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INTERNATIONAL LAW

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I INTRODUCTION

THE FOCUS of this survey has been to examine the application of international law by the Supreme Court and high courts in some important cases decided by the courts in the year 2014. The courts, through various landmark decisions, established that courts are not averse to applying international law where courts found the provisions of international treaties to be consistent with the Indian Constitution. The important decisions discussed below will establish that reference to relevant international treaties by the courts has increased significantly over the years and that stands true as well in the year 2014. It is pertinent to highlight here that the approach of the Indian judiciary in application of international law may be considered positive and proactive. The judgements clearly show that the judges are not hesitant to apply international law in deciding cases whenever it is necessary.

II SUPREME COURT

Human rights

The Supreme Court of India, in *Shatrughan Chauhan* v. *Union of India*,[1] expanded the ambit of article 21 of the Indian Constitution by commuting the death sentence of 15 individuals to life imprisonment on the ground of existence of supervening circumstances and held that inordinate, unexplained delay in the execution of death sentence would be violative of article 21 of the Constitution. The court clubbed 12 writ petitions, which were filed under articles 32, either by the convicts, who were awarded death sentence or by their family members or People's Union for Democratic Rights (PUDR). All these writ petitions were filed after rejection of mercy petitions by the Governor and President of India. In all the petitions the main prayer was relating to the issuance of a writ of declaration declaring that execution of sentences of death pursuant to the rejection of the mercy petitions by the President of India is unconstitutional and to set aside the death sentence imposed upon them by commuting the same to imprisonment for life.

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1 (2014) 3 SCC 1.

The petitioner claimed that the impugned executive orders of rejection of mercy petitions against 15 accused were passed without considering the supervening events which were crucial. The legal basis for supervening circumstances is that article 21 is available to every prisoner until his/her last breath and the court will protect that right even if the noose is being tied on the condemned prisoner's neck. The court had examined the supervening circumstances, for commutation of death sentence to life imprisonment, as asserted by the petitioners. The supervening circumstances mentioned by petitioners were as follows; (i) delay (ii) insanity (iii) solitary confinement (iv) judgments declared *per incuriam* and (v) procedural delays.

The court held that an unduly long delay in execution of the death sentence will entitle the condemned prisoner to approach this court under article 32. The concept of supervening events emerged from the jurisprudence set out in *T.V. Vatheeswaran* v. *State of Tamil Nadu* [2] and *Triveniben* v. *State of Gujarat.*[3] The court held that undue, inordinate and unexplained delay in execution of the death sentence amounts to torture which indeed is in violation of article 21 and is a ground for commutation of the death sentence. The court also held that unexplained delay as one of the grounds for commutation of a death sentence into life imprisonment is applicable in all types of cases including the offences of TADA. Thus, the court held that the ration laid down in *Devneder Pal Singh Bhullar* v. *State of (NCT) Delhi* [4] is *per incuriam.* The court also decided that execution of a death sentence should be carried out only after 14 days after rejection of the mercy plea. It also ruled that convicts who were given a death sentence must be informed about the rejection of their mercy petitions and should be given a chance to meet their family members before they are executed. Another ground for commuting a death sentence to life imprisonment for long delay in deciding mercy petitions which has caused onset of mental illness and in view of this execution of a death sentence will be inhuman and against well established canons of human rights. The court held that insanity/mental illness/schizophrenia is a crucial supervening circumstance and sufficient ground for commuting a death sentence to life imprisonment. The decision of the court in this case, once again, strengthened its commitment to protection of fundamental rights.

The Supreme Court in *National Legal Services Authority* v. *Union of India* [5] highlighted concerns in relation to legal gender recognition of transgender people, and whether the lack of legal measures to cater for the needs of persons not identifying clearly as male or female contradicts the Constitution. Pre-existing Indian law only recognised the binary genders of male and female, and lacked any provision with regard to the rights of transgender people, which advocates in India have also defined as (third gender). The gender of a person has been

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2 (1983) 2 SCC 68.

3 (1988) 4 SCC 574.

4 (2013) 6 SCC 195.

5 AIR 2014 SC 1863.

assigned at birth and would determine his or her rights in relation to marriage, adoption, inheritance, succession, taxation and welfare. Due to the absence of legislation protecting transgender people, the community faces discrimination in various areas of life.

The petition sought several directions from the court, including granting of equal rights and protection to transgender persons; inclusion of a third category in recording one's sex/gender in identity documents like the election card, passport, driving license and ration card; and for admission in educational institutions, hospitals, amongst others. The Supreme Court delivered a historic judgment recognising transsexuals as a third gender and upholding their rights to equality (article 14), non-discrimination (article 15), expression (article 19 (1) (a) and autonomy (article 21). Transgender (TG) is described as a term of persons whose gender identity, gender expression or behaviour does not conform to their biological sex. Transgender also includes person who wish to undergo Sex Reassignment Surgery (SRS) to align their biological sex with their gender identity in order to become male or female. The court addressed this question broadly on two categories, *firstly*, where TG may be treated as a third gender, and *secondly*, where they may decide their gender within the male/female binary regardless of their biological sex. In this case the court took a bold step towards course correcting. The court held that, when it comes to violation of minority rights, constitutional courts cannot be a mute spectator to the violation and recognised TG as a third gender. The court held that recognition of transgender as a third gender is not a social or medical issue but a human rights issue.

