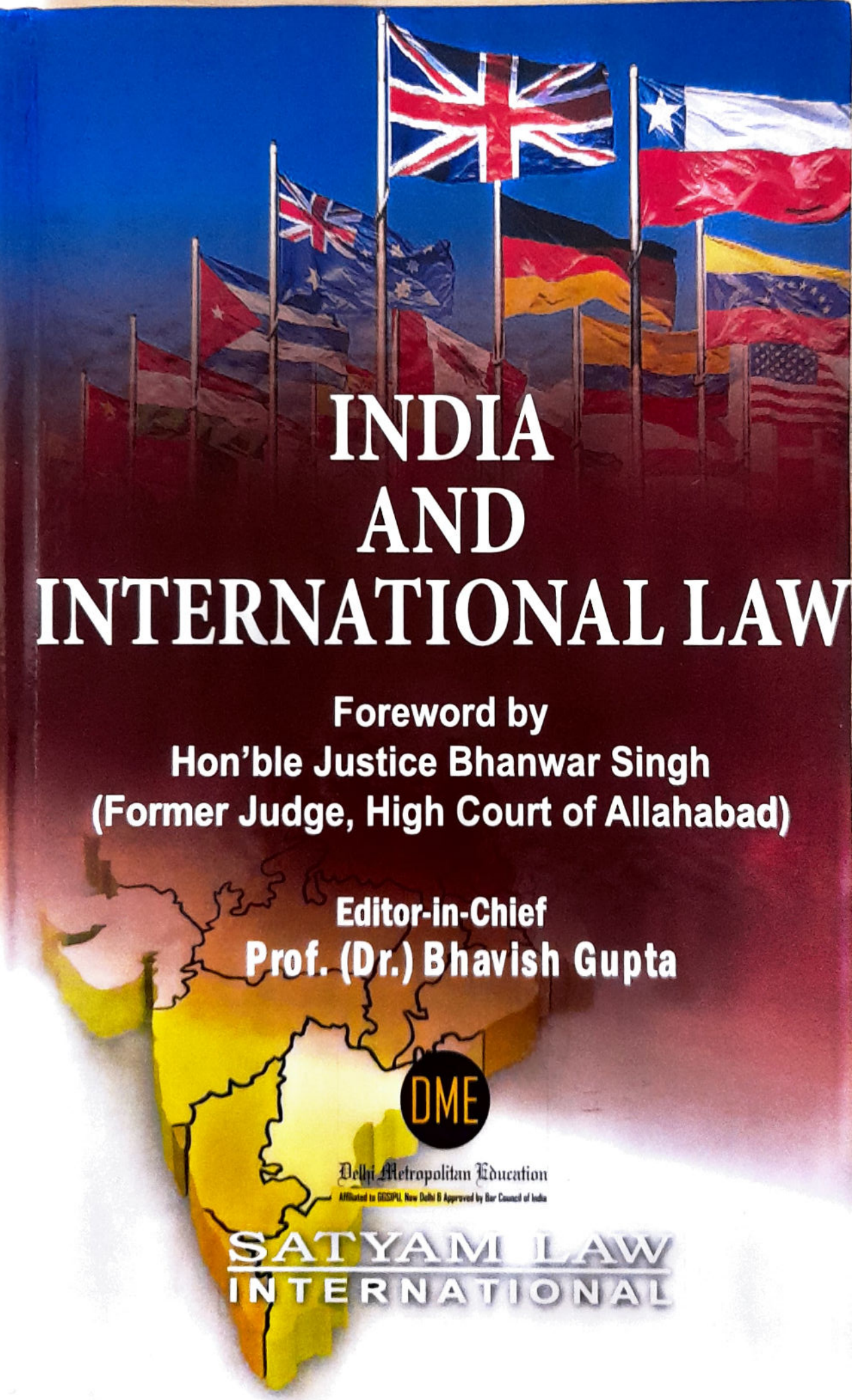

INDIA AND INTERNATIONAL LAW

Foreword by
Hon'ble Justice Bhanwar Singh
(Former Judge, High Court of Allahabad)

Editor-in-Chief
Prof. (Dr.) Bhavish Gupta

DME
Delhi Metropolitan Education
Affiliated to GGSIPU, New Delhi & Approved by Bar Council of India

SATYAM LAW
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Contents

Article 1

A Postcolonial Defence of India's Resistance to the NPT

*Aman Sahni**

Introduction

A vast amount of postcolonial literature has been published over the last few decades that raises questions about the injustices laid out to the non-Western world during and following colonialism understood as an event. It has failed however, to address the extent to which the current nuclear treaties and arrangements fall prey to postcolonial criticism. Postcolonial literature has in fact largely abstained from engaging directly and participating in present political agendas on a wider level[1]. For postcolonialism to escape the tag of being a fringe theoryand gain wider support, it needs to lend a stronger voice on current affairs.

