republic of Tanzania as the seat of the Tribunal. An agreement between the United Nations and Tanzania concerning the Tribunal's headquarters was signed on 31 August 1995.

The Tribunal, which has a relatively wide jurisdiction, is supposed to prosecute persons responsible for genocide and other serious violations of international humanitarian law. The Statute of the Tribunal more or less follows the [36] Genocide Convention of 1948 in defining genocide as any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Such acts include: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures to prevent births within the group; and forcibly transferring children of the group to another group. According to the Statute, genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity in genocide are all punishable.

In addition, the Tribunal has powers to prosecute persons charged with crimes against humanity, which include: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial or religious grounds; and other inhumane acts Since such crimes can be committed in various circumstances, the Statute specifies that they only fall within the purview of the Tribunal when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

Opening a completely new area for tribunals of this nature, [37] Article 4 of the Statute empowers the Tribunal to prosecute persons who commit or order to be committed serious violations of [38] Article 3 common to the 1949 Geneva Conventions for the protection of war victims and of 1977 Additional Protocol II relating to the protection of victims of non-international armed conflicts. Such violations include: violence to the life, health and physical or mental well-being of persons, in particular murder and cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishments; the taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; pillage; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; and threats to commit any of the foregoing acts.

To date the Tribunal has issued several indictments and arrest warrants for persons suspected of having been involved in masterminding the genocide in Rwanda in 1994. Some of these persons have been arrested in various States and brought to Arusha, where three trials are under way. First of all there is the case of [39] Clement Kayishema, the former Prefect (Governor) of Kibuye, who is facing 25 charges related to massacres committed at various places. He is being tried jointly with [40] Obed Ruzindana, a businessman accused of having organized massacres in western Rwanda. Then there is the case of [41] Georges Rutaganda, from Gitarama, a senior official in the party of assassinated President [42] Juvenal Habyarimana. As Vice-President of the Interahamwe militia, Rutaganda is alleged to have helped arm the militia in Kigali, placed road-blocks and ordered the militia to kill Tutsis. He is also alleged to be a shareholder in Radio Télévision Libre des Mille Collines, which made regular broadcasts inciting its listeners to genocide. Finally, there is the case of [43] Jean-Paul Akayesu, the former Mayor of Taba, near Gitarama, who is charged on 12 counts, including genocide and crimes against humanity.

Also indicted by the Tribunal is [44] Colonel Theoneste Bagosora, who appeared before the Tribunal on 23 January 1997, charged with genocide and crimes against humanity and on two counts of violations of Article 3 common to the Geneva Conventions.

He pleaded not guilty on all counts. According to one report, Bagosora is the "biggest fish" that the Tribunal has so far managed to catch [45].

Mechanism for the International Criminal Court of Rwanda

With the Resolution 1966 (2010) the Security Council has established the "International Residual Mechanism for Criminal Tribunals", latest step undertaken in the framework of the completion strategy.

The "Mechanism" will be composed of two branches, one mandated to complete the work of the ICTR, the other one charged of finalizing the work of the ICTY. In particular, the former branch will commence functioning on 1 July 2012 and will seat in Arusha. In its first stages "the Mechanism" will partly overlap with the work of the ICTR and it will then continue to operate until it deems it appropriate. Its progress will be reviewed in 2016 and every two years thereafter.

The Mechanism will perform a limited number of functions:

- It will have jurisdiction to prosecute and try the remaining fugitives arrested on or after 1 July 2012;
- It will have jurisdiction to conduct appellate proceedings for which the notice of appeal against the sentence of the ICTR is filed on or after 1 July 2012;
- It will perform retrials disposed by the ICTR Appeals Chamber six months or less before 1 July 2012 or ordered by the Mechanism Appeals Chamber;
- When an application for review of a final judgment based on the discovery of a new fact unknown at the time of the trial is filed after 1 July 2012, the Mechanism will conduct the review proceeding;
- It will carry out investigations and trials over contempt of the court and false testimony committed before the ICTR after the 1 July 2012 or before the Mechanism;
- It will undertake the necessary measures aimed at the protection of victims and witnesses;
- The Mechanism will designate the States where its sentences and the sentences adopted by the ICTR after 1 July 2012 will be enforced, and it will supervise their enforcement;
- It will assist national courts, prosecutors and defence lawyers in relation to domestic proceedings related to violations of international humanitarian law in the territories of Rwanda and of the neighbouring States;
- It will preserve the ICTR archives;
- It will proceed to its own organization [46].

3.3 Special Court for Sierra Leone (SCSL)

[47] After 11-years of brutal conflict in which at least 50,000 people were estimated to have been killed and limbs of thousands of civilians hacked off, the Sierra Leone government wrote a letter to the United Nations Secretary-General requesting assistance from the UN and the rest of the international community in establishing a Special Court for Sierra Leone. In 2002, an agreement was signed between the Sierra Leone Government and the United Nations to establish a Special Court with a mandate to bring to justice "those who bear the greatest responsibility" for the atrocities that took place in the territory of Sierra Leone since 30th November, 1996. It was certainly a novelty - the first criminal tribunal based on an agreement between the UN and a government of a member state. The Special Court was seen as an improvement in terms of implementing a narrow focus on "those bearing the greatest responsibility", which in turn would allow for a more limited and efficient approach.

The Court had a number of limitations, though: First, it could not try crimes that occurred before November 30, 19961, and only those who "bear the greatest responsibility" for the atrocities could be tried. I propose that those limitations, even if justified in light of a genuine need to respond to the pitfalls of the ICTY and ICTR, somewhat undermined Court's competence to combat impunity for the crimes that took place in Sierra Leone.

The Proceedings

In March 2003, the Prosecutor of the Special Court for Sierra Leone handed down the first set of indictments, and included the leaders of all three major factions in the war - the Revolutionary United Front ([48] Foday Sankoh and Issa Sesay), the Armed Forces Revolutionary Council (Johnny Paul Koroma), and the Civil Defence Forces (Sam Hinga Norman). This batch of indictments also included the indictment of Charles Taylor, although it was kept under seal until June 4, 2004. Sam Bockarie and Foday Sankoh died before their trials began, while Chief Sam Hinga Norman died in the course of his trial. Charles Taylor was finally transferred into the custody of the Court in 2006. Eight accused – including two former leaders of the CDF, three former leaders of the RUF, and three former leaders of the AFRC were ultimately tried and convicted by the court in Freetown. They were sentenced to prison terms ranging from 15 to 52 years. They are currently serving their prison terms in Rwanda.

The Landmark Ruling and its Impact on the Development of International Criminal Court

Through a number of landmark rulings, the Special Court's proceedings contributed to the development of the jurisprudence of international criminal justice. On May 31, 2004, for instance, the Appeals Chamber held that the recruitment or use of children under the age of 15 was a crime under international law since 1996, and that defendants are subject to individual criminal responsibility for this offence during the entire period covered by the court's jurisdiction. This ruling certainly helped promote justice for the thousands of children who were recruited by the various fighting forces.

Furthermore, [49] on May 31 2004, the Appeals Chamber held that heads of state immunity does not apply to the prosecution of international crimes, and unanimously rejected Charles Taylor's preliminary motion challenging the legality of his indictment on the grounds that he was the President of Liberia at the time it was issued. The significance of this ruling is huge. It means that no one – including national leaders who perpetrate or order the commission of crimes - will be legitimately shielded from facing justice on the basis of their political power.

The Appeals Chamber also held that the amnesty granted under the Lomé Peace Agreement could not bar the Court from prosecuting crimes of international nature before July 1999. It ruled that the amnesty granted in the [50] Lome Peace Accord applied only to national criminal jurisdiction and not international crimes. This essentially paved the way for the Special Court's trials. In essence, while countries emerging from conflict can grant amnesty, such amnesty provisions cannot preclude international criminal justice system from holding perpetrators accountable.

During Taylor's trial, for instance, the Court ruled that raping of women and girls in public was part of a campaign aimed at

terrorizing the civilian population. Although there had been many previous judgments in international war crimes tribunals in which the accused were convicted of rape, sexual slavery, and other forms of sexual violence, all were when the accused physically perpetrated the rape or was present, ordering, or ignoring the crimes. According to [51] Kelly Askin, "The conviction of Taylor recognizes that civilian or military leaders who are far from the battlefield but who support and encourage sexual violence, or make no attempt to prevent or punish it, can be held responsible for sex crimes" [52].

Charles Taylor and the Special Court for Sierra Leone

Charles Taylor, the former president of Liberia, was tried and convicted in April 2012 on 11 charges arising from war crimes, crimes against humanity, and other serious violations of international humanitarian law, committed from [53] November 30, 1996 to January 18, 2002 during the course of Sierra Leone's civil war. He was subsequently sentenced to 50 years in jail.

The 11 specific counts against Taylor were:

- Five counts of war crimes: terrorizing civilians, murder, outrages on personal dignity, cruel treatment, looting.
- Five counts of crimes against humanity: murder, rape, sexual slavery, mutilating and beating, enslavement
- One count of other serious violations of international humanitarian law: recruiting and using child soldiers.

The Conviction

[54] On April 26, 2012 Special Court for Sierra Leone (SCSL) judges ruled that Taylor was guilty of aiding and abetting the RUF in all 11 charges, including murder, rape, and pillage. They also convicted the former Liberian president of planning, with former Revolutionary United Front (RUF) commander Sam Bockarie, the attacks on Kono, Makeni, and Freetown, which took place in late 1998 and early 1999.

The judges rejected the defense argument that Taylor was a peacemaker. They noted that while Taylor may have publicly supported the peace process in the region, he privately undermined the negotiations by continuing to support the RUF through financial, operational, and moral support. Notably, the judges did not accept the prosecution claim that Taylor had effective command and control over the RUF rebels, finding him only responsible for aiding and abetting their activities as well as planning attacks.

The Sentencing

The office of the Prosecutor of the SCSL, originally recommended that Taylor serve an 80 year jail sentence. According to the prosecution, that sentence would be commensurate with the "gravity of crimes and the specific conduct of the accused."

The defense argued against the high prison term and provided four reasons why Taylor should benefit from mitigating circumstances: that the period of offending was not an extended period, save for use of child soldiers and enslavement that cover a more prolonged period in the indictment Mr. Taylor's role in the Sierra Leone peace process; his voluntary departure from the Liberian presidency in 2003; and his age, being 64 years already at the time of his conviction.

On May 30, 2012, judges at the SCSL sentenced Taylor to a jail term of 50 years after he was convicted of aiding and abetting the commission of serious crimes in Sierra Leone and the planning of attacks on various towns in late 1998 and January 1999.

The Legal Issues on Appeal

On July 19, 2012 prosecution and defense teams filed notices of appeal, raising several grounds on which they will appeal the findings of the trial chamber, in both the decision on Taylor's conviction and his sentence.

The Prosecution

Prosecutors raised four grounds on which they appealed the findings of the trial chamber judges. These include the trial chamber's failure to find Taylor liable for ordering and instigating the commission of crimes, the chamber's failure to find him liable for crimes committed in certain locations in five districts on the ground that they fell outside the scope of the indictment, and then chamber's decision to sentence the former Liberian President to a single term of 50 years. Prosecutors argue that the judges in making these findings "erred" in fact and in law.