The court took note of the role of the United Nations (UN) in promotion and protection of human rights of sexual minorities and transgender. In this context, reference to relevant international human rights, especially Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICCPR) proved that the Indian Judiciary is effectively using international law whenever its application is required. The court also referred the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity. The court also looked into other jurisdictions to find out how the issue of transgender identity is addressed by the respective courts. To begin with, it referred to the infamous *Corbett* v. *Corbett* [6] with its complete emphasis on biological sex, to New Zealand's standard requiring surgical and medical procedures to effect a transformation in *Attorney-General* v. *Otahuhu Family Court* [7]. The court rejects any basis of gender in biology, instead arguing that the test to be applied is a psychological one: "psychological factor and thinking of transsexual has to be given primacy."

The various international law provisions used in this case are the ICCPR article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or

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6 (1970) 2 All E R 33.

7 (1995) 1 NZLR 603.

degrading treatment), article 16 (recognition before the law), article 17 (right to private and family life); UDHR article 6 (right to life); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) article 2, Yogyakarta Principles, Principle 1 (universal enjoyment of human rights), Principle 2 (rights to equality and non-discrimination), Principle 3 (right to recognition before the law), Principle 4 (right to life), Principle 6 (right to privacy), Principle 9 (right to treatment with humanity while in detention), Principle 18 (protection from medical abuses).The court also referred to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its articles 11 (discrimination in employment) and 24 (commitment of State parties); Convention for Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights), article 8 (right to respect for private and family life) and 14 (non-discrimination) & the Vienna Convention on the Law of Treaties articles 31, 32 (Interpretation of International Conventions).

The court observed that, by recognising TG as a third gender, they will be able to enjoy human rights of they were deprived for want of this recognition. By recognising the third gender and most importantly, an individual's choice to decide one's own gender, the Supreme Court has recognized in theory what has been denied in practice: the equal rights of the transgender community as citizens of India.

In *People's Union for Civil Liberties* v. *State of Maharashtra*,[8] People's Union for Civil Liberties (PUCL) filed three special leave petitions (SLP) against the judgment of Bombay High Court in the year 1999 on the ground that relief granted by the court was not adequate. PUCL had questioned the genuineness of nearly 99 encounters that took place between the Mumbai Police and alleged criminals resulting in death of about 135 person between 1995 and 1997. In this case, the court issued 16 point guidelines to be followed for thorough, effective and independent investigation into police encounters.

Article 21 of the Constitution provides "no person shall be deprived of his life or personal liberty except according to procedure established by law." The court emphasised that article 21 confers a sacred and cherished right under the Constitution which cannot be violated, except according to procedure established by law. Article 21 guarantees personal liberty to every single person in the country which includes the right to live with human dignity. In addition to article 21 and other provisions of the Constitution, a number of statutory provisions also seek to protect personal liberty, dignity and other basic human rights. However, despite these safeguards the cases of death in police encounters keep on happening. The court also referred to a number of cases to highlight that killings in police encounter required thorough independent investigation. It is pertinent here to highlight the observations made by the court in *Om Prakash* v. *State of Jharkhand*.[9] The duty of a police officer is not to kill the accused merely on the

8 (2014)10 SCC 635.

9 (2012)12 SCC 72.

ground that he was a dreaded criminal and danger to society. In such a situation the police should arrest the accused and put him/her up for trial. There are cases where the police is performing their duty and they are attacked and killed. In such situations, police have to do their legal duty of arresting the criminal and, at the same time, has to protect them.

In some countries when a police officer is involved in a shooting, there are strict guidelines and procedures in place to ensure that what has happened is thoroughly investigated. Unfortunately, in India, we do not have structured guidelines in place, though from time to time the National Human Rights Commission of India (NHRC) has issued guidelines which need to be followed by the police. The court felt strongly about this and laid down certain guidelines which would help in bringing to justice the perpetrators of the crime who take law in their own hands.

The couralso cited international instruments, namely, UDHR, the United Nations Code of Conduct for Law Enforcement Officials and Model Protocol for a Legal Investigation of Extra- Legal, Arbitrary and Summary Executions (Minnesota Protocol). All these instruments provide certain procedures which need to be adhered by the state.

While framing the 16 guidelines the court took note of the directions issued by the Bombay High Court, guidelines issued by NHRC, suggestions of the – PUCL, *amicus curiae* and the affidavits filed by the Union of India, state governments and the union territories. The court made it clear that the guidelines must be observed in all cases of death and grievous injury in police encounters by treating them as law declared under article 141 of the Constitution. By framing these guidelines the Supreme Court of India has shown its deep commitment to promotion and protection of human rights.

In *Assam Sanmilita Mahasangha* v. *Union of India*[10] the Supreme Court touched upon various issues of pressing importance related to the problem of illegal immigration in particular from the Indo-Bangladesh border with special emphasis on the problems faced by the State of Assam. Deliberating upon the issue that section 6A of the Citizenship (Amendment) Act, 1985 cannot be challenged now, as being barred by "doctrine of laches" or inordinate delay. However, the court held that with respect to petitioners' appeal under articles 21 to 29 of the Constitution, on behalf of the whole class of tribal and non-tribal of Assam cannot be turned down on grounds of delay keeping in mind the fact that this violation is existing and doing so would amount to the court evading its constitutional duties. The court requested the chief justice for constitution of an appropriate constitutional bench under article 145(3) of the Constitution and framed 13 questions for consideration of the said bench, arising out of the alleged validity of section 6A of the Citizenship Act, 1955.