In this study, I extendfour different practical criticisms of the content and performance of the Nuclear Non-Proliferation treaty (NPT), which share a common link. Wrapped together, the resulting postcolonial take on the NPT forms a compelling and unambiguous argument worthy of consideration from an Indian perspective. India understandably does not enjoy exclusivity of context to make these arguments, butcertainly happens to be a perfect example to lead analysis and illustrate this postcolonial bias in the NPT.

I will start by briefly enunciating postcolonial theory before scrutinizing the NPT with my criticisms.

Foundations of Postcolonial Theory

Western culture and knowledge has dominated both culture and academic thinking in the outward oriented (traditional) spheres of international relations. Since the time of

* Vice Chairman, Delhi Metropolitan Education, Noida (Affiliated to GGSIP University, Delhi)

[1] Philip Darby "Pursuing the Political: A Postcolonial Rethinking of Relations International", Millennium: *Journal of International Studies* (2004) Vol. 33(1), p. 1.

Article 2

International Law and Climate Change: The Challenges and Dilemma Faced by India

Prof. (Dr.) Bhavish Gupta * & *Prof. (Dr.) Meenu Gupta* **

Introduction

Climate change is a change in the usual weather pattern of a particular region. This could be reflected in amount of rainfall a place usually receives in a year or it could be a change in a region's usual temperature for a month or season. Climate Change means a long term change in Earth's climate, especially a change due to an increase in the average atmospheric temperature. The discovery of the phenomena of Climate Change through natural causes began in the early 19th century and as the century proceeded further, the belief or the awareness of human contribution towards Climate change began to receive widespread acceptance. The scientists further observed that the Carbon Dioxide released from burning fossil fuels took longer time to get absorbed by the ocean, rather the ocean surface had only limited ability to absorb it, predicting thereby a further rise in CO2. Towards the end of 1950s, the consensus within the scientific community grew strong that Carbon Dioxide emissions would rise by 25% by the end of the 20th century and have radical effects on the earth's climate.

By the 1960s, scientists began to consider whether "smog" or "aerosol pollution" could have a cooling effect on the world temperature, they were yet not sure of the overall impact of the greenhouse gases (which have a warming effect) and particulate pollution (which have a cooling effect) and which one of them would dominate. Nonetheless, the belief that anthropogenic emissions would have a disruptive effect on the climate in the coming century, drew general affirmation. Paul R. Ehrlich, in his book- *The Population Bomb*, published in 1968, wrote, "the greenhouse effect is being enhanced now by the greatly increased level of carbon dioxide... [this] is being countered by low-level clouds generated by contrails, dust, and other contaminants... At the

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Article 3

Between the States, But Not Over It (India v. Pakistan)

*Dr. Neha Bahl** & *Dr. N.K. Bahl***

Kulbhushan Sudhir Jadhav's case[1] has once again reminded us that International law has been playing a significant role in maintaining relations between the member states. However, it made phenomenal progress during the last century and acquired universal range in terms of its application. The credit of beginning the system of settling international disputes through judicial decisions goes to Permanent Court of International Justice[2] which was established under League of Nations. This PCIJ was based upon the statute of PCIJ. After the dissolution of League of Nations, PCIJ was also dissolved and it was immediately succeeded by International Court of Justice.[3] This new court stepped into the shoes of old court and began its work in the same city, in the same place and in the same hall in which the previous court delivered its high judgments.[4] The statute of the ICJ is also based upon statute of its predecessor, the statute of PCIJ.[5]

The ICJ is the principal judicial organ of the UN.[6] It was established by the UN Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the UN[7], it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized UN organs

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1 Hereinafter referred to as KJ's case
2 Hereinafter referred to as PCIJ
3 Hereinafter referred to as ICJ
4 Stephen S. Goodspeed, *The Nature and Functions of International Organizations*, Second edition, p.329.
5 See Article 92 of U.N. Charter.
6 See Article 7 and 92 of U. N. Charter.
7 Hereinafter referred to as UN