The Defense

Defense lawyers for Taylor raised 42 grounds on which they say the trial chamber "erred" in fact and in law as they convicted and sentenced Taylor in 2012. Included in the numerous grounds of appeal are findings of the judges that Taylor was involved in planning attacks on Kono, Makeni, and Freetown in late 1998 and early 1999, the chamber's finding that he assisted the commission of crimes by providing medical assistance to rebel forces in Sierra Leone, that he assisted the commission of crimes by providing a guesthouse for RUF rebels in Liberia, that the jail term of 50 years that Taylor was sentenced to is "manifestly unreasonable," that the judges "erred" in their failure to consider Taylor's expression of sympathy as grounds of mitigation, that there were irregularities in the proceedings based on the statement made by the Alternate Judge El-Hadj Malick So that there had been no deliberations among the judges, and that Justice Julia Sebutinde's participation in the proceedings after she had already become a judge of the International Court of Justice was irregular [55].

3.4 International Military Tribunal at Nuremberg

[56] On 13 January 1942, representatives of nine governments exiled in Great Britain and whose countries were under Nazi occupation met in London for « an allied conference on the punishment of war crimes. The idea of an international trial to punish those responsible for crimes committed under the Nazi regime, no matter the degree of responsibility of the perpetrators, began to take form. On 17 December 1942, for the first time, the extermination of the Jews was brought up and the governments concerned reaffirmed their resolve to punish those who were found guilty within the shortest possible time. However, at that stage in the process, no precise details were formulated concerning the nature or means of such punishment.

On 30th October, 1943, a War Crimes Commission was set up in London to collect and classify information on the crimes and those responsible for extermination. At the same time the Allies drafted the Moscow Declaration in which reference was made to two types of criminals: those who had committed crimes in one sole location and those whose offenses had

occurred in several different countries. The declaration stipulated that the latter would be punished by a joint decision of the Allied governments.

[57] On 28 November to 2 December 1943 a conference was held in Teheran, where Roosevelt, Churchill and Stalin met each other for the first time. War crimes were not listed on the conference agenda, but a dinner table discussion between the three statesmen took place on this subject. Stalin proposed mass execution for all German officers. Churchill was an adherent to the idea of summary execution but, nevertheless, rejected the suggestion of mass execution. The leaders of the American delegation leaned more towards executions after a trial, but their position was however, not unanimous.

At the Yalta Conference which was held from 4-11 February 1945, the question concerning the punishment of war criminals was brought up. Churchill again proposed summary execution of the high ranking Nazis after properly establishing their identity. Roosevelt's successor, Harry S. Truman adopted an unambiguous position: he refused to agree to summary executions.

As the war came to an end, negotiations came to a head [58]. On 2 May 1945, the American Supreme Court judge, Robert Jackson, was nominated Chief Prosecutor by President Truman and given the responsibility to prepare the trial. The Declaration of Defeat on 5 June 1945, concerning the assumption of complete authority with respect to Germany by the Allied Powers, made mention of bringing criminals to justice without delay. However, at that point in time, it had not yet been agreed what approach the Tribunal would adopt. On 20 June 1945, the American delegation arrived in London intent on negotiating with their British allies an agreement which would allow the trial to get underway. Two major questions were on the agenda: the number of trials and the content of the bill of indictment. The American delegation preferred a trial centred on the [59] "Nazi conspiracy", meaning that the accent would be on the crime of aggression with a limited number of defendants and with limited, but decisive proof, as well as on the indictment of certain organizations. The British wanted a quick trial to be concluded in less than two weeks.

Negotiations with the French and Soviet delegations proved to be more complicated. The USSR immediately expressed its disagreement over the procedure and the nature of the crimes. The French, just like the Soviets, wished to put the accent on war crimes and the suffering endured by the people, and not on the "crime against peace" as put forward by the Americans.

On 2 August 1945, the American proposition was accepted by Stalin during the Potsdam Conference. It was agreed that the indictment would include the issue of aggression. The headquarters of the Tribunal was fixed as being in Berlin where the opening ceremony was held on 18 October 1945. However the trial was to be held in Nuremberg following the refusal of the Americans to allow it to be held in a city occupied by the USSR. Moreover, for a symbolic reason, the city of Nuremberg was a privileged location. The city had been host to the Annual Congresses of the Nazi party and it was here that the "Nuremberg Laws" were promulgated in 1935 with texts which fuelled the racist foundation of the Reich. A large Chamber of Justice having suffered very little war damage and located next to a large prison provided ideal conditions.

On 8 August 1945, delegation heads from the United States, Great Britain, France and the USSR signed the London Agreement of 8 August 1945 (Nuremberg Charter) and the Charter of the International Military Tribunal, as an integral part of this Accord [60].

A small summary of the proceedings of the International Military Tribunal at Nuremberg

[61] On 14 November 1945, the proceedings of the International Military Tribunal at Nürnberg (Nuremberg) were opened. The twenty-four accused, whose number was later reduced to twenty-two by disease and death, among the top officials of the National Socialist Party, the top leadership of the armed forces and of the state administration of the defeated German state, were confronted with three classes of accusations:

Crimes against peace

War crimes in a more restricted sense, e.g., violations of the laws and customs of war.

Crimes against humanity

Nine months later, twelve of the defendants were indeed condemned to death on the basis of two or more of the charges, three were set free, and the remainder was sentenced to prison terms of varying duration. Controversy was aroused among jurists and the general public alike, above all in regard to the validity and treatment of points (1) and (3).

For the epoch-making International Military Tribunal at Nürnberg, which lasted for nine months, members of the Tribunal were selected from among the four large victor nations: Britain, France, the U.S.A., and the USSR.

On the side of the prosecution,

Main Prosecutor for the U.S. was Justice Robert H. Jackson (who was also Chief of Counsel);

For Britain, State Attorney General Sir Hartley Shawcross;

For France, Francois de Menthon, Auguste Champetier de Ribes;

For the USSR, General R.A. Rudenko.

On the side of the Tribunal sat:

Mr. Francis Biddle, member for the U.S., and his alternate, judge John J. Parker;

M. le Professeur Donnedieu de Vabres, member for France, and his alternate, M. le Conseiller Falco;

Major-General I.T. Nikitchenko, member for the USSR, and his alternate, Lieutenant-Colonel L.T. Volchkov;

Sir Geoffrey Lawrence (now Lord Oaksey), member for the United Kingdom, and his alternate, Sir William Norman Birkett (now Lord Justice).

[62] October 14, 1945 British representative Sir Geoffrey Lawrence is elected President of the International Military Tribunal (IMT). The mechanical aspect of the proceedings was impressive by itself. The trial was conducted in four languages, involved the calling of thirty-three witnesses in open court for the Prosecution, sixty-one for the Defense, a further 143 for the Defense via written answers, and some thousands of others giving evidence by affidavit for Defense and Prosecution.

4. The approach of international criminal court in the enforcement of crimes against humanity, war crimes and genocide.

4.1. Sources of the Power of International Criminal Court

Part I Establishment of the Court

Article 1: The Court

[63] An International Criminal Court (the Court) is hereby

established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2: Relationship of the Court with the United Nations

[64] The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3: Seat of the Court

1. [65] The seat of the Court shall be established at The Hague in the Netherlands ('the host State').
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4 Legal status and powers of the Court

1. [66] The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State

4.2 Crimes under the jurisdiction of International Criminal Court is contained in the Rome statute

[67] Rome statute which established the court also listed and defined crimes under the jurisdiction of the International Criminal Court.

Herein is the provision of Article 5 of Rome Statute.

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

a) The crime of genocide;
b) Crimes against humanity;
c) War crimes;
d) The crime of aggression.

The concept of 'international crimes' has been around for centuries. They were generally considered to be offences whose repression compelled some international dimension. Piracy, for example, was committed on the high seas. This feature of the crime necessitated special jurisdictional rules as well as cooperation between States. Similar requirements obtained with respect to the slave trade, trafficking in women and children, trafficking in narcotic drugs, hijacking, terrorism and money-laundering. It was indeed this sort of crime that inspired Trinidad and Tobago, in 1989, to reactivate the issue of an international criminal court within the General Assembly of the United Nations. Crimes of this type are already addressed in a rather sophisticated scheme of international treaties, and for this reason the drafters of the Rome Statute referred to them as 'treaty crimes'.

The crimes over which the International Criminal Court has jurisdiction are 'international' not so much because international cooperation is needed for their repression, although this is also true, but because their heinous nature elevates them to a level where they are of 'concern' to the international community. These crimes are somewhat more recent in origin than many of the so-called 'treaty crimes', in that their recognition and subsequent development is closely associated with the human rights movement that arose subsequent to World War II. They dictate prosecution because humanity as a whole is the victim. Moreover, humanity as a whole is entitled, indeed required, to prosecute them for essentially the same reasons as we now say that humanity as a whole is concerned by violations of human rights that were once considered to lie within the exclusive prerogatives of State sovereignty [68].

The Power to Prosecute

The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes and crimes against humanity.

Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again [69].

The International Criminal Court will also have jurisdiction over nationals of a State party who are accused of a crime, in accordance with Article 12(2) (b). Again, the Court can also prosecute nationals of non-party States that accept its jurisdiction on an ad hoc basis by virtue of a declaration, or pursuant to a decision of the Security Council. Creating jurisdiction based on the nationality of the offender is the least controversial form of jurisdiction and was the absolute minimum proposed by some States at the Rome Conference. Cases may arise where the concept of nationality has to be considered by the Court. In accordance with general principles of public international law, the Court should look at whether a person's links with a given State are genuine and substantial, rather than it being governed by some formal and perhaps even fraudulent grant of citizenship.

Echoing provisions found in the Nuremberg Charter and the 1948 Genocide Convention, the Statute declares that rules in either national or inter-national law that create immunities or otherwise shelter individuals from criminal prosecution are of no effect before the Court. Traditionally, immunities have taken two main forms: first, some States, through their constitutions or ordinary legislation, provide that their own heads of State and in some cases other government officials or elected representatives are immune from prosecution; secondly, under both customary international law and international treaties, incumbent heads of State, foreign ministers and diplomats cannot be prosecuted by the courts of other States. Some States have had to consider constitutional amendments in order to eliminate such special regimes and thereby make their legislation consistent with the Statute. In its 2002 ruling in the Arrest Warrant case, the International Court of Justice recognized that an incumbent or former minister of foreign affairs would not have immunity before an international tribunal like the International Criminal Court, where it has jurisdiction. However, the Court did not consider that Article 27 of the Statute provided it with a basis for

concluding that incumbent heads of State and similar officials, such as foreign ministers, were not protected by traditional immunities, as a matter of customary international law.

There is an important practical exception, however, that can serve to shield certain classes of persons from prosecution. The Court is prohibited, pursuant to Article 98(1), from proceeding with a request for surrender or assistance if this would require a requested State to act inconsistently with its obligations under international law as concerns a third State, unless the latter consents. Diplomatic immunity falls into such a category. This means that, while a State party to the Statute cannot shelter its own head of State or foreign minister from prosecution by the International Criminal Court, the Court cannot request the State to cooperate in surrender or otherwise with respect to a third State. Nothing prevents the State party from doing this if it so wishes, and once the head of State was taken into the actual custody of the Court, he or she would be treated like any other defendant. Similarly, the Court is also prohibited from proceeding in a request for surrender that would require a State party to act inconsistently with certain international agreements reached with a third State [70].