In the present appeal, filed against the backdrop of large scale rioting which occurred in 2012-2014 in Assam, validity of section 6A of Citizenship Act 1955,

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10 AIR 2015 SC 783.

inserted in 1985 pursuant to giving effect to the provisions of "Assam Accord", was challenged, among other prayers, as being arbitrary and violative of the provisions of the Constitution of India.

On the issue the laid-back attitude of both the central and the state government regarding implementation of the provisions of the Assam Accord, the court highlighted the pronouncement of *Sarbananda Sonowal* v. *Union of India*[11] and regretted that while some parts of the accord have been wholly implemented, many of them have yet to be implemented. In furtherance of the issue the court issued direction to central and state government under article 142 of the Constitution for comprehensively fencing the Indo-Bangladesh border in its entirety, increasing the patrolling along the border, setting up of additional foreign tribunals and accelerating the work of selecting officers for these tribunals by Guahati High Court and lastly it directed the Central Government to work out a mechanism with Government of Bangladesh for deportation of illegal migrants. It further said that the Court would oversee the execution of the orders after 3 months and reserved the matter for hearing for March 2015.

The judgment in *Md. Jamiluddin Nasir* v. *State of West Bengal* [12] disposes of the appeal of the convicts in the case relating to the attack on the American Centre at Kolkata in 2002, in which five police personnel lost their lives. The Indian government as a member of the UN is duty bound to provide necessary security to the foreign consulate officers located in this country by virtue of international treaties. The Supreme Court set aside the death sentence imposed under the Arms Act,1959 and modified the death sentence imposed for offences under sections 121, 121A, 122, 120B, 302, 333, 427 and 21 Indian Penal Code, 1860 (hereinafter IPC) as well as sections 25(1B) (a) and 27 of the Arms Act, 1959 to one of life sentence, and in the case of appellant Aftab, till the end of his life, and in the case of appellant Nazir, for 30 years without remission. The court distinguished this case from other terrorism-related cases where the death penalty was imposed, and justified a lesser sentence on the appellants.

The right to life has acquired the status of *jus cogens* under international law and thus cannot be derogated from even in time of emergency. By the 44th Constitutional amendment of 1978, Article 21 cannot be suspended even during the proclamation of emergency under article 359.

Therefore the court held that section 27(3) of the Arms Act, 1959 is against the fundamental tenets of our constitutional law as developed by this court. The apex court declared that section 27(3) of the Arms Act, 1959 is *ultra vires* and declared it void.

The Supreme Court of India in, *In Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News* [13] took *suo motu* action on the basis of a news item that appeared in the Business and Financial

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11 (2005) 5 SCC 665.

12 AIR 2014 SC 2587.

13 AIR 2014 SC 2816.

News on 23.01.14 relating to the gang-rape of a 20 year old woman of Subalpur Village in the Birbhum district of the State of West Bengal. The girl was punished by a community panchayat for having a relationship with a man from a different community.

In the final judgment the court stated that all hospitals, public or private, whether run by the Central Government, the state government, local bodies or any other person, are statutorily obligated under section 357C to provide the first aid or medical treatment, free of cost, to the victims of any offence covered under sections 326 A, 376, 376 A, 376 B, 376 C, 376 D or section 376 E of the IPC. The court also awarded compensation of Rs. 5 lakhs to be paid to the victim within a month for rehabilitation.

The court concluded by stating that crimes against women are not only in contravention of domestic laws, but are also a direct breach of the obligations under international law. India being party of various international conventions and treaties has an obligation to ensure the protection of women from any kind of discrimination. Unfortunately, women of all classes are still suffering from discrimination even in contemporary society. It would be wrong to blame only the attitude of the people. Such crimes can certainly be prevented if the state police machinery work in a more organized and dedicated manner. Thus, the state machinery is implored to work in harmony with each other to safeguard the rights of women. This judgment has sent a signal to the State that if they fail or procrastinate to conduct proper investigation in serious crimes, in such cases judiciary will not remain a silent spectator, the court will move the extra mile if question arises to protect the rights of the individuals.

In *Parvasi Bhalai Sangathan* v. *Union of India* [14] a writ petition was filed by an organisation which works for the welfare of inter-state migrants, requesting the court to issue direction in remedy the concerns that have arisen because of "hate speeches". The petitioners' lawyer contended that hate speeches delivered by politicians, religious leaders are mainly based on religion, caste, region or ethnicity, which is contrary to the constitutional idea of fraternity and violates various provisions of the Constitution which include articles 14, 15, 19 and 21. The existing legal framework is not adequate to cope with the menace of hate speeches. Article 20(2) of the ICCPR restricts advocacy of national, racial or religious hatred which may result in incitement for discrimination, hostility or violence. Similar provisions are also available under articles 4 and 6 of the CEDAW, which prohibits the elements of hate speech and mandates the member states to make a law prohibiting any kind of hate speech through a suitable framework of law.

The court, after analysing various statutory provisions, held that effective remedy is available for prosecution of those who indulges in hate speeches with the idea to disturb the communal harmony and peace of the society.