Article 5

Role of ICJ in Development of International Law with Special Reference to Kulbhushan Jhadav Case

*Navjot Suri**

Introduction

The Charter of the United Nations established the International Court of Justice (ICJ) in June 1945, which is the principal judicial organ of the United Nations (UN). It has its seat at the Peace Palace in Hague (Netherlands). The major role of the court is to solve disputes in accordance with international law and not to create law, as it is not a legislative organ. It gives advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. The court in the Use of Nuclear Weapons case[1]clearly stated that ICJ states the existing law as per international law but does not legislate.[2] The UN Charter or the ICJ Statute does not give any law making powers to ICJ, therefore scholars have questioned the legitimacy of the authority of ICJ to develop and evolve new norms of international law. My research paper will elucidate mainly on the role played by ICJ in development of international law with special reference to KulbhushanJhadav's case as well as on the jurisdiction of ICJ in this case.

Article 2[3] of the Statute of ICJ states that, ICJ is composed of fifteen judges, who are elected regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices for the term of nine years and can also be re-elected by the United Nations General Assembly and the Security Council.[4] No judge of ICJ can exercise

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[1] I.C.J. Reports 1996, p. 226

[2] Dr. H.O Agarwal *"International Law and Human Rights"*,487(20th ed.2014)

[3] Article 2 -The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

[4] Dr. H.O Agarwal *"International Law and Human Rights"*,488(20th ed.2014)

Article 6

Derogation of Human Rights Under International Law

Parul Gurudev & Sangya Negi***

"To deny people their human rights is to challenge their very humanity."

–Nelson Mandela

Human rights are the rights which are natural and innate in nature, they are inherent to all human beings; they are granted irrespective of our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. People are equally entitled to their human rights without any discrimination.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups[1].

Some of the Characteristics of Human Rights[2]

1. Universal and Inalienable

The principle of universality of human rights is the keystone of international human rights law. It was first emphasized in the Universal Declaration on Human Rights in 1948 and has been reiterated in several international conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights noted that it is the duty of States to promote and protect all human rights and fundamental freedoms.Some fundamental human rights norms enjoy universal protection by customary international law across all countries.

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[1] 'What are human rights?' (www.ohchr.org) http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx accessed 6 May 2017.

[2] *Ibid*

Article 7

Child Trafficking Laws in India *Vis A Vis* International Law: The Dualist Approach of A Sovereign State

*Karishma Sheikh**

1 An Overview of Trafficking

In June of 2005, Secretary of State Condoleezza Rice stated that "[t]rafficking in human beings is nothing less than a modern form of slavery,"[1] in an address coinciding with the release of the Fifth Annual Department of State Trafficking in Persons Report (TIP Report 2005).?[2] Characterizing trafficking as slavery is appropriate, as it involves the buying and selling of human beings, forced labor and prostitution, and other affronts on individuals? freedom.[3]

In the past, international efforts against trafficking focused mainly on forced prostitution of women; however, the paradigm shifted with the passage of the Protocol in 2000 (Forced labour, servitude, slavery).[4] In contrast to the earlier perception of trafficking as involving only prostitution, the Protocol views trafficking in a broader sense and thus covers a wider variety of exploitative practices.[5]

Worldwide, an estimated 12.3 million persons suffer from enslavement at any given time, ranging from bonded and forced labor to sexual servitude, despite the international community?s condemnation of slavery and slave-like practices.[6] Trafficking,

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1 Act of 2000: Trafficking in Persons Report, L etter from Secretary Condoleezza Rice, Office To Monitor And Combat Trafficking In Persons, June 3, 2005, available at http://www.state.gov/j/tip/rls/tiprpt/2005/46605.htm (May 24, 2017).

2 Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report, available at http://www.state.gov/j/tip/rls/tiprpt/2005/ (May 24, 2017).

3 See, Virginia Garrard, *Sad Stories: Trafficking in Children-Unique Situations Requiring New Solutions,* 35 Ga. J. Int'l & Comp. L. 145 (2006-2007).

4 Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime, 2000, available at http://www.osce.org/odihr/19223?download=true (May 24, 2017).

5 *Id.*

6 *Supra* note 11.