Rights of the Suspect

Presumption of innocence

The presumption of innocence, recognized in Article 66 of the Statute, imposes the burden upon the prosecution to prove guilt beyond any reasonable doubt, a specialized application in criminal law of a general rule common to most forms of litigation, namely, that the plaintiff has the burden of proof. But the presumption of innocence has other manifestations, for example in the right of an accused person to interim release pending trial, subject to exceptional circumstances in which preventive detention may be ordered, the right of the accused person to be detained separately from those who have been convicted, and the right of the accused to remain silent during the investigation and during trial. Several of the rules that reflect the presumption of innocence are incorporated within the Statute. For example, during an investigation, there is a right '[to remain silent, without such silence being a consideration in the determination of guilt or innocence'; there is a right to interim release; and there are grounds for appeal which are wider in scope for the defence than for the prosecution. Nevertheless, it was also felt necessary to affirm the principle generally and explicitly.

The European Court of Human Rights has defined the presumption of innocence as follows:

"It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him [71].

Suspects Are Presumed Innocent.

[72] They are present in the court room during the trial, and they have a right to a public, fair and impartial hearing of their case. To this end, a series of guarantees are set out in the Court's legal documents, including the following rights, to mention but a few:

- To be defended by the counsel (lawyer) of their choice, present evidence and witnesses of their own and to use a language which they fully understand and speak;
- to be informed in detail of the charges in a language which they fully understand and speak;
- to have adequate time and facilities for the preparation of the defence and to communicate freely and in confidence with counsel;
- to be tried without undue delay;
- not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- To have the Prosecution disclose to the defence evidence in its possession or control which it believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the Prosecution's evidence. Suspects have the right to legal assistance in any case where the interests of justices require and, if the suspect does not have the means to pay for it, to legal assistance assigned by the Court.

The Trial

[73] Trials take place at the seat of the Court in The Hague, unless the judges decide to hold the trial elsewhere. This issue has been raised in several cases. The accused must be present at his or her trial, which is held in public, unless the Chamber determines that certain proceedings be conducted in closed session in order to protect the safety of victims and witnesses or the confidentiality of sensitive evidentiary material.

At the commencement of the trial, the Trial Chamber causes the charges against the accused to be read out to him or her and asks whether he or she understands them. The Chamber then asks the accused to make an admission of guilt or to plead not guilty.

What happens if the accused makes an admission of guilt? First, the Trial Chamber ensures that the accused understands the nature and consequences of the admission of guilt, that the admission is voluntarily made by the accused after sufficient consultation with his or her lawyer and that the admission of guilt is supported by the facts of the case that are contained in the evidence and charges brought by the Prosecution and admitted by the accused. Where the Trial Chamber is satisfied that these conditions have been met, it may convict the accused of the crime charged. If it is not satisfied that the conditions have been met, the Chamber shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued.

Conducting the Trial

[74] At trial, the Prosecution and Counsel for the Defence have the opportunity to present their case. The Prosecution must present evidence to the Court to prove that the accused person is guilty beyond all reasonable doubt. This evidence may be in the form of documents, other tangible objects, or witness statements. The Prosecution must also disclose to the accused any evidence which may show that he or she is innocent.

The Prosecution presents its case first and calls witnesses to testify. When the Prosecution has finished examining each witness, the Counsel for the Defence is given the opportunity to also examine the witness.

Once the Prosecution has presented all its evidence, it is the turn of the accused, with the assistance of his or her counsel, to present his or her defence.

Presentation of Evidence

[75] All parties to the trial may present evidence relevant to the case. Everyone is presumed innocent until proven guilty according to law. The Prosecution has the burden of proving that the accused is guilty beyond all reasonable doubt. The accused has the right to examine the Prosecution's witnesses, and to call and examine witnesses on his or her own behalf under the same conditions as the Prosecution's witnesses.

When the personal interests of victims are affected, the Court allows their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and fair and impartial trial.

Their views and concerns may be presented by their legal representatives.

In a judgment rendered on 11th July, 2008, the Appeals Chamber granted victims the right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence, although this right lies primarily with the parties, namely the Prosecution and the Defence. This right is subject to stringent conditions, namely proving that the victims have a personal interest in doing so, and to the request's consistency with the rights of the defence and the requirements of a fair trial.

Victims must also comply with disclosure obligations, notify the request to the parties, and comply with the Court's orders on the protection of certain persons. Lastly, the appropriateness of the victims' request is subject to the judges' assessment.

Judgment and Sentence

Once the parties have presented their evidence, the Prosecution and the Defence are invited to make their closing statements. The Defence always has the opportunity to speak last. The judges may order reparations to victims, including restitution, compensation and rehabilitation. To this end, they may make an order directly against a convicted person. After hearing the victims and the witnesses called to testify by the Prosecution and the Defence and considering the evidence, the judges decide whether the accused person is guilty or not guilty. The sentence is pronounced in public and, wherever possible, in the presence of the accused, and victims or their legal representatives, if they have taken part in the proceedings.

The judges may impose a prison sentence, to which may be added after or forfeiture of the proceeds, property and assets derived directly or indirectly from the crime committed. The Court cannot impose a death sentence. The maximum sentence is 30years. However, in extreme cases, the Court may impose a term of life imprisonment. Convicted persons serve their prison sentences in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

The conditions of imprisonment are governed by the laws of the State of enforcement and must be consistent with widely accepted international treaty standards governing the treatment of prisoners. Such conditions may not be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

Appeals and Revision

[76] Any party may appeal the decisions of a Pre-Trial or Trial Chamber. The Prosecution may appeal against a conviction or acquittal on any of the following grounds: procedural error, error of factor error of law.

The convicted person or the Prosecution may also appeal on any other ground that affects the fairness or reliability of the proceedings or the decision, in particular on the ground of this proportion between the sentence and the crime.

The legal representatives of the victims, the convicted person, or a bonafide owner of property adversely affected by an order for reparations to the victims may also appeal against such an order.

Unless otherwise ordered by the Trial Chamber, a convicted person remains in custody pending an appeal. However, in general, when a convicted person's time in custody exceeds the sentence of imprisonment imposed, the person is released. In addition, in the case of an acquittal, the accused is released immediately unless there are exceptional circumstances.

The convicted person or the Prosecution may apply to the Appeals Chamber to revise a final judgment of conviction or sentence where:

I. new and important evidence has been discovered;
II. it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
III. One or more of the judges has committed an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under the Rome Statute [77].

The Power to Arrest

[78] After the initiation of an investigation, only a Pre-Trial Chamber may, at the request of the Prosecution, issue a warrant of arrest or summons to appear if there are reasonable grounds to believe that the person concerned has committed a crime within the ICC's jurisdiction.

When the Prosecution requests the issuance of a warrant of arrest or summons to appear, it must provide the judges with the following information:

I. the name of the person;
II. a description of the crimes the person is believed to have committed;
III. a concise summary of the facts(the acts alleged to be crimes);
IV. a summary of the evidence against the person;
V. The reasons why the Prosecution believes that it is necessary to arrest the person.

The judges will issue a warrant of arrest if it appears necessary to ensure that the person will actually appear at trial, that he or she will not obstruct or endanger the investigation or the Court's proceedings, or to prevent the person from continuing to commit crimes.

The Registrar transmits requests for cooperation seeking the arrest and surrender of the suspect to the relevant State or to other States, depending on the decision of the judges in each case. Once the person is arrested and the Court is so informed, the Court ensures that the person receives a copy of the warrant of arrest in a language which he or she fully understands and speaks.

The Court does not have its own police force. Accordingly, it relies on State co-operation, which is essential to the arrest and surrender of suspects.

According to the Rome Statute, States parties shall cooperate fully with the Court in its investigation and prosecution of

crimes within the jurisdiction of the Court.

Execution of the Warrant of Arrest

[79] The responsibility to enforce warrants of arrest in all cases remains with States. In establishing the ICC, the States set up a system based on two pillars. The Court itself is the judicial pillar. The operational pillar belongs to States, including the enforcement of Court's orders.

States Parties to the Rome Statute have a legal obligation to cooperate fully with the ICC. When a State Party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter for further action to the Assembly of States Parties.

When the Court's jurisdiction is triggered by the Security Council, the duty to cooperate extends to all UN Member States, regardless of whether or not they are a Party to the Statute. The crimes within the jurisdiction of the Court are the gravest crimes known to humanity and as provided for by article 29 of the Statute they shall not be subject to any statute of limitations. Warrants of arrest are lifetime orders and therefore individuals still at large will sooner or later face the Court.

An arrested person is brought promptly before the competent judicial authority in the custodial State, which determines whether the warrant is indeed for the arrested person, whether the person was arrested consistently with due process and whether the person's rights have been respected. Once an order for surrender is issued, the person is delivered to the Court, and held at the Detention Centre in The Hague, The Netherlands.

Conditions for Detention in the Detention Centre of Hague, Netherlands.

[80] The ICC Detention Centre operates in conformity with the highest international human rights standards for the treatment of detainees, such as the United Nations Standard Minimum Rules. An independent inspecting authority conducts regular and unannounced inspections of the Centre in order to examine how detainees are being held and treated.

At the ICC Detention Centre, the daily schedule affords the detainees the opportunity to take walks in the courtyard, exercise, receive medical care, take part in manual activities and have access to the facilities at their disposal for the preparation of their defence. Additionally, the centre has multimedia facilities and offers a series of training, leisure and sports programmes. ICC detainees also have access to computers, TV, books and magazines.

Those who are indigent have the right to call their Defence Counsel free of charge during official working hours. Each 10m2cell is designed to hold one person only. A standard cell contains a bed, desk, shelving, a cupboard, toilet, hand basin, TV and an intercom system to contact the guards when the cell is locked.

The Court provides three meals per day, but the detainees also have access to a communal kitchen if they wish to cook. A shopping list is also available to detainees so that they can procure additional items, to the extent possible.

All detainees may be visited by their families several times a year and, in the case of detainees declared indigent, at the Court's expense, to the extent possible.

Persons convicted of crimes under the jurisdiction of the ICC do not serve their sentence at the ICC Detention Centre in The Hague as the facility is not designed for long-term imprisonment. Convicted persons are therefore transferred to a prison outside The Netherlands, in a State designated by the Court from a list of States which have indicated their willingness to allow convicted persons to serve their sentence there [81].

However there are dictatorial head of states who evaded the International Criminal court's power of arrest based on some provisions in the Rome Statute that created the International Criminal Court. Despite all the charges seen in the case below Omar Hassan Ahamad Al Bashir has not been arrested by the International Criminal Court.

The Prosecutor v. Omar Hassan Ahmad Al Bashir

[82] Hassan Ahmad Al Bashir was issued on 4 March 2009, the second on 12 July 2010. In issuing the warrant, Pre-Trial Chamber I stated that there are reasonable grounds to believe that: From March, 2003 to at least 14 July 2008, a protracted armed conflict not of an international character existed in Darfur between the Government of Sudan (GoS) and several organised armed groups, in particular the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).