Thus, it is evident that the legislature had already provided effective remedy for prosecution of those who are responsible for hate speeches. The court has

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14 AIR 2014 SC 1591.

continuously observed that the Constitution clearly provides for separation of powers and the court merely applies the law enacted by the legislature. Though, the court has issued directions in cases where a total vacuum in law was found by and continuation of such situation would have led to complete denial of effective enforcement of human rights law.

In this case, the court declined to issue any directions which are incapable of enforcement. Interestingly, the court recognised the role of the NHRC to initiate *suo- motu* proceedings against those who tried to divide society by delivering hate speeches.

In *Association of Unified Tele Services Providers* v. *Union of India*,[15] private service-providers entered into license agreements with the Department of Telecommunications (DoT). However, because of the special powers of the government with respect to spectrum, service-providers had to accordingly maintain records to account for the shared revenue and extra surcharges payable to the government. When the TRAI (Telecom Regulatory Authority of India), on behalf of the Comptroller and Auditor General (CAG) called upon the service-providers (appellants) to furnish accounts for audit, the service provider contested this request, arguing that the DoT had already undertaken a separate audit, so it would be costly for the company to suffer another. Upon insistence and threat of sanction by TRAI, the service-providers filed a writ petition before the Delhi High Court of Delhi and subsequently came in appeal to this court.

The Supreme Court held that this case deals with a valuable natural resource (spectrum) and applied the public trust doctrine which states that the government is the legal 'trustee' of the resource for the people and so uses it for public good in a reasonable and fair way, keeping in mind the larger good of the public. The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a customary international norm by the International Court of Justice in the case of *Democratic Republic of Congo* v. *Uganda*:[16]

> Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to the States as per international norms.

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15 AIR 2014 SC 1984.

16 I.C.J. Reports 2005 at 168.

Therefore, in consonance with the public-trust doctrine, the court expanded the powers of the CAG to incorporate the auditing of private suppliers since these were granted license only in order to promote the original objective of equitable distribution of resources.

Intellectual Property Rights

In *Bharat Bhogilal Patel* v. *Union of India* [17] a writ petition was filed which stated to assail the territorial jurisdiction of the court. This writ petition was assailing the order passed by the Intellectual Property Appellate Board (IPAB). The respondent filed patent applications on 21.09.98 in respect of 'An Improved Laser Marking and Engraving Machine' and 'A Process of Manufacturing Engraved Design Articles on Metals or Non-Metals' under the Patents Act, 1970 as amended by the Patents (Amendment) Act, 2002. Section 159 of the Patents Act,1970 Rule 4 specifies the 'appropriate office' to be the head office of the patent office or the branch office, as the case may be, within whose territorial limits the applicant normally resides or has his domicile or a place of business or the place from where the invention actually originated.

This case actually deals with the effect of the 42nd Constitutional Amendment of the introduction of clause (2) to article 226 of the Constitution, which analyses the concept of cause of action arising either wholly or in part. Here the principle of *forum non conveniens* originating as a principle of international law, concerned with Comity of Nations, was noticed and its non-application to domestic courts in which jurisdiction is vested by law.

The remedy under article 226 is discretionary, it was held by the full bench earlier that the court may refuse to exercise jurisdiction when jurisdiction has been invoked mala fide. However, the concept of *forum conveniens* could come into play. While setting aside the earlier view, it was concluded that mala fide manner of invoking jurisdiction would be too narrow a compass as the exercise of power under article 226 of the Constitution is discretionary.

On an analysis of the aforesaid judgments, the principles which emerge can be summarized as follows:

i) In view of the 42nd Constitutional Amendment and the wording of clause (2) of article 226 of the Constitution of India, even a part of cause of action would confer jurisdiction on the court.

ii) The choice would be normally of the litigant approaching the court as to where he would initiate the litigation if there were two high courts which would have jurisdiction.

iii) Merely because the original order is passed within the jurisdiction of another court, it would not exclude the jurisdiction of the court which is the situs of the appellate authority.

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17 2014 (6) CTC 285.

iv) The principles *of forum conveniens*, though applicable to international law as a principle of Comity of Nations, would apply to the discretionary remedy under article 226 of the Constitution of India.

In *Duroflex Pvt. Limited* v. *Duro flex Sittings System*[18] M/s. Duro Flex Pvt. Ltd., the appellant, is a company incorporated and registered as a private limited company under the Companies Act, 1956 and engaged in the business of manufacturing and marketing Rubberised Coir Products such as Mattresses, Pillows, Cushioning materials and Air Filters since 01.10.81 under the brand name 'DUROFLEX'. It is the case of the appellant that initially the business was carried on under the name of 'M/s. Duroflex Coir Industries Private Limited', but that name was changed on 08.03.86 to "M/s. Duroflex Limited" and thereafter on 29.0901 to the present entity. The trade mark was registered on 10.0283. The Trade Mark is stated to have been published in the Trade Mark Journal dated 16.08.87 and on registration, the registration certificate was issued on 12.08.88.

The appellant alleges that the respondent dishonestly adopted the trade mark 'DURO FLEXI PUFF', which came to the knowledge of the appellant in November, 2005. The Trade Mark is alleged to be deceptively similar and identical to the registered trade mark of the appellant with only the suffix 'PUFF' being added. The appellant thus sent a legal notice, but the respondent refused to oblige and the result was that the appellant filed a suit for perpetual injunction seeking a decree against the respondent, as also to deliver, for destruction and a preliminary decree for rendering accounts of profits.