Article 8

Interim Measures Under the International Court of Justice

*Sunaina Mishra**

Introduction

Under article 41 of the Statute the Court has the power to indicate, if it considers Article 41 of the Statute of the International Court of Justice[3], provides thatif the circumstances so require due to a situation of urgency, any interim measures can be taken topreserve the respective rights of either party involved in a dispute before the ICJ. The Article further providesthat pending the final decision notice of the interim decisions shall be given to the parties andto the Security Council. However, the present Article raises more questions than it answers in its four line explanation.

It is not clear as towhat extent the jurisdictional link must exist for the Court to be able to exercisethe power laid down in Article 41. The matter has been settled by a constantcase-law of the Court to the effect that the Court need not to indicate provisional measures before it finally satisfy itself that it has jurisdiction on the merits of the case.[4] Yet it ought not to takethat such measures unlessthe provisions invoked by the applicant appear, prima facie, to afford a basis onwhich the jurisdiction of the Court might be founded.

This seems to be a satisfactory compromise between the extremes which would otherwise make Article 41 meaningless. The Court, if it is not sitting when the request is made, shall be convened forthwith for thepurpose of proceeding to a decision on the request as a matter of urgency. It is indeed the practice of the Court to decide very quickly on provisional measuresrequested by one of the parties.

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3 (1) The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
(2) Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council

Article 9

Need to Harmonize Public Policy Defence Under New York Convention

*Komal Kapoor**

1. Introduction

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards, hereinafter referred to as 'the New York Convention', is definitely the most momentous present-day instrument relating to international commercial arbitration. The specific reason to adopt the New York Convention was to better the legal framework provided by the Geneva Protocol and Geneva Convention for dealing with the international arbitral process. The first draft of the convention was presented before the United Nations Economic and Social Council (ECOSOC) by the International Chamber of Commerce (ICC) in 1953.[1]The ICC and the UN ECOSOC then prepared preliminary drafts of a revised convention. A three-week United Nations Conference on Commercial Arbitration was conducted which was attended by 45 states in the 1958.[2]This conference resulted in the framing of the New York Convention which is considered as the founding instruments of international arbitration.

The original drafts of the New York Convention had no focus upon the recognition and enforcement of international arbitration agreements.[3]The provisions relating to the recognition and enforcement of awards to international arbitration agreements were incorporated upon the proposal of the Dutch delegation.[4]

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1 Enforcing Arbitration Awards under the New York Convention Experience and Prospects, UNITED NATIONS PUBLICATION, 1999, at 3, available at https:// www.uncitral.org/pdf/english/texts/ arbitration/NY-conv/NYCDay-e.Pdf visited on 21..04.2017.

2 Sanders, *The History of the New York Convention*, in, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (A van den Berg ed. 1999) at 4.

3 BORN G., INTERNATIONAL COMMERCIAL ARBITRATION, KLUWER LAW INTERNATIONAL, 2009 at page 93.

4 BERG A. VAN DEN, THE NEW YORK ARBITRATION CONVENTION OF 1958 kluwer law international (1994) at 278.

Article 10

Institutional and Legal Framework of Indian Food Safety Standards

*Souma Brahma Sarkar**

1. Introduction

About 2500 years ago, Hippocrates (460–377 BC), the renowned father of modern medicine, conceptualized the relationship between the use of appropriate health foods and their therapeutic benefits and quoted, ***"Let food be thy medicine, andmedicine be thy food"***[1]. The fact that good quality food and healthy body are the two sides of the same coin is not a novel concept.

The food processing industry is one of the largest sectors in India in terms of production, growth, consumption and export which thereby increasing the risk of unsafe food quality. The food processing industry is widely recognized as the 'sunrise industry' in India and is of enormous significance for India's development because of the vital linkages and synergies that it promotes between the two pillars of the economy, namely industry and agriculture. As the country is moving towards the path of development, agricultural sector has switched from traditional level farming to commercial agriculture.

Food safety has emerged as an important global issue with international trade and public health implications. In response to the increasing number of food borne illnesses, governments all over the world are intensifying their efforts to improve food safety. The World Health Assembly adopted a resolution (WHA 53.15) in which, the World Health Organization (WHO) was asked

> *"to give greater emphasis on food safety...with the goal of developing suitable, integrated food safety systems for the reduction in health risk along the entire food chain, from primary producer to the consumer"*

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1 D. Bagchi,"Nutraceuticals and functional foods regulations in the United States and around the world". *Toxicology* 2006; 221(1):1-3.