Soon after the April, 2003 attack on the El Fasher airport, Omar Al Bashir and other high-ranking Sudanese political and military leaders of the GoS agreed upon a common plan to carry out a counter-insurgency campaign against the SLM/A, the JEM and other armed groups opposing the Government of Sudan in Darfur.

A core component of that campaign was the unlawful attack on part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – who were perceived to be close to the organised armed groups opposing the Government of Sudan in Darfur. The campaign was conducted through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed militia, the Sudanese Police Forces, the National Intelligence and Security Service (NISS) and the Humanitarian Aid Commission (HAC). It lasted at least until the date of the filing of the Prosecution Application on 14 July 2008.

During the campaign, GoS forces allegedly committed crimes against humanity, war crimes, and crimes of genocide, and in particular:

a) carried out numerous unlawful attacks, followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;
b) subjected thousands of civilians – belonging primarily to the Fur, Masalit and Zaghawa groups – to acts of murder, as well as to acts of extermination;
c) subjected thousands of civilian women – belonging primarily to the said groups – to acts of rape;
d) subjected hundreds of thousands of civilians – belonging primarily to the said groups – to acts of forcible transfer;
e) subjected civilians – belonging primarily to the said groups – to acts of torture; and
f) contamined the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked; and encouraged members of other tribes, which were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups.

Pre-Trial Chamber I also found that there are reasonable grounds to believe that:
Omar Al Bashir, as the de jure and de facto President of the State of Sudan and Commander- in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan; and, in the alternative, that Omar Al Bashir also:

a) played a role that went beyond coordinating the implementation of the said GoS counter-insurgency campaign;
b) was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed militia, the Sudanese Police Forces, the NISS and the HAC; and
c) Used such control to secure the implementation of the said GoS counter-insurgency campaign.

Pre-Trial Chamber I found that there are reasonable grounds to believe that Omar Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups [83].

The Complementary Nature of the International Criminal Court.

[84] When the outline for an international criminal court was established, it quickly became evident that in order for the court to not only appease the reluctant states, but maximize its usefulness on the international stage, the court had to be complimentary. This role of a complimentary institution maintains the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial. By limiting the role of the ICC to complimentary, the Rome Statute and the states that are party to the treaty created a last resort institution that will only be utilized if the country is unable or unwilling to prosecute their war criminals. This entails many factors that must each be examined before an indictment or even an investigation is launched by the ICC.

First, is the country's judicial system intact? Many war crimes are committed during times of civil war, or in the recent case of Libya, the civil war often leads to regime change. If a new court is not established, and the state is therefore unable to launch an investigation or hold a court proceeding, then the ICC can step in as a support unit and take over the case. Also, if circumstances arise that invoke a sense of bias for or against a criminal who is being prosecuted, such as the case of President Al-Bashir of Sudan for the crimes committed in Darfur in which his country will never consider indicting him, then the ICC can step in and take over the case, as they have done.

In order to determine if the state is unwilling the court needs to examine if the proceedings are impartial, if the criminal is being shielded by government lackeys or whether there is an unjustifiable delay in the proceedings. The role of a complimentary court counts as a success because it limits the authority the court possesses, and it enables the states themselves to take the initiative in prosecuting their own criminals.

By limiting the power of the court, the Rome Statute correctly prevented the court from growing into an unrestricted power [85].

Rationale for the Complementary nature of The International Criminal Court Complementarity is a new concept in the context of the allocation of concurrent jurisdiction between international and national courts and tribunals.

Given the considerable implications of the establishment of an international criminal court in terms of state sovereignty, complementarity was strongly supported by States. According to this mechanism, States retain their right (and duty) to exercise their criminal prerogatives over persons responsible for the commission of international crimes. At the same time, the newly established international criminal court ensures that, in case of failure to investigate or prosecute at the domestic level, impunity is fought at the international level.

The choice of complementarity responded also to the specific features of the ICC, a permanent international criminal court with extremely wide potential jurisdiction, but limited structural and financial resources. Complementarity was also seen as the best tool to foster states' adhesion to the ICC Statute – an international treaty – and to ensure their cooperation with the Court.

The complementary relationship between the Court and States is regulated through the procedures for the admissibility of cases before the former. It is generally said that the Court [86].

I. Shall intervene – as a doctor entrusted to combat the virus of impunity – when States fail to take action, or where their action is not deemed genuine. In case of disputes over which forum shall exercise jurisdiction, the international Judges are in charge of deciding, in accordance with the statutory provisions. By doing so, they are not only arbiters of the Court's jurisdiction; they are also in charge of the delicate task of evaluating the conformity of domestic proceedings with the statutory provisions and criteria.
II. Since its adoption, complementarity was subject to extensive doctrinal elaboration.

Complementarity has been regarded to as both the mechanism that regulates the concurrent jurisdiction between the Court and national jurisdiction, and as an incentive for States to take action, in accordance with statutory requirements. Much attention has been devoted to the interpretation of the statutory provisions regulating the Court's activation and the exercise of its complementary jurisdiction. This is because of the consequences of complementarity in terms of States' compliance with their duty to prosecute, in particular through implementation of provisions on international crimes within their legal systems, and to the concrete realisation of the relationship between the Court and domestic jurisdictions [87].

5. Conclusion

The International Criminal Court headquartered at The Hague, the Netherlands is a permanent institution not constrained by time and place limitations. It is able to act more quickly than if an ad hoc tribunal had to be established. As a permanent entity its very existence will be a deterrent, sending a strong warning message to would-be perpetrators. It will also encourage States to investigate and prosecute grievous crimes committed in their territories or by their nationals, for if they do not, the International Criminal Court will be there to exercise its jurisdiction [88].

The establishment of the International Criminal Court is of great importance to the maintenance of world peace and security. The court's criminal jurisdiction is one of the reasons for her relevance but above the fact that both states and individuals are both subjects of the International Criminal

Court is another legal innovation that could not be ignored. The complementary nature of the court is also one of the reasons for her effectiveness since it recognizes state's sovereignty and the notion of cooperation in enforcing the law.

So far the court has carried out her duties of investigating and prosecuting crimes against humanity, genocide, war crimes and other crimes under her jurisdiction with great seriousness. However there are serious challenges facing the court that must be tackled. The International Criminal Court as a child of necessity is now growing with wisdom and power to tackle the responsibility facing her as the child of humanity's plea.

6. Recommendations

The International criminal court has played an important role in prosecution of war crimes, crimes against humanity, genocide and other degree of atrocities. However it depends on the cooperation of states that have ratified it to turn over suspects, and help in the information gathering process to speed up and actually complete fair and efficient trials [89].

Unfortunately for ICC this is not always the case. Many instances have occurred since the inception of the courts where the prosecutor has evidence, the indictment has been issued but no trial ensues simply because the indicted is not turned over to ICC for trial. Therefore the suspects remain at large as an international criminal. This is especially the case with Omar Al-Bashir of the Sudan. Because of lack of cooperation many head of states that were indicted and military leaders had escaped the sword of justice still living as a terror to the defenseless citizens that they are oppressing.

The Darfur conflict had really exposed the weakness of the International Criminal court in prosecuting war crimes. The effectiveness of the International Criminal Court is thus under serious suspension when thousands of civilians are massacred without the perpetrators being brought to justice. Justice thus will be an elusive world to harmless civilians.

It was Aristotle who said that "justice is the cry of the weak". This dictators and tyrants don't care about justice; they only care about their safety and the safety of their families. Thus this writer suggests that the International criminal court should ensure that there is cooperation amongst member states so that they can give it that support that is highly needed to prosecute crimes within the jurisdiction of the said Court.

And also it will be important for the International Criminal court to persuade a world power like the United States of America to sign in and become a member state of the International Criminal court. A policeman of the world like the United States of America will give more credence, credibility support, confidence, and back up to the said court.

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Legal basis and features of the agreement about franchising

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Abstract
This article deals with a complex business license (franchise agreement). In the introduction of this article it is briefly described the historical development of this type of agreements in medieval Europe and also in the Silk Road countries in the middle of the XIX and in the beginning of the XX centuries. Then the author gives the characteristics of the main legal acts of Uzbekistan in this sphere. The article continues with an interesting exploration of the legislation of foreign countries regarding the franchise agreement, particularly, of the post Soviet Union countries and the European Union member states as well as of the USA.

Keywords: franchise agreement, complex entrepreneurial license contract, and license contract

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1. Introduction

1.1 Historical development of franchising

The history of legal regulation of relations of complex business license (franchise agreement), as the experts reckon, refers to medieval Europe.

However, one can argue about the occurrence of such legal structures not only in medieval Europe, but even earlier.

Particularly, in the conditions of development of ancient caravans and the Great Silk Road, there were forms of business organization, quite similar and identical to modern franchise relationship.

Namely, definite features of modern franchising in selling goods in other countries through the Silk Road and the opening of large stores by merchants in neighboring countries or trade missions can be noted.

Despite of legal norms touching the franchising have been reflected in legislation of Uzbekistan in the years of independence, its signs coincide with the medieval view of the trade craft, when the salesman of a merchant traveled to other cities and villages by order of the owner (protégé). Especially this relationship has been widely spread in the middle of the XIX and in the beginning of the XX centuries. For example, protégés of the famous shoemakers or calligraphers, who have the permission of these masters, produced and sold an analog of their goods or traded in the products made by masters, but on its own behalf.

1.2 Characteristics of the legal basis of the contract of complex entrepreneurial license (franchise agreement) in the Republic of Uzbekistan.

Initial legal norms relating to the franchise agreement in Uzbekistan have been reflected in the Civil Code of the Republic of Uzbekistan, which came into force on January 1, 1997. Chapter 50 of the Civil Code of the Republic of Uzbekistan (articles 862-874) is devoted to legal regulation of the complex business license contract. In this chapter, it is provided descriptions associated with the contract of the complex entrepreneurial license, namely the procedure for drafting and registration, the restrictive terms of the contract, the rights and obligations of the parties, the licensor's responsibility to the requirements of the licensee, the bases of contract termination.

A significant role in the system of legal norms, concerning the contract of complex entrepreneurial license (franchise agreement) in the Republic of Uzbekistan was played a Regulation on the procedure of state registration of contracts of complex business licenses (franchise agreements), approved by the Cabinet of Ministers of the Republic of Uzbekistan dated November 4, 2010 No.244. In this Regulation, it is described the procedure for state registration of the contract in detail. In particular, the Regulation defines the procedure of state registration of the contract, expressed in abstract form in Article 863 of the Civil Code of the Republic of Uzbekistan. In particular, in article 863, it is defined that «the contract of complex business license must be made in writing and is subject to the registration agency that carried out the registration of the legal entity or individual entrepreneur acting under the contract as a licensor», but not listed in any public body contract is subject to registration, if the licensor is from a foreign country. Unlike the Civil Code of Uzbekistan in paragraph 4 of the Regulation it is specified that if the licensor is registered as a legal entity or individual entrepreneur in a foreign country, the state registration of the franchise agreement (significant changes, additions or termination) is carried out by the registration authority of the Republic of Uzbekistan which carried out state registration of the legal entity or individual entrepreneur acting under the contract as a licensee.

In addition, the Regulation takes into account the special procedure of state registration of the contract of complex business license (franchise agreement) in case if it involves a franchise agreement, including the foreign trade (export-import of goods and services), exclusive rights to intellectual property.