The appellant has an office/depot and is working for gain in Chennai from where it started manufacturing the product under the Trade Mark 'DUROFLEX', the certificate of registration has been issued at Chennai, from where the appellant issued a legal notice and the reply of the respondent was received, declining to discontinue the use of the trade mark. The counsel stated that, according to private international law, the *situs* of certain shares (which are movable) is the place where the registered office of the company is situated, and it is the place where the shares can be effectively dealt with. In case of immovable property the *situs* of the property is the law of that place which would govern the rise of any issue.

The Supreme Court thus applied the artificial legal fiction which was long established in common law principles in the case of shares, to determine its location for the purpose of taxation. This fiction was created for the purpose of taxation alone as the law of taxation was based on the location of assets. The conclusion of this case was determined by the principles of *forum conveniens*, though applicable to the international law as a principle of Comity of Nations, would apply to the discretionary remedy under article 226 of the Constitution of India.

Directions were sought from the Government of India, in *Gaurav Kumar Bansal* v. *Union of India*[19] to intervene and expedite release of Indian seamen

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18 AIR 2015 Mad 30.

19 (2015) 2 SCC 130.

held hostages by the Somalian Pirates in the international waters on 29.03.10, 02.03.12 and 10.05.12. It was also requested to direct the government to frame anti-piracy guidelines. Piracy is illegal as per United Nations Convention on the Law of the Sea, 1982 (UNCLOS). It is the fundamental duty of the Member States to cooperate in preventing incidents of piracy. The International Maritime Organisation (IMO) is a UN specialised agency for safety of shipping and prevention of marine pollution by ships.

The Security Council of the UN established, a Contract Group on Piracy off the Coast of Somalia (CGPCS) in January, 2009 to coordinate anti-piracy efforts of the International Community. India is a founder-member of the CGPCS and has been fully engaged in the efforts to share information, coordinate actions of the navies in combating piracy in the Gulf of Aden, raising public and merchant marine awareness and examining legal issues with respect to apprehended pirates. The Indian government has called for better coordination of international efforts for escorting merchant ships and patrolling in the region, preferably under the aegis of the UN. India has also become a member of International Contact Group (ICG) on Somalia in 2013.

India is party to the UNCLOS which defines piracy and pirates acts (article101). Accordingly, the Piracy Bill 2012 was prepared by the Ministry of External Affairs in consultation with the Ministries of Shipping, Defence, Home Affairs and Law & Justice and tabled, with the approval of the cabinet, in the Parliament.

The petitioner counsel urged the court to issue directions to the Government of India to take up the matter at the international level and to secure the release of Indian citizens who have been held captive by the pirates. Counsel for the Union of India submitted that the issue of coordination at international level with foreign countries and international bodies has to be left to the wisdom of experts in the government. It is not a case where the State has not shown any concern for its citizens, but where an unfortunate situation has come about in spite of serious efforts. It does appear that pirates operating from Somalia have become a serious menace to the safety of maritime traffic in Gulf of Aden and Western Arabian Sea and three incidents involving Indian citizens are part of a series of such events. Handling of the situation requires expertise and continuous efforts. While safety and protection of the lives and liberty of Indian citizens is also the concern of this court, the issue has to be dealt with at the level of the executive.

From the affidavit filed on behalf of the Union of India, it is evident that steps have been taken at various levels, though without complete success. The court issued only a direction that the matter may be periodically reviewed at the appropriate level and a nodal officer may be designated who may continue to coordinate and oversee and brief families of the victims about the progress made by the government in releasing of those who were abducted by the Somalian pirates.

The court in *Charu Khurana* v. *Union of India*[20] held that applications from female make-up artists for membership to the Cine Costume Make-up Artists and Hair Dressers Association (Association) could not be denied by the association only on the grounds that they were women. In this case the court has extensively referred to international human rights instruments which deal with empowerment of women and elimination of discrimination against women. It was rightly pointed out in the judgment that the United Nations Convention on Elimination of All Forms of Discrimination is considered the international bill of women's rights and states parties to this instrument have an obligation to take necessary steps for elimination of discrimination against women, if any, existing in the state. India being party to this convention has a similar obligation. The court held that discrimination based on gender is in clear violation of article 14 of the Constitution. The court also delved into the question which arose from this petition whether the female artists, who are eligible, can be deprived to work in the film industry as a make-up man and only be permitted to work as hair dressers. The court held that denial of "her capacity to earn her livelihood which affects her individual dignity" and thus a violation of article 21.

Environment

In *Gulf Goans Hotels Company Ltd.* v. *Union of India*[21] allegedly illegal constructions raised by the appellants were under consideration, the Gulf Goans Hotels, Goa where the court has noted that:[22]

> The constructions raised by the appellants are not *per se* illegal in the conventional sense. They are not without permission and sanction of the competent authority. What has been alleged by the State and has been approved by the High Court is that such constructions are in derogation of the environmental guidelines in force warranting demolition of the same as a step to safeguard the environment of the beaches in Goa.

During the deliberations, the court observed that the Stockholm declaration of 1972 to which India is a party is the foundation of the state's claim that the environmental guidelines in question, being in implementation of India's international commitments. The said guidelines are in conformity with India's commitment to international values in the matter of preservation of the pristine purity of sea beaches and to prevent its ecological degradation. Such commitment to an established feature of international law stands engrafted in the municipal laws of the country by incorporation.