Article 11

Foreign Arbitral Award : It's Recoginition and Enforcement

*Akansha Madan**

Introduction

"Conflict between partners in trade has existed ever since the beginning of trade itself and so have methods of resolution of such disputes. As a means of resolving disputes, arbitration has been used for centuries"[1]. There have been a number of attempts to define arbitration but this has always been considered problematic. However, the following definition might be taken for the purposes of this paper:

Arbitration is a mechanism for dispute resolution it is not only important in the domestic affairs nut also in the international economic relations. Arbitration has worked out as an effective mechanism because of the neutral party feature in it. According, to Tweeddale A and Tweeddale K

- Arbitration must have the following factors like there must be some kind of an agreement between the parties.
- The parties must be given an option to choose the arbitral panel.
- Dispute must have arisen between the parties and the arbitral panel must give a decision in the form of arbitral award. "This is usually put into writing and once the award is made the tribunal is functus officio in respect of the matters decided within the award and the issues are thereafter resjudiacta."[2]

A process like arbitration assumes special importance for a developing country like India. In the early 1990s, foreign exchange reserves were frighteningly low and foreign capital was only trickling in. In order to encourage more foreign investment,

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[1] David St John Sutton, John Kendall, Judith Gill, Russell on Arbitration, 21st ed., Sweet and Maxwell, London,1997, p.3.

[2] Wuraola O. Durosaro, The Role of Arbitration in International Commercial Disputes, Volume 1, Issue 3, March 2014, PP 1-8, https://www.arcjournals.org/pdfs/ijhsse/v1-i3/1.pdf visited on 17th November, 2015

Article 12

Intellectual Property Rights in India and International Law Conventions: Copyright

*Tulika Narbar**

Introduction

The Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) came into force at the end of seven years of negotiations from 1986 to 1993, as part of the Uruguay Round of Multilateral Trade Negotiations of the GATT. The TRIPS Agreement came into force on the 1st of January 1995, with the establishment of the World Trade Organization. The Trade Related Aspects of Intellectual Property Rights Agreement (1995) provides for minimum norms and standards in respect of the following categories of intellectual property rights: Copyrights and Related Rights (rights of performers, producers of phonograms and broadcasting organizations), Trademarks, Geographical Indications, Industrial Designs, Patents, Layout Designs of Integrated Circuits and the protection of Undisclosed Information. The Trade Related Aspects of Intellectual Property Rights Agreement under Article 2 (Intellectual Property Conventions) obligates a compliance with Articles 1-12 and Article 19 of the Paris Convention for the Protection of Intellectual Property (1967) and provides that nothing in the given Agreement shall derogate from the existing obligations prescribed under the Paris Convention, the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (Rome Convention) (1961), the Berne Convention for the Protection of Literary and Artistic Works (1971) and the Treaty on Intellectual Property in Respect of Integrated Circuits (1989).

The aim of the study is first to compare the Trade Related Aspects of Intellectual Property Rights agreement with the Paris Convention, Rome Convention, Berne Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits and then with the provisions of Indian Law provided.

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Article 13

International Court of Justice: Evolution, Establishment and Jurisdiction

*Gunjan Agrahari**

EVOLUTION OF ICJ[1]

Need For International Dispute Resolution Organisations

The International Court, which is now expected to play such a vital role in the preservation and reaffirmation of peace, was not created in day. It was constituted after much hesitation and delay as the greatest obstacles in its' way was the false notions of sovereignty and the complete independence of states. After the dark ages, period of renaissance and the decline of the Holy Roman Empire, a type of state, in principal completely independent of any outer factors, was born. The notion of state sovereignty, or of the fullest independent power, was the source of theories which sanctioned the anarchy in international life. The ideas of *bellum justum* (lawful use of force) and *bellum injustum* (unlawful use of force) were recognized and the states were considered entitled to decide, without any restrictions, in whatsoever manner they were to defend their interests including the possibility of having recourse to war. Every state was permitted to be a Judge in its own case no outer factors, states, or organizations of nations, could impose on a state their will or decision.[2]

Though settlements were not binding upon them, yet from earliest times, they are founded on diplomatic procedures for the settlement of disputes between states or peoples or governments. In western history three principal forms of diplomatic procedure identified themselves for this purpose, namely, negotiations, good offices and mediation. Firstly if a disagreement arose between the parties, usually they tried first to settle the matter by direct *negotiations*. If no successful result could be achieved, third parties

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[1] "Compulsory Jurisdiction of the International Court of Justice" by RP. Anand Revised second edition 2008.