The complex of exclusive rights under the contract may include the company name, trademark, inventions, useful models, an industrial prototype, trade secrets, copyrights, and others. For this reason, the legal regulation of the contract of complex business license, besides to the Civil Code of the

Republic of Uzbekistan is made also by other normative documents, in particular, by the laws of the Republic of Uzbekistan «About trademarks, service marks and names of places of goods origin», «About accession of the Republic of Uzbekistan to the Patent Law Treaty adopted by the Diplomatic Conference on June 1, 2000 in Geneva» and «About an author's right and allied rights» of July 20, 2006 and others [1].

In article 862 of the Civil Code of Uzbekistan it is determined that under the contract of complex entrepreneurial license (franchise agreement) one party (complex licensor) agrees to provide to other party (complex licensee) set of exclusive rights (license complex) for remuneration, which includes the right to use a trade name of the licensor and protected commercial information, as well as other objects of exclusive rights (trademark, service mark and inventions, etc.), provided by the contract, in business activities of the licensee.

The contract of complex entrepreneurial license provides for the use of the license complex, business reputation and commercial experience of the licensor in a certain volume (in particular, with the establishment of minimum and/or the maximum volume of use) with or without specifying the territory of use in relation to a particular field of activity (sale of goods received by the licensor or produced by the licensee, rendering services, performance of work, implementation of commercial activities, etc.).

1.3 Legal basis of the franchise agreement foreign countries.

The concept of the contract of complex entrepreneurial license (franchise contract) in different countries has a different formulation. For example, "franchising" in the US and Western Europe, in the Russian Federation and Ukraine is designated as "commercial concession", in Uzbekistan and Kazakhstan – as "complex entrepreneurial license (franchising), in Moldova (CC, article 1171), in Azerbaijan (CC, article 723) and Turkmenistan (CC, article 629) is designated as a "franchise." However, various formulation of the franchise agreement in foreign countries does not affect its value and meaning.

In many European countries, the Code of Ethics of franchising adopted in 1990 governs the relations connected with the franchise agreement. European Federation of Franchise with its members - franchising associations of Austria, Belgium, Denmark, Germany, France, Italy, the Netherlands, Portugal and the UK, in collaboration with the European Community Commission are worked above the Code of Ethics. The Code regulates the relations connected with the franchise agreement in each individual European country.

Besides, for the regulation of contracts on franchising, it has bases of the national legislation in each European country. Thus, regulation of relations connected with the franchise agreement, is performing by national law, European Union law and the norms of the European Code of franchising ethics. This circumstance is considered an original feature of the relations connected with the franchise agreement. That is, the relationship between the licensor and the licensee, organized and leading activity in the country, which is part of the European Union, may be regulated by the European code of franchising ethics, at the request of business entities operating in the country, which is member of the European Union. It is remarkable that the norms of the European Code of franchising ethics are applied in countries that are not members of the European Union, but located on the European continent.

Today there are special regulations about franchising in the USA, at the federal level – "The set of franchising rules", enshrined in the United States Commercial Code, and territorial laws in 15 states of America, in Canada (at the provincial level), also in France, Australia, Spain, China, Indonesia and etc. [1].

1.4 The peculiar features of the complex business license contract (franchise agreement). Features of the franchise agreement follow from the concept of the essence of the subject and the design of this contract.

It should be noted, the subject of complex business license contract (franchise agreement) is considered to be exceptional and has complex character, i.e., some rights from the licensor to the licensee are transferred immediately for a fixed term. These rights include the right of use the licensor's brand name and protected commercial information, as well as other objects of exclusive rights: trademark, service mark and inventions. In this case it is necessary to distinguish between these rights by the license agreements for the right to use intellectual property. Under the license contract, the party which holds the exclusive right to result of intellectual activity or to means of individualization (licensor) grants the other party (licensee) permission to use the object of intellectual property (part one, article 1036 of the Civil Code of Uzbekistan). The franchise agreement, in turn, implies the use of a complex of the exclusive rights in an entrepreneurial activity. If usually in the license contract it is given permission use of intellectual property for one or same type, or specific objects, objects used in franchising have complex character, i.e. refer to several objects of intellectual property, and also the purpose of use is directed only at the entrepreneurial activity.

The essence of the design of this contract consists in registration through the contract, which is considered as the private legal means of allowing use of exclusive rights that have unique aspects in civil law.

E.A. Kozina: franchising allows large companies to enter new market segments and expand the area of economic activity without additional capital investments through by providing to individual entrepreneurs the right to use the complex of exclusive rights to results of intellectual activity [3].

According to R. Baldi, difficulties in a formulation of this definition due to a wide range of different shapes, in which it is implemented in business practice.

However, it should be noted the difference between the franchise and the concept of the complex entrepreneurial license contract (franchise agreement). Franchising is one of the ways of organizing business, thus, as the contract of complex entrepreneurial license (franchise agreement) is the civil law relation.

In the legal literature, in the Civil Code of the Republic of Uzbekistan it is noted a peculiar of sense in the formulation of «complex entrepreneurial license (franchise)»:

Firstly, such formulation (complex entrepreneurial license (franchising) of this contract follows from essence and values of the corresponding legal relations.

Secondly, the term "franchising" serves in the name of the contract for the appropriate use of its name.

Thirdly, the facilities, which are underlying contract, provided by one party (licensor) to another, can be captured only the term "complex entrepreneurship" [4].

In our opinion, the reason of why the franchise agreement is named as complex entrepreneurial license contract (franchise agreement) in the Civil Code of the Republic of Uzbekistan can be explained providing a complex of exclusive rights to the licensee the licensor. In general, this name is fully consistent with the practice and norms of international law.

It is possible to note that despite the differences in the name of the franchise agreement in foreign countries, the approach in the formulation of this concept does not differ. For example, according to the Civil Code of the Russian Federation, under the contract of commercial concession one party (franchisor) undertakes to provide to other party (user) for a period or without specifying the period of the right to use a complex of the exclusive rights belonging to the owner in an entrepreneurial activity of the user, and the user undertakes a duty of use of the rights and payment of assignments, taking into account the restrictions set in a legislative and contractual order [5].

O. A. Orlova notes full compliance of the majority of aspects of the contract of commercial concession of the Russian Federation and the franchise agreement of foreign countries [6].

M. I. Kulagin paid attention to the fact that a main objective of franchising activity of large producers is creation of system of goods distribution.

V. V. Pilyaeva claims that the contract of commercial concession (franchising) shows the relations between large and small business in itself [7].

Indeed, joining the scientists' opinion, who studied the franchise agreement, it should be noted that in most cases, large companies favor as licensor and licensee acts as - representatives of small business.

Increasing the number of licensees, leading activities on the base of complex business license contract (franchise agreement), demonstrates development by licensors new markets and occupancies. For instance, we will analyze the priority of the entrance of the large companies to another country based on franchising. There are more than hundred administrative and territorial units of the state level. Consequently, it is possible to organize the activities of more than hundred licensees. It is known, that all parts of the population tend to buy goods and services of the most well-known and reliable companies and firms. Therefore, leading the activity on the base of the contract of complex entrepreneurial license (franchise agreement) will be beneficial not only for people but also for representatives of business, acting as licensees and licensors. In the case of admittance of known brand into a new market through the branches, the expenses associated with the organization of activities of the branch, delivery of goods to the wholesale and retail trade agencies make up a significant amount of sum. Also, if the branch sustains economic losses or recognized economically not capable (declare bankruptcy), in this case the licensor will suffer material damage, the head company or firm is incumbent to the creditors of the branch.

In the sources it is noted the need for paying attention to the terms of the exclusive rights in the preparation of the franchise agreement [8].

1.5 According to the legislation of the Republic of Uzbekistan

- Patent for the invention is valid for 20 years (can last up to 5 years)
- For the selection achievements of 20 years (in some cases 25 years)
- Patent for the industrial design - 10 years
- Patent for useful model - 5 years
- Trademark - 10 years;
- Integral Circuits - 10 years [9].

Therefore, in the process of drawing up the contract of complex entrepreneurial license (franchise agreement), the parties should pay attention to the duration of the intellectual property.

Characteristic features of the franchise agreement can be recognized as follows:

- only business entities may participate as parties of the contract;
- the licensee has the right to use a complex of licenses, according to the contract, only in the specified territory;
- presence of restrictive terms of the contract;
- ability to specify by the licensee involvement of additional licensees not as the right, but as the obligation in the contract.

Complex of licenses is issued to the licensee in accordance with the contract of franchise. However, it should not be deduced that the franchise agreement is one of the types of the license agreement. Paying attention to the terminology of the franchise agreement in the domestic legislation, S.S.Khamroev claims that the license is an administrative document, which cannot be issued by the person who does not have an appropriate authorized for that jurisdiction [10].

Being an opponent of this idea, E.A. Sukhanov asserts that the contract should not be considered a commercial concession (franchise agreement) as one of the varieties of the license agreement [11].

Besides, regulation of relations connected with licensing certain types of activities that require a license in the Republic of Uzbekistan, is carried out according to the Law of the Republic of Uzbekistan "About licensing of certain activities", adopted on May 25, 2000. As stated in this law, it does not apply to relations arising under a contract of complex entrepreneurial license (franchise agreement) [12].

From this, it can be concluded that the agreement on the complex entrepreneurial license (franchise agreement) is not a license agreement. Consequently, the term "license" in the franchise agreement does not imply the authorization procedure by the public authorities.

According to the Civil Code of the Republic of Uzbekistan, if the period of the complex entrepreneurial license agreement is not specified, each party has the right at any time to terminate the termless contract of complex entrepreneurial license, if the contract does not provide for a longer period, the other party must be notified of this in 6 months prior to termination.

In most cases, the period is specified in the franchise agreement, and further the period shall be extended for an indefinite period. That is, first, is checked for or not prospects, if the prospects of activity is identified in the practice, with the consent of both parties, the contract is extended.

1.6 In theory of civil law, franchise is divided into the following types

- Product franchise
- Industrial franchise
- Business franchise
- Corporate franchise
- Conversion franchise
- Regional franchise

1.7 L. T. Ibadova, depending on the scope of the granted rights, allocates two types of franchise agreement

- Dealer, in which small company distributes products of the head company or provides services on its behalf, receiving a certain share from sales volume;
- Corporate, where besides independent use of the trademark, product or service, the user (licensee) is connected to a full cycle of economic activities of the head company [13].

In turn, L. Mayland noted three types of franchise: a personal franchise, business franchise and investment franchise [14].

Obviously, while studying franchise agreement, scientists have used various approaches to the separation of franchise types. The reason for this can be considered as a wide variety of spheres of business activity, where franchise agreements are applied.

Today the implementation of the franchise agreement in all areas of production of goods and services, promotes expansion of the number of types of franchise agreements. For this reason, it is not possible to make a concrete list of types of franchise agreements.

In general, franchise agreement is a separate type of contract, which is used in the description of the various approaches, however, they all have a common character, i.e., there are no significant differences among views, describing the agreement. It can be explained by the fact that franchising in many countries it is one of the new types of contract and is used in business recently.

It is known that there is a similarity of the contract of the complex entrepreneurial license (franchise agreement) in contents and subject with some other contracts. The license contract and the contract of trust management of property are among such contracts.