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20 (2015) 1 SCC 192.

21 (2014) 10 SCC 673.

22 *Id.* at 679.

The Parliament, though fully aware of the resolutions and decisions taken in the Stockholm Conference as well as the commitments made by the India as a signatory thereto, did not consider it necessary to enact a comprehensive law to protect and safeguard ecology and environment until enactment of the Environment (Protection) Act, 1986 with effect from 18.011.86. In *Vellore Citizen's Welfare Forum* v. *Union of India*,[23] "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of customary international law though its salient features are yet to be finalised by international law jurists.

It has been further held that there can be no question that nations must march with the international community and municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national state and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield.

The principal question which arose for consideration in *State of (NCT of Delhi)* v. *Jaysukh Bavanji Shingalia* [24] is whether the provisions of Mines and Minerals (Development and Regulation) Act, 1957 explicitly or impliedly excludes the provisions of the IPC when the act of an accused is an offence both under the IPC and under the provisions of Mines and Minerals (Development and Regulation) Act, 1957.

The court while balancing the conservation of natural resources *vis-à-vis* urban development, in the case of *Intellectuals Forum* v. *State of A P* [25] observed as follows:[26]

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23 AIR 1996 SC 2715.

24 AIR 2015 SC 75.

25 (2006) 3 SCC 549.

26 *Id.* at 572.

> The responsibility of the State to protect the environment is now a well-accepted notion in all countries. It is this notion that, in international law, gave rise to the principle of "State responsibility" for pollution emanating within one's own territories in the famous *Corfu Channel* case.[27] This responsibility is clearly enunciated in the United Nations Conference on the Human Environment, Stockholm 1972 also known as the Stockholm Declaration. The relevant clause of this declaration in the present context is Paragraph 2, which states, "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Thus, there is no iota of doubt about the fact that there is a responsibility bestowed upon the government to protect and preserve the tanks, which are an important part of the environment of the area.

III HIGH COURTS

The High Court of Madras in *Gnanaprakasam* v. *The Government of Tamil Nadu*[28] styled as Public Interest Litigation, was filed by a Sri Lankan Tamil refugee who has been living in India for the last 25 years. His children have been studying in state government schools, but their applications for engineering admissions were rejected on the ground that they are not Indian citizens. The prayer made was that Tamil refugees should be entitled to driving licences, bank accounts, movable articles, educational rights and immovable properties. The petitioner invoked article 21 of the Constitution of India and the international convention/treaty, and also the doctrine of legitimate expectations.

The fact that India is not a signatory to the UN Refugee Convention of 1951 and 1967 Protocol was discussed. However, the Government of India has taken various steps to look after Tamil refugees from Sri Lanka.

It was specifically stated that the Constitution of India is applicable only to Indian citizens and not to foreigners settled as refugees, by relying on the judgment of the Supreme Court in *Louis De Raedt* v. *Union of India.*[29] The Government of India conceded the right of a foreigner under article 21 of the Constitution to life and liberty, but that would not include the right to reside and settle in this country. In view of the peculiar situation, Sri Lankan refugees are being provided support.

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27 I.C.J. Reports 1949 at 244.

28 AIR 2015 Mad 65.

29 (1991) 3 SCC 554.

The petition in *Abdul Hamid* v. *State of Rajasthan*[30] was filed before the High Court of Rajasthan against the judgment delivered by the trial court which convicted the appellants for offences punishable under sections 121, 121-A, 122, 123 Ranbir Penal Code read with section 14 of the Foreigners Act, 1946 and section 25 read with section 7 of the Arms Act, 1959. In this case it was stated that if any person is found conspiring to commit an offence, he would be punished under section 121 of the IPC. Section 121 attracts punishment under section 121A and the maximum sentence could be imprisonment for life. Section 121A clarifies that it is not necessary that any act or illegal omission should take place pursuant to the conspiracy, in order to constitute the said offence. War, terrorism and violent acts to overawe the established government have many things in common. It is not too easy to distinguish them, but one thing is certain, the concept of war imbedded in section 121 is not to be understood in the international law sense of inter-country war involving military operations by and between two or more hostile countries.

The court further held:[31]

> There are four major constituent elements in Oppenheim's view of War: (i) there has to be a contention between at least two States (ii) the use of the armed forces of those States is required, (iii) the purpose must be overpowering the enemy (as well as the imposition of peace on the victor's terms); and it may be implied, particularly from the words 'each other' and (iv) both parties are expected to have symmetrical, although diametrically opposed, goals.

According to Mr Dinstein, the definition of 'war'[32]

> War is a hostile interaction between two or more States, either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which must be comprehensive on the part of at least one party to the conflict.

In international law there exist allied concepts of undeclared war, limited war, warlike situation-the nuances of which it is not necessary to unravel. The court observed that, though the accused persons were armed with sophisticated weapons, they decided not to fire on the patrolling persons of the Indian Army, and opted to surrender to patrolling team. No document or other material was recovered from them to arrive at the conclusion that they in any manner were

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30 2015 Cri L J 669.

31 *Id.* at 700.