[2] Illinois Law Review (1952-53), pp. 21 ff.

Article 14

Prostitution Beyond Binaries

*Avantika Tiwari**

1. Introduction

Prostitution/ sex work is a perfect illustration of feminist ambivalences around the issue of sexuality. Diverse agendas about gender equality, the regulation of sexuality, personal self-determination, state protectionism, public nuisance and socio-economic disparity have come together in debates on prostitution policy – often fusing and/or clashing with one another in complex, unpredictable and controversial ways.[1] Feminists are deeply divided and can be broadly categorized as abolitionists or sex work advocates. The essence of the ideological gap between the two factions is the relationship between sex-work and consent. The construction of consent hasbeen perennially the most problematic enquiry in feminist scholarship. The former assert that prostitution is inherently degrading and 'reduces the women to a body'[2] and therefore consent becomes extraneous. As the institution is seen through the imagery of violence therefore the most apparent response is in from of crime control policy. Whereas the sex work advocates perceive it as work thereby attributing some form of agency to the women who choose the profession. They consider prostitution to be subversive to normative sexuality which is monogamous. These feminists advocate for labour rights.

Drawing from the discourse around prostitution the state policy responses to it have been conceptualized aslegalization or regulation, complete criminalization, partial criminalization and decriminalization. The theorization of sex work as labour has led to the legalization framework whereby the state proactively regulates the sex market through "zoning restrictions, licensing requirements, and public health measures such as mandatory health check"[3]. Generally in this regime all forms of sex work whether

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1 Vanessa .E. Munro (ed.) *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Routledge, 2016)

2 Kathleen Barry, *The Prostitution of Sexuality* (NYU Press, New York, 1995)

3 Janie A. Chuang, " Rescuing Trafficking from Ideological Capture: Prostitution Reforms and Anti Trafficking Law and Policy" 148 *University of Pennsylvania Law Review* 1655-1728 (2010)

Article 15

The Efficacy of International Law to Fight Against Piracy: Nature & Extent

*Kush Kalra**

Introduction

Pirates are enemies of all mankind *(bastis bumani generis)*. They are criminal groups which have long been present in the Mediterranean Sea, northern Europe, the Caribbean Sea, the East China Sea, Southeast Asia, Africa, and other parts of the world. The acts of piracy[3] off the coast of Somalia in recent years, however, have been unprecedented in terms of frequency and the extent of damages, and there has never been such a strong awareness of the need for international efforts to combat piracy. According to the International Maritime Bureau (IMB) of the International Chamber of Commerce (ICC), the number of cases of piracy off the coast of Somalia and in the Gulf of Aden grew rapidly in 2005 to 45 and rose to 196 in 2009. The latter number accounts for about half of the piracy cases worldwide during that period (406). The number of acts of piracy in the Gulf of Aden has recently increased sharply (116 in 2009).[4] For almost 20 years, Somalia has lacked a central government having effective control over the entire country, and many parts of the State are in a state of anarchy. The economic situation has been worsening, and young people who are unable to make a living through normal business activities choose to pursue piracy. Piracy has been generated by the conditions pertaining in a failed State, and coastal states are unable to effectively combat it. Is the existing framework of international law effective to address the piracy off the coast of Somalia?

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[3] The word "piracy" is used in different meanings depending on contexts. For example, Article 101 of the United Convention on the Law of the Sea gives its definition of "piracy," which primarily refers to acts on the high seas. Relevant Security Council Resolutions such as 1816 follow this definition and the similar acts in the territorial sea are referred to as "armed robbery." Each domestic law has its own definition or interpretation of "piracy." In the present article, "piracy" is used in its general term which does not exclude "armed robbery" unless otherwise made clear from the context.

[4] ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships, Annual Report 2009* (January, 2010), pp. 5-6. Figures for the number of attacks and attempted attacks by pirates reflected in the statistics of the IMB are only those confirmed by the IMB. It can reasonably be assumed that the actual number of attacks is larger than these figures indicate.

"Law is the essential foundation of stability and order both within societies and in international relations."

J. William Fullbright

This book throws a spotlight on contemporary issues under Indian law and their relevance to the international body of rules and principles. It is an extensive foray into questions of international relations, international dispute resolution, human rights, and commercial law.
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