According to S. Safoeva, under the license agreement it is understood the civil agreement on providing the intellectual property right (licensor) for the owner to use intellectual property rights purposefully under the legal protection and procedures established by a licensee in the contract on the one hand, and payment of the product, the use of the above-mentioned rights, the purpose and order the other party (licensee) stipulated in the contract [15].

Despite the similarity of complex entrepreneurial license contract (franchise agreement) and the licensing agreement on the subject, there is a difference between them in the subject and the subject field. As if one facility is provided under the license agreement, then according to the franchise agreement, the licensee is granted a complex of the exclusive rights. Furthermore, only subjects of business act as subjects of the franchise agreement. At the time, as in the license agreement concerning intellectual property, any natural or legal person may be a party of the agreement.

In accordance with the contract of trust management of property, the person acting as the owner of the trust property, i.e. (settlor) transfers to other party, the trustee for a period assets in trust, for management of the property in the interests of the founder or the person on its behalf - the beneficiary [16].

The contract of complex entrepreneurial license just passed the complex of exclusive rights is also delivered from the licensor to the licensee in trust management. In this case, the licensee carries out the complex of exclusive rights, not only in their own interests, but also in the interest of the licensor. It uses and has the complex of exclusive rights in accordance with the contract requirements, like the possession of the property for the purpose of benefits of the founder or the beneficiary.

Another similarity is that both the trustee and the licensee have no authority to dispose of the property and the complex of the rights without consent of the founder and the licensor.

The agreement of complex entrepreneurial license (franchise agreement) and property trust management agreement have the following distinctive aspects:

Firstly, if the subject of the complex enterprise license can act only the complex of the exclusive rights, then the list of the property, which is subject of the contract of trust management of property, can be wider and include the enterprises and other property complexes, separate objects relating to real estate, securities, the individual rights and other property.

Secondly, asset management entities also may act individuals. At the time, both as a subject of complex entrepreneurial license contract (franchise agreement) may make only commercial organizations and citizens registered as an entrepreneur.

Considering the fact that foreign entrepreneurs and legal entities registered in foreign countries act as the treaty party of the complex entrepreneurial license contract (franchise agreement), it can be argued about the need for the international law governing relations in this sphere. S. Klimov proposes to develop a legal document regulating international franchise relationship in his research work.

If to consider participation of representatives of entrepreneurship, organized and leading activity in various countries, in the contract of the complex entrepreneurial license (franchise agreement), it is possible to reveal need of regulation of these relations on the base of the international precepts of law.

In general, the improvement and study the characteristics of complex entrepreneurial license (franchise agreement) plays a significant role in education and implementation of new forms of business and enterprise systems.

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Extradition issues of members of criminal groups involved in human trafficking

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Abstract
In this article, widely disclosed extradition issues of criminal groups involved in human trafficking. In particular, the author analyzes the issues in the application of national laws relating to international cooperation in criminal cases. Moreover, it is considered and analyzed the institute of extradition and related to international acts. Author noted the international nature of organized crime requires the urgent conception of new and effective cooperation agreements on a more comprehensive basis.

Keywords: International law, extradition, international cooperation, fight against organized crime, transnational crime, human trafficking

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1. Introduction

Since the late XIX century, international activity of crime has gradually been increasing.

In recent decades, this phenomenon is due to blurring of the boundaries of States and their increasing transparency, extension and interpenetration of the economic markets that were previously closed or tightly controlled by the States. This creates conditions for the emergence of new, previously unknown forms of crime, enhancement of its professionalism. Because of structural changes in trade, finance and information, crime often loses stable connections with particular States and national borders are increasingly losing their character for being obstacles to its spread [1]. The world community faced human trafficking crimes as a problem at transnational scale. At the international level it is recognized that the man (his organs, force) became transaction "goods" for the sale and exploitation.

Trafficking as objectively dangerous phenomenon.

Unfortunately, it should be stated that slavery and forced human trafficking remains a pressing agenda for politicians and States, international non-governmental organizations, private individuals and, of course, law enforcement.

According to the UN statistics, human trafficking and labor exploitation has become the third most profitable criminal business after drugs and arms trafficking. Naturally, fighting against these types of criminal attacks demanded the unification of efforts by the international community in general and each country in particular.

International law, and in particular interstate relations, certainly has an impact on national legislation, though it does not determine it. Today each sphere of national legislation reflects the norms determined by international standards, contracts and pacts ratified by the state. However, a country's domestic affairs are nevertheless governed by national legislation. The competent authorities of the state determine standards of national legislation, whereas all states or other subjects of international law through the signing of agreements determine international law, where sovereign states are subject to no uniform system of power or management. In order to ensure compliance with both norms of international law and national legislation, the state has enacted compulsory execution.

Norms of international law become valid for a state only after adoption of the national legal normative. The state, as the sovereign power, gives validity to norms of international law through its governing bodies. Without ensuring effective interaction between international law and national legislation, it is impossible to solve the most important problems of interstate relations.

Therefore, the main international legal document in this context is undoubtedly the Convention of 2 December 1949 "Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others" [2] which is endorsed by the General Assembly of the United Nations and which was ratified by Uzbekistan on 12 December 2003.

International law and human values have priority status at the legislative level in Uzbekistan, thus the Law of the Republic of Uzbekistan "On Countering Human Trafficking" [3] was adopted on 17th April, 2008 and the title and content of article 135 of the Criminal Code [4] was brought into compliance with the requirements of the international Convention, which contributed to strengthening the fight against this type of crimes at the state level. This is evidenced by the fact that coordination of implementation measures on this issue is performed by the National Interagency Commission on combating human trafficking, chaired by the General Prosecutor of the country [5]. The activities of this Commission are carried out in close cooperation with all stakeholders, including the judiciary, law enforcement agencies, health authorities, social protection of population and labor migration and frontier service, the public and representatives of international organizations, as evidenced by its work plan, which includes a variety of tasks for the prevention, detection and suppression of trafficking cases, brings perpetrators to justice, and social and legal rehabilitation of the victims of crime.

In the framework of order implementation the Law "On Countering Human Trafficking", the Cabinet of Ministers of Uzbekistan on November 5, 2008, adopted Decree "On the

formation of the National Rehabilitation Center for assistance and protection of victims of human trafficking" [6].

The system of countering human trafficking [7] covers state activities, state bodies, state and municipal institutions (state counter), as well as non-governmental organizations and institutions, public and other associations, mass media, civil society for the prevention, detection and suppression of human trafficking crimes, and neutralizes their social impact in order to assist victims of trafficking.

The continuation of planned and coordinated fighting against trafficking in persons implies the need for enhancing interaction between the law enforcement agencies of different States directly involved in combating this type of crimes.

Most countries in the world effectively apply national legislation for prosecuting responsible people for these crimes. However, to ensure the inevitability of perpetrators' responsibility is hampered due to the fact that all actions of recruitment, transportation, transfer, harboring or receipt for the purpose of exploitation of trafficking victims are financed from abroad, and members of criminal syndicates are spread across two or more countries in a given region of our planet.

International tracking and extradition of persons hiding from investigation and trial, to bring to justice, are rightly considered as global problems [8]. In turn, international search and extradition of persons accused of committing human trafficking crimes is one of the most important spheres of cooperation of States in combating transnational crime. The efficiency of this activity determines the degree of implementation of such a criminal law principle as inevitability of punishment.

Interstate tracking and extradition represent essentially separate forms of law enforcement activities [9], however, in order to enhance international forms and methods of combating crime, there is the need to consider their relationship.

The interaction of States on the interstate tracking and extradition of persons hiding from investigation and trial to bring to justice is characterized by an annual increase in its volume, due to the presence of the objective, including the legal prerequisites.

As a legal basis of extradition, they can be both bilateral and multilateral treaties. In turn, it is appropriate to distinguish the following types of multilateral agreements:

a) The agreement on the detention of criminals;

b) The agreement for the provision of comprehensive legal assistance, including rules concerning extradition;

c) The agreement of an international character and dealing with the general problems of combating international crimes, including extradition treaties of persons accused or convicted of certain crimes.

Thus, based on the study of the historical, legal and other aspects, it appropriate to consider the legal framework of this institute in the following order:

1) A bilateral agreement on detention;
2) multilateral extradition agreements;
3) A bilateral and multilateral legal assistance treaties, providing for special provisions for the detention;
4) regional and universal conventions, declarations against transnational organized crime, contains rules relating to detention;
5) A bilateral and multilateral intergovernmental agreement on international tracking and detention of persons.

Currently, the main instruments regulating this activity, are: the United Nations Convention against transnational organized crime [11]; the Protocol to prevent, suppress and punish trafficking in persons, especially women and children and punishment [12]; the Convention on legal assistance and legal relations in civil, family and criminal matters (Minsk, 22 January 1993) and Protocol (Moscow, 28 March 1997) [13]; the new edition of the Convention on legal assistance and legal relations in civil, family and criminal matters (Chisinau, 7 October 2002), entered into force for the ratifying States, as well as bilateral treaties of various countries on matters of legal assistance.

In this regard, the modern experience of the European Union countries concerning the creation and operation of the Schengen information system (Schengen Information System or SIS) and the European information network in the field of justice is of high importance [14]. For example, the technical capabilities of the SIS allow giving similar form to a request for information in the system as the arrest warrant [15].

The framework decision of the Council of the European Union of 13 June 2002 "On the European arrest warrant and the surrender procedures between member States" (2002/584/JAI) is regarded as one of the most significant achievements of the "legislative activities of the European Union in the sphere of the criminal process", whose appearance was preceded by laborious legislative process in the field of legal regulation of issues of the institution of extradition.

The task of the European arrest warrant, as noted in the above Framework decision, is "the abolition between member States of formal extradition procedures concerning persons trying to evade justice after receiving final convictions regarding these persons and to accelerate extradition procedures of persons suspected of committing crimes."

It should be recognized that the effectiveness of cooperation in the sphere of extradition of persons for bringing to justice is generally low to date. Statistical data confirms this conclusion, which leads to an increase in the number of repeated instructions about the tracking and extradition of the previously detained persons, who are on the international wanted list, but who have been released from custody.

2. Conclusion

It should be noted that the legislation of some States still do not contain any provisions regulating international cooperation in the field of extradition, which complicates its implementation. Therefore, the task to fill such gaps in the legislation is still on the agenda. Therefore, the lack of international and national regulation on the timing of the decision-making procedure of extradition at the legislative level significantly reduces its effectiveness.

The international nature of organized crime requires the urgent conception of new and effective cooperation agreements on a more comprehensive basis. A separate area, in our opinion, should be the strengthening of technical cooperation in its most diverse forms and the extension of advisory services with the aim of sharing experiences and new achievements, as well as assistance to countries in need in this regard.

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Institute of children's ombudsman as a mechanism of protection of juveniles' rights

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Abstract
In this article there are spoken the history and development of the Children's Ombudsman Institute. The article considers special features of the activity of Children's Ombudsman in the world. Has been revealing the issues concerned with the formation and development of Children's Ombudsman in the Republic of Uzbekistan.