32 *Ibid.*

intending to lodge any kind of war against the Government of India. Thus, the court held that the accused could have been convicted for an offence punishable under section 123 Ranbir Penal Code, but not for the offences punishable under sections 121, 121-A and 122 of the Ranbir Penal Code. The court further directed that since the accused have already served the sentence awarded for the offence under section 123 Ranbir Penal Code, they deserved to be deported to their home country *i.e.,* Afghanistan. This case is very important on point of international law because it looked into the elements of war and to reach an effective conclusion it referred to the definition of war given by the international jurists.

The High Court of Punjab and Haryana in *Abdul Latif Adam Momin* v. *Union of India*[33] turned down the CBI's plea for a death sentence to be given to Abdul Latif Adam Momin, one of the conspirators in the sensational hijacking of Indian Airlines Flight IC-814 to Kandahar in December 1999. On account of his prolonged custody the court sentenced Momin to life imprisonment. The court exonerated the other two accused, Bhupal Man Damai alias Yusuf Nepali and Dilip Kumar Bhujel, of murder, Anti-Hijacking Act, 1982 and other offences on the grounds that the CBI had failed to prove their "active participation" in the plot to hijack the plane but found them guilty under section25 of the Arms Act, 1959.

During the course of the proceedings, the court placed reliance on *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey*[34] to contend that international conventions can be taken into consideration for interpreting the provisions of municipal law. The court held that:[35]

> …[T]here can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves.
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> The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or

33 2014 (2) RCR (Cri) 54.

34 AIR 1984 SC 667.

35 *Id.* at 671.

> no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield.

A perusal of the international convention clearly indicates that the expression 'any person on board an aircraft in flight' relates to both set of persons, who seize or exercise control of the aircraft or also who is an accomplice of a person, who performs or attempts to perform any such act.

It was established that no ambiguity in the Municipal law could be found. Therefore there was no conflict between international law and municipal laws in this case and both could co-exist harmoniously. The court dismissed the petition filed by Abdul Latif. However, conviction of Dilip Kumar Bhujel and Bhupal Man Damai and Yusuf Nepali under section 302, 307, 363, 342, 467, 506 read with section 120B IPC as well as under section 4 of the Anti-Hijacking Act, 1982 was set aside, whereas conviction and sentence for an offence punishable under section 25 of the Arms Act, 1959 was upheld. Indeed, this decision in the context of international law will be considered significant for its interpretation in establishing the relationship between international law and municipal law.

In *Delhi High Court Legal Services Committee* v. *Union of India*[36] an instant revision petition filed, the petitioner challenged the order of 10.08.09 passed by the Metropolitan Magistrate (Central) with regard to custody of two minors recovered in police actions in violation of the provisions of section 17 (A) of the Immoral Traffic (Prevention) Act, 1956(hereinafter IT Act, 1956) and other relative provisions. The petition was filed by the Delhi High Court Legal Services Committee as per the mandate of section 8 (a) of the Legal Services Authority Act, 1987 and the High Court Legal Services Committee Regulations. The important question which arose for consideration before the court in this case was whether the court should proceed in a matter where persons recovered by the police in a raid under section 15 or 16 of the IT Act, 1956, are under 18 years of age. Are the authorities required to proceed against them under the IT Act, 1956 or in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act)?

The object and purpose of enacting the IT Act of 1956 was to fulfil the commitment the government had taken after becoming party to the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation

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36 214 (2014) DLT 1; 2015 Cri L J 2054.

of the Prostitution of Others of 1950. The court observed that the IT Act of 1956 is a piece of social legislation intended to ameliorate the lot of those persons of the country who are being exploited by others. A special status has been ensured for children under the Constitution in both the fundamental right provisions in articles 15(3), 21 A, 23, 24 as well as the directive principles of state policy enshrined in articles 39(e)(f), 45, 46 and 47. In addition to relevant national laws the court took note of international instruments, namely the Geneva Declaration of the Rights of the Child, 1924, UDHR, Beijing Rules, 1985 and the UN Convention on the Rights of the Child, 1989.

The rights of the juvenile and children having been placed on such a high pedestal by the legislature, and so it was held that the procedure prescribed under the Juvenile Justice (Care and Protection) Act, 2000 governs all cases concerning juveniles in conflict with law irrespective of the offence they are alleged to have committed as well as all children covered under the definition of children in need of care and protection. Every aspect of the matter including detention, prosecution, sentencing, rehabilitation, restoration of a person who has not completed eighteen years of age under section 18 has to be dealt with in accordance with provisions of the Juvenile Justice (Care and Protection) Act, 2000. The international instruments dealing with child rights clearly stipulate that a child found involved in any aspect of prostitution is a victim and not to be treated as an offender.

The Supreme Court held in a number of cases that the rules of customary international law which are not contrary to municipal law shall be deemed to have been incorporated in domestic law and shall be followed by the courts of law.

Thus, it is clear that courts have repeatedly relied on and applied the norms of international law and international covenants to interpret domestic legislation. The Supreme Court has reiterated that there would be no inconsistency in the use of international norms to domestic legislation, if by reason thereof domestic law is not breached. International conventions and norms have been read into fundamental rights in the absence of domestic law occupying the field. Conventions to which India is not a signatory have also been permitted to be referred to for the purposes of statutory interpretation of holidays, disputes as to age, minimum standards in order to ensure health and safety.