Keywords: Children's Ombudsman, Commissioner for Children's Rights, Children's Ombudsman Institution, ENOC

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1. Introduction

As is known, the Ombudsman (or ombudsman) - an independent public body, based on Parliament official, whose purpose is to protect the rights and legitimate interests of the person violated by acts or omissions of administrative bodies and officials. For the first time, the Ombudsman appeared in Sweden in 1809 and throughout the XIX century it remained exclusively Swedish phenomenon.

In other countries, this institution has been gradually penetrated into the XX century. But a truly triumphal procession around the world it is observed only from the middle of the XX century. [p. 96] [1]

In the XX and XXI centuries the development of the institution led, on the one hand, to the emergence of specialized Ombudsmen (on affairs military, juvenile, on National Minorities, on health, on information and so on. D.), And on the other hand - the introduction of such a body, not only at the national level, as it was originally, but also at the level of the individual administrative - territorial units. In some countries, ombudsmen work only at the municipal level or (especially in the Federation) federation subjects. Specialty Ombudsman aims mainly to improve their performance. [p. 24] [2]

Generally, the Ombudsman for Children's Rights defends the needs, rights and interests of minors, fighting for the observance of the Convention on the Rights of the Child and promotes its dissemination. The Ombudsman may conduct an investigation, give a critical evaluation and publish an opinion, but he did not have the right to change or rescind the administrative measure, administrative decisions. The ombudsman intervenes separately from legal representatives, parents or guardians, protecting the rights of the child in all types of civil and criminal cases, in which children are directly or indirectly involved.

In some countries, the ombudsman is responsible for the use of valuation techniques such as the "child impact assessment" to identify and evaluate all possible consequences on children of various legislative proposals, regulations, etc.

For the first time a post of Children's Ombudsman was introduced in Norway in accordance with the Act on Children's Ombudsman ("Relating to the ombudsman for children") on March 6, 1981 [4]. For thirty-plus years of Children's ombudsman institution he appeared in more than 44 countries: Norway (1981), Canada (1987 - in British Columbia, and later in the rest of Canada), New Zealand (1989), Austria (1989 g), Guatemala (1990), Colombia (1991), Portugal (1992), Sweden (1993), Hungary (1995), Iceland (1995), South Africa (1995,), Spain (1996), Romania (1997), Belgium (1998), Russia (1998), Bolivia (1998), Macedonia (1999), Nicaragua (1999), Lithuania (2000), Poland (2000), Great Britain (2001 - in Wales, in the other realms - later), Denmark (2001), Greece (2003), Slovenia (2003.), Bangladesh (2004), Ireland (2004), Serbia (2005), Cyprus (2007), Bosnia and Gertsigovine (2008), Estonia (2010), the Netherlands (2010-2011 gg.), France (2011), Italy (2011.), Ukraine (2011), Australia (2013), and others. [p. 589-590] [5].

Norwegian Barneombudet (Barneombudet) is an independent defender of the rights of children under the age of 17 years. His term is calculated 4 years and may be extended for not more than one consecutive term. Children's Ombudsman (hereinafter CO) in Norway itself defines its methods of work and priorities, has guaranteed access to all documents available to the authorities and institutions dealing with children's rights; he is also free to decide which issues fall within its competence and which means when it uses the resolution. The Administration for Children's Ombudsman in Norway is subordinated to the Ministry of Children and Family Affairs. It determines the budget of the Administration, which was subsequently approved by the Norwegian Parliament. Under CO Administration operates a group of experts constituting a permanent Advisory Committee of CO. Norwegian Children's Ombudsman has become a model of Defender of children's rights. This pattern was seen in other countries, although the models of activity of the Ombudsman for Children are quite diverse.

In Australia in 1989, it was created Agency of child support (Child Support Agency). It is subordinate to the Ministry of family and community issues. In Austria, the Bureau of the child has been functioning since 1989, but, in addition to the central office in Vienna, like Bureau operates in each region. In Finland, the functions of the Children's Ombudsman since

1981 carries a special non-governmental organization. In Spain and Guatemala the Child Rights clubs operate under CO administration. In Canada there are Regional Offices of Commissioners for Human Rights to the fact that there are sections of Commissioners for children's rights in some provincial office (for example, in Quebec since 1979). In Costa Rica, since 1987 operates the Children's Ombudsman of the Ministry of Justice and Mercy; in practice, this Defender is one of the vice-ministers of justice. In Germany, in the Bundestag since 1988 working parliamentary commission on children's rights. In New Zealand in 1989 under the influence of the Norwegian model created Office of the Commissioner for Children's Rights. The Norwegian model has become a model also for Sweden, which in 1992 formed the Institute of Children's Ombudsman.

As you can see, the main development of the children's ombudsman institution falls on the 1990s.

The trend towards the creation of the institute in the world Children's Ombudsman was due to several reasons. First of all, the adoption and subsequent ratification by UN member states of the Convention on the Rights of the Child 20 November 1989 [6]. At present, the said UN Convention, ratified by 191 UN member countries except the USA and Somalia. Another reason - the critical situation of children rights in the world, which was noted by the World Summit for Children in 1990, which was held at the UN headquarters in New York [p. 20-21.] [7].

UNICEF published in digest "the Institute of Commissioners for Children's Rights," there are four basic methods of formation on children's rights Ombudsman institution:

1. Institute CO established by a special law adopted by the Parliament (Norway, Sweden, Iceland, Luxembourg);
2. Institute of the CO established in accordance with the legislation on protection of children's rights, according to which the Ombudsman's functions are directly related to the execution and enforcement of the relevant law (Austria, New Zealand);
3. CO position is not created on a statutory basis, as established in the framework of existing public bodies; these ombudsmen are as a public authority accountable to the state (Canada, Spain, Denmark, Germany);
4. Institute of the CO established non-governmental organizations and working under their auspices (Finland, Israel) [8].

To date, developed following the model of Children's ombudsman:

1. **The Executive Ombudsman.** An illustrative example – Children's Rights Commissioner for the President of the Russian Federation, which is appointed by the President of the RF.
2. **An independent ombudsman.** In this case, the example is the Children's Rights Commissioner in England.

The peculiarity of the English Commissioner (Children's) is that it is a non-state public institution (NDPB - nondepartmental public body), established to promote the interests and wishes of children living in England, and not an institution to protect their rights.

In this regard, it is unable to "promote" interests only one child. Commissioner is appointed by Head of State (Her Majesty), but after the appointment is not subject to either her or the Parliament of the country.

In Finland, and Israel the term "ombudsman" is used to refer to the activities of non-governmental non-governmental organizations. Thus, the activities of these organizations identified with the activities of the Ombudsman [p.9] [9].

3. *The Parliamentary Ombudsman*. It is in the legislative branch of government, appointed (elected) by the Parliament and is accountable (or controlled by) him. He has broad powers and is independent from the Parliament. For example, Children's ombudsman of the Republic of Bashkortostan (Russian Federation).

This model is the most typical as historically ombudsman emerged as a parliamentary oversight body of the administration.

In some countries the Children's Ombudsman have narrower competence. For example, in Finland, an ombudsman acts exclusively as a defender of individual complaints filed either by children or on their behalf. In Norway, the Children's Rights Commissioner, along with the protection of the individual interests of children represents the interests of Norwegian children in general. Swedish Ombudsman has no authority to review specific cases and works to strengthen and expand the rights and interests of all children.

Despite the fact that the institution of children's ombudsman in each country has its own characteristics, in the activities of ombudsmen child can distinguish similarities consist in the performance of the following functions:

1. Protecting the rights of the individual child and to the representation of their interests.
2. Investigation of the cases of individual complaints of children.
3. Monitoring the implementation of legislation relating to child protection.
4. Making recommendations to the state authorities to change in the field of child protection legislation.
5. Promote awareness about the rights of the child as the children themselves, as well as adults.
6. Acting as mediator in cases of conflict between parents and children.
7. Submission of reports on progress and on the status of child rights issue.

Thus, the ombudsman institution is an effective protection of the rights of children in the world. As the experience of states that have created at institutions authorized for children's rights, the existence of these institutions is an important mechanism to protect the rights and interests of children, as the children's rights ombudsman are independent bodies with the right to speak on behalf of children and at the same time focuses its activities exclusively to the protection of their interests.

In order to coordinate the efforts of children's ombudsmen form the European Network of Children's Ombudsmen (ENOC). The European Network of Ombudsman for Children (ENOC) was founded in 1997 and unites 44 independent organizations from 35 European countries working in the field of protection of children's rights.

ENOC regularly holds meetings to discuss urgent problems and share experiences. For example, in 2011 the children's ombudsmen met in Warsaw, in 2012 - in Paris, in 2013 in Brussels, and in 2014 in g.Edinburg.

Despite the fact that the European Network of Children's Ombudsman was created in 1997, and every children's ombudsman to seek to enter it, in practice between themselves

authorized no effective cooperation in the event of specific problems.

In addition, unlike the human rights commissioners, Children's Ombudsman do not constitute an international organization, which complicates the dialogue between them at the international level. The situation that arose around the brother Dima Yakovlev, could be solved much faster and more effectively in the international dialogue of children's ombudsmen Russia and the United States. This is a sore issue for the country's adoption of Russian children by foreign families, as well as the adoption of the "Act Dima Yakovlev" [10] in the memory of the deceased Russian orphan due to the negligence of their adoptive parents July 8, 2008 in the US. During the event the Russian children's ombudsman Pavel Astakhov carried out activities aimed at both the adoption of the Act, and the ban on adoption of Russian children by foreign families.

In India instead of the Children's Ombudsman functions The National Commission for Protection of Child Rights (NCPCR). India, being a UN member, has been actively involved in the organization, so it is not surprising that the country has signed the Convention. At independence in 1947, India embarked on the democratic path of development, which is reflected in the Constitution as the prohibition of all forms of discrimination and a focus on individual rights and freedoms of the child. In particular, it is worth noting the emergence of organizations, both public and private, who see to it that children have access to primary and secondary education and to health care, are not subjected to violence and forced labor. One of the main organizations of Delhi is to protect the rights of children by the Commission.

The National Commission for Protection of Child Rights (NCPCR) was set up in March 2007 under the Commission for Protection of Child Rights Act, 2005, an Act of Parliament (December 2005). The Commission's Mandate is to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and also the UN Convention on the Rights of the Child. The Child is defined as a person in the 0 to 18 years age group.

The Commission visualises a rights-based perspective flowing into National Policies and Programmes, along with nuanced responses at the State, District and Block levels, taking care of specificities and strengths of each region. In order to touch every child, it seeks a deeper penetration to communities and households and expects that the ground experiences gathered at the field are taken into consideration by all the authorities at the higher level. Thus the Commission sees an indispensable role for the State, sound institution-building processes, respect for decentralization at the local bodies and community level and larger societal concern for children and their well-being.

So, it seems that the experience of the Institute of the Children's Rights Commissioner and the principles of its activities are essential for all States experimenting with the idea of the defense of children's rights, including the Republic of Uzbekistan.

Accession of the Republic of Uzbekistan to the UN CRC contributed to the formation of state policy in the field of protection of children's rights, which is consistently implemented the activities of state bodies and public authorities on the ground to establish an effective mechanism of legal regulation of relations arising in connection with the implementation and protection of children's rights. In this regard, the priority direction of state policy in Uzbekistan is to create the necessary legal and organizational conditions and guarantees for the respect and protection of children's rights.

January 7, 2008, despite the fact that Uzbekistan has more than 100 laws regulate certain rights and freedoms of the child, the Law of the Republic of Uzbekistan "On guarantees of child rights" came into force. This law is the first in the history of Uzbekistan codified legal act in the field of children's rights. According to its intended purpose it is intended to regulate the relations connected with the definition of the legal status of the child, legally guarantee the rights and freedoms of the child.

Adoption of the Law "On guarantees of child rights" has created the possibility of establishing in Uzbekistan Children's ombudsman, and to lay the institutional and legal framework for the special protection of children. Currently in Uzbekistan formed the conceptual basis of the introduction of the post of children's ombudsman, developed the concept and the draft law "On Children's Ombudsman", which took the necessary public and international expertise.

The Children's Ombudsman concept of the bill defined:

1. The main ideas, goals and subject of legal regulation, the circle of persons who are covered by the bill, their basic rights and obligations;
2. Place of the future regulatory legal act of the children's Ombudsman in the system of the current legislation, the value of which will have a bill for the legal system;
3. A general description of the foreign law enforcement on child activities of the Ombudsman;
4. Socio-economic, political, legal and other consequences of the adoption and implementation of the normative legal act of the children's Ombudsman in Uzbekistan.

The concept of the draft law "On Children's Ombudsman" provides such functions of Children's Ombudsman, as a method of applications of citizens about violation of children's rights, the settlement of disputes between the children, their legal representatives and bodies of state power and administration, as well as between children and their legal representatives, the provision of free legal assistance to children and their legal representatives and advice to children's institutions and organizations, the right to go to court to protect the rights of children in difficult circumstances and making the relevant authorities of proposals for improving the welfare and protection of children's rights mechanisms.

According to the concept, a children's ombudsman should be given the duty of submission to the Parliament and the President of the Republic of Uzbekistan annual report on its activities, which should be the subject of discussion by civil society institutions.

Children's Ombudsman shall be entitled to obtain the necessary information and documents related to the provision of children's rights, free access to organs and officials, and obtaining from them clarifications, conducting audits of their activities with the involvement of experts and specialists and the introduction of applications for the prosecution of persons guilty of violating the rights of the child [11].

The concept is also the basic form of organization of activities of Children's Ombudsman in the field of public awareness, including children, on the international and national standards and observance and protection of children's rights through the establishment of appropriate educational and consulting structures for children and their legal representatives, as well as

the conduct and publication of systematic studies analyzing the situation of children in difficult life circumstances.

Working Group, chaired by Fund "Sen yolg'iz emassan" (You are not alone") developed a draft law "On Children Ombudsman", which was presented to the Cabinet of Ministers and its working version - the Legislative Chamber of Oliy Majlis. To date, work is continuing with the public to promote the ideas of the need for a children's Ombudsman in Uzbekistan.

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Role and relevance of personal non-property rights of Uzbekistan and japan in civil rights

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Abstract This article describes the personal non-property rights and the Japanese civil law, carried out a comparative analysis of the legal and theoretical suggestions.

Keywords: civil rights, personal non-property rights, dignity, right to life, the title of the secret, the health law.

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1. Introduction

Personal non-property rights owned by a physical person, has its own system of values established by law intangible benefits. Such privileges and blessings are recognized in every country the system of legislation and regulations. In the light of the highest values and human rights associated with social and mental health status and socio-economic and legal systems of the developed countries a comparative study based on the comparison of the legislation law of one of the most important challenges facing modern jurisprudence.

In addition, the international standards in this field, the comprehensive study of the experience of the practice of law in developing countries and as well as a comparative analysis of the positive effects. For this reason, before this study, we tried to refer to comparative law [1] the study of foreign countries have the right to a better understanding of its achievements and shortcomings in the national law that will be the basis for the knowledge.

It is no secret that, in accordance with the national legislation in comparison with the legislation of foreign countries in the West, in many cases, the example of the countries of the European legislation, which usually stay. However, according to the geographical location of the eastern countries is considered. Therefore, it should be noted that in comparison with normative-legal acts of the legislation of the countries of the East logical and effective. Some of the personal non-property rights of the community, in which he lives, communities, are closely linked with the family. A person in a way that is more powerful impact on public opinion about him. In this, we have the Japanese government and the Japanese people living with some similarities and common. This is one of the most advanced in the world in the development of the state, despite their own national traditions and customs of the faithful are distinguished by a special love for him. In this context, the President noted: "The country of Japan after the Second World War, the difficult situation the rest of us know better. Well, what did they do for a short period of time to achieve this development? After all, this country's abundant natural resources, mineral resources, there is virtually no! Of course, at that time in the world in this regard, the political factors, the impact of the international situation must not be ignored. But the Japanese people through the centuries, has become a major creative force at the expense of the unique spirit of development today is not a secret to anyone. Thus, the "Japanese miracle" that are well-known experts and specialists, first and foremost, "the Japanese character" was mentioned. Naturally, they are here; first of all, this refers to the nations of the moral qualities. In other words, the inner world and the will of the people on the basis of spirituality more refined, and perfected".

Studied by a number of personal non-property rights and these rights are described as follows. According to H.R. Rahmonqulov's intangible goods - born citizen, or in accordance with the law, strangers specific characteristics (life and health, honour and dignity, safety, etc.), personal non-property rights of citizens and legal party and a third party without the consent of their unacceptable conduct personal non blessing (copyright, trade name, business reputation, trademarks and service marks, etc.) [2].

I.B. Zokirov say that the material forms of goods (materials), as well as non-material blessings are the object of civil law. The concept of intangible delights of the Civil Code of the Republic of Uzbekistan, according to which the citizens by birth or by law to refer to a person's life, health, honor, dignity, personal integrity, dignity and good name and professional reputation, inviolability of private life, private and public access to the secrets of migration walk, and habitat selection, copyright and other intellectual property rights, intangible delights [3].

"The personal non-property rights" concept in the field of personal life, family, household, personal and spiritual relationships with the private entity that belongs to freedom and independence in their dealings with their own unique character thanks to the so-called present-day name of the bearer. Personal non-property rights, including I. Nasriev described as: "... the personal non-property rights of human skills, focused on the expression of social status and the ability to access a person's life, good health, independence, dignity, and ensure the quality of the individual, the state and to be recognized by the society, the law on the protection of personal non-property rights of nature [4]".

Japanese law scholars Xidoki Kurosava that the "personal rights (Civil Code - the author's emphasis) the life, dignity, personal secret as closely tied to a person on the basis of non-

object favours the development of access to these goods, they are in the third person (s) by the sum of interest reflected the amount necessary [5].

According to Kavai Takashi, the law of Understanding that defines the content of a person's specific interests of human rights. The human person, freedom, dignity (JCC, Article 710), the life and health (Article JCC 711) as well as personal interests are protected by the Civil Code, in addition, be committed to the civil law, the name, image, keep rights and personal rights are recognized as [6].

According to Mori Izumi Akira, the rights of the individual rights of every single person, the right to protect personal interests. Individual rights to life, health, dignity and the rights to the image, that is, the person is not possible to separate the interests of the public life the rights [7]. According to Japanese scientist Kato, a person's life, health, honor, dignity, name, inviolability of private life, personal secrets, the right image, and the person may alienate the rights of human rights are closely linked with the person [8].

The content of the rights described above, this legal right is based not only scientific theory.

It should be noted that we have a personal non-property rights with the Constitution and the Civil Code of the Republic of systematised. At the moment, these are not included in the scope of the system and the scattered laws, common norms on personal non-property rights. The same approach, personal non-property rights to create a system that can be common to all such rights to determine the prospects for the development of practical and theoretical urgent task. In addition, the state of law enforcement in this system is also important to study and analyze.

"The current level of democratic renewal of the country's most important one is to strengthen the rule of law, human rights and the protection of the interests of the judicial system aimed at the gradual democratization and liberalization. In other words, the foundations of a law-governed state and nurturing legal awareness and awareness remain a crucial task for us"[9].

In fact, the main defender of the rights and freedoms of this judicial organ. Thus, the private non-implementation of the rights related to the protection and enforcement practice, in particular, the practice of the court waiting for a solution to the problems that need to be addressed. Some of the personal non-property rights of the content can be interpreted in different cases, precluding the use of biodiversity and economic measures as well as a deep analysis of these issues and their solutions specific conclusions before the development of modern law is an important task.

Personal non-property rights and a description of the types described in the special protection of the civil rights theories and, most importantly, practice, and application of emerging based on the elimination of such shortcomings, because of personal non-property rights by scientists learn, however, there are still problems. For example, courts in the protection of property rights in any way to go, what to do in order to make a clear way to solve them. Personal non-property rights protection and the protection that they come quite often. In this case the protection of personal non-property rights, enforcement of adequate practice formed as well as the specifics of the personal non-property rights of law depends not possess enough intercessors. It is noted that Japan has rich experience in the practice of the court, and the Japanese civil law and judicial practice comparative analysis of the legal basis of such a conclusion. And cooperation between the countries of Japan, nearly regulatory documents is evidence of friendly relations between our signatures. Issues of cooperation in all areas, training, and training issues. Summing up, we can say that civil judge’s consideration of the issues related to the personal non-property rights, and Japan to study the practice of law enforcement in this area would be useful. As a result, in our opinion, the exchange of experience and law enforcement in order to get acquainted with the practice of the Supreme Court of the Republic of Uzbekistan and Japan, it would be desirable to establish cooperation between the courts.

Uzbek and Japanese to understand of the scope of the personal non-property rights, and those rights were very close to, their positive and negative aspects of legal and practical point of view, the comparison of its expression. Legislation and regulatory point of view, compared to Japan, belonging to the family of continental law, which regulates the relations on the basis of the legislation codification, but the issues of individual rights and the protection of their personal non-property rights is seen from a deeper and more fully reflected in the legislation. Japanese civil law, personal non-property rights, their protection methods on the basis of national law as a system and not defined in detail. However, the protection of personal non-property rights, the current state of the Japanese Life and Girard Japanese society, based on the legal provisions do not require the use of a large, very effective.

Proceeding from the above that the Japanese civil law, personal non-property rights of the role of negative concepts, namely personal non-property relations regulated by norms of civil law, but is based on the fact that protection. In Uzbek civil law has personal non-property rights of the positive conception [10] that individual rights are not only protected by the civil law, but the legislation would regulate it.

Personal non-property rights are private rights, the legislation, which is regulated by civil law, Japanese law, media law, which is governed by the constitution. Violation of the rights specified in the Constitution of Japan is inadmissible, referred to as a right of citizenship. Unlike the civil code of Uzbekistan in Civil Code of the Japanese, there is no chapter for regulating not material wealth. Personal non-property rights of individual rights as enshrined in the Constitution of Japan, the Japanese scientists to show them by the Civil Code and are not required to list the types of opinions expressed. This is a personal non-property right because of the Japanese Civil Code enshrined that is not generally available. And the fact that the protection of these rights is not only the existence of the practice of the court, but the number seems to be related with the protection of their works, and the content is larger. In this regard, the Japanese law, personal non-property rights to particular challenges in terms of law enforcement in not represents persuaded, Japan, such as laws to protect their moral rights and to strengthen practical methods and tools used in the practice of the court in accordance with the national mentality aspects of law practice desirable.

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