The court held that the order of the metropolitan magistrate was contrary to law and was set aside and quashed. The court was informed that the child welfare committee has proceeded in the matter in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and the court found there was no requirement of passing a further order in this regard.

To sum up, in the words of Gita Mittal J, it is highly deplorable and heart-rending to note that many poverty stricken children and girls in the prime of youth are taken to 'flesh market' and forcibly pushed into the 'flesh trade' which is being carried on in utter violation of all cannons of morality, decency and dignity of humankind. There cannot be two opinions—indeed there is none—that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps.

In *G. Sarla* v. *Home Secretary* [37] the detenues were treated inhumanely. They were tied with ropes because there was a possibility for them to run away from the hospital, so to avoid such kind of situation the officials behaved cruelly with them.

The court stated that even detenues are required to be treated with humanity and the basic standard of living has to be maintained. The same is stated under international law. Violation of the human rights guaranteed to an individual under international law and the law of the land is stated to be wholly unjustified and against the law. The court further stated that to prevent the detenues from escaping, any other step can be taken but the prisoners should not be treated badly even if they belong to a terrorist group. The most important thing to be remembered is that they are human beings. Hence, the detenues, in this case who are still in hospital, should be relieved from the fetters and the ropes immediately.

In *Mariya Anton Vijay* v. *State Represented by Inspector of Police, Thoothukudi* [38] which came before the High Court of Madras, where the captain and crew of a foreign vessel "M.V. Seaman Guard Ohio" were charged with violation of the provisions of Arms Act of 1959, the IPC, criminal conspiracy and Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 1990 while 8 others who were alleged to have illegally supplied fuel to the foreign vessel were charged under section 7 of the Essential Commodities Act, 1955. In the instant case, the foreign vessel was drifting and out of necessity it had come into Indian waters and had anchored at Outer Port Limits [OPL] of Tuticorin Port. This ship never had intention of visiting Indian ports, because the captain was waiting for further instructions from its owners as to what the next move should be for getting provisions and fuel. When the Indian Coast Guard questioned them over wireless communication, they did not hide presence of arms on board and anchor was lifted only on orders of Indian Coast Guard and further it was the Indian Coast Guard which piloted the vessel from Outer Port Limits of Tuticorin into berth in port. Hence, the ship has not violated requirements adumbrated in the circular issued by Director General of Shipping. The issue which arose was whether crew and guards in ship should be prosecuted for possession of prohibited arms under Act 1959 and whether the Indian Arms Act, 1959 applied to presence of prohibited arms on board a flag ship vessel.

It was decided by the court that the fact that a vessel is a registered ship, engaged in antipiracy business and registered as a utility vessel, does not affect its use as an anti-piracy. The deck log book bore evidence that the operations of the ship were to provide security guards to merchant ships that pass through pirate infested areas. The crew of the vessel were neither pirates nor working for an enemy nation to India. The deck log book and GPS log book showed that the ship ran out of provisions and fuel came into Indian territorial waters and anchored. India is obligated to follow the United Nations Convention on the

37 2014 (3) MLJ (Cri.) 161.

38 2015 Cr L J 107.

Law of the Sea, 1982 (UNCLOS) and under article 27 of UNCLOS, Arms Act of 1959 cannot be extended on board flag ship as the vessel was simply found anchored and did not commit violations or any act prejudicial to the safety of India. Article 18 (2) of UNCLOS states that 'passage' includes stopping and anchoring. "Innocent passage" shows that passage is innocent as long as not prejudicial to peace or security of India. Therefore, anchoring of the vessel within Indian territorial water is saved by the principle of 'innocent passage'. Hence prosecution of the captain, the crew and security guards of the vessel for offences under Arms Act, 1959 was quashed and in the final judgment it was held that the ship is entitled to protection under right of innocent passage clause recognized by articles 18 and 19 of the UNCLOS. But for the offences alleged to have committed under the provisions of Essential Commodities Act, 1955, the court held that the accused who had supplied fuel could be prosecuted under Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 and the Act of 1955 and the captain of the vessel will be liable for abetment of offence committed by the supplier of fuel under Essential Commodities Act within Indian territorial waters.

IV CONCLUSION

The afore-mentioned judgments have shed light upon the application of international treaties and conventions in the domestic cases. It has also reflected that the violation of *jus cogens* is prohibited. International treaties at numerous circumstances are consistent with our constitutional provisions. Our Indian Constitution embodies the basic framework for the implementation of international treaty obligations undertaken by India under its domestic legal system. According to this, the Government of India has special power to conclude and put into operation various international treaties and agreements. International treaties do not involuntarily become a component of the national law in India. They must be incorporated into the legal system by an act of Parliament, which has been provided with the legislative authority to enact laws in order to implement India's obligations under the international treaty. The judges have interpreted the above cases both in terms of municipal laws and international laws. They have applied liberal interpretation of the laws and broadened the concepts so that a wider and a novel meaning can be derived. Some of the Supreme Court judgments have given vital new judgments in the fields of social justice, protection of intellectual property rights, prevention of the degradation of the environment, international commercial matter, *etc*. Thus, the Indian judiciary through judicial activism has filled up the voids in the municipal law of India and international law, thereby playing an imperative role in the execution of international law in India. The need of the hour is for a gradual development of rapprochement between national laws and international legal obligations. A time may come when international law and national law will perfectly reconcile and the dream of effective global law and world institutions would be fulfilled.