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## BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

***Aims and Scope***

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

The *BRICS Law Journal* is published in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars.

***Notes for Contributors***

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. BRICS LJ doesn't accept translations of original articles prepared not in English. The BRICS LJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.bricslawjournal.com*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

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# CHIEF EDITOR'S NOTE ON MEDIATION IN THE BRICS COUNTRIES

DMITRY MALESHIN,

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DOI: 10.21684/2412-2343-2017-4-2-4-5

**Recommended citation:** Dmitry Maleshin, *Chief Editor's Note on Mediation in the BRICS Countries*, 4(2) BRICS Law Journal 4–5 (2017).

Mediation is a way to resolve disputes through a process that is an alternative to court proceedings. It is strongly influenced by the cultural particularities of a country. There is a difference in how mediation is realized in Western and non-Western societies. In Europe and the United States, mediation has for some time now been a part of the official program of civil justice organization and in both it is supported by the state authorities. Mediation is seen as one of the measures that assists in improving the dispute resolution system and easing the caseloads of the courts. On the other hand, in non-Western societies mediation has been a way to resolve disputes since far back in time before contemporary court systems were introduced. It is a part of their cultural tradition. The main difference between the two models is that while Western mediation is an additional option, non-Western mediation is the original and most important way to resolve disputes.

In the BRICS countries, mediation has been a traditional way of resolving disputes for many years. In addition to their historical experience of mediation, these countries have introduced modern measures to improve the realization of mediation in a contemporary way. Here follows a brief summary of those measures.

The **Brazilia**n Mediation Law was enacted in 2015. Together with the new Brazilian Civil Procedure Code (2016) it regulates mediation in Brazil. There is judicial and non-judicial mediation. The judge must recommend judicial mediation, preferably, in disputes in which it is necessary to preserve or make good an interpersonal or social relationship, or when the decisions of the parties entail material consequences for third parties.

In **Russia**, the first legislation on mediation was introduced in 2011. Federal Law "Alternative Procedures for Dispute Settlement with Participation of a Mediator (Mediation Procedure)" (2011) establishes the procedure for mediation. Mediation procedure can be applied after the occurrence of disputes transferred for consideration in civil proceedings and proceedings in arbitrazh (commercial) courts. Mediation procedure is not applied to collective labor disputes nor to disputes that can affect the rights of third parties not participating in the mediation procedure, or public interests. Mediation may be undertaken according to the mutual will of the parties, on the basis of the principles of voluntariness, confidentiality, cooperation and equal rights of the parties, and the impartiality and independence of the mediator.

Mediation in **India** is informal. A mediator can be anyone who has received special training. Once the parties agree to go through mediation they have two months to reach a resolution, otherwise the case goes back to the courts.

Dispute resolution in the form of mediation has a long tradition in the history of **China**. It has been the main source of dispute resolution there since time immemorial. According to the philosophy of Confucianism, mediation can help to establish and maintain social stability.

The People's Mediation Law of the People's Republic of China was enacted in 2010. The administrative department for justice under the State Council is responsible for providing guidance on the people's mediation work nationwide. The basic-level people's courts provide operational guidance to the people's mediation committee in mediating disputes among the people.

The people's mediation committee is a community-based organization established for the mediation of disputes among the people. The villagers committees and the residents committees set up the people's mediation committee. Enterprises and public institutions set up the people's mediation committee as needed. The people's mediation committee comprises three to nine members. Committee members are elected through meetings held by the villagers. The committee members of the people's mediation committee serve a three-year term and may be re-elected and re-appointed.

Mediation has long existed in the customs of the traditional communities and tribes of **South Africa**. Formal contemporary legislation there consists of the Rules of Voluntary Court-Annexed Mediation that were enacted in 2014.

# ARTICLES

## PACIFIC WALRUS PROTECTION AND MANAGEMENT IN A CHANGING CLIMATE

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*This article identifies and evaluates strategies and policies for walrus management in both Chukotka and Alaska. As the climate and walrus migration continue to change, it is important to follow adaptable strategies that are not fixed to specific geographic areas. Many of the recommendations may be easier to accomplish in the United States, which offers more opportunities for co-management and stakeholder involvement. The United States government can implement most recommendations without making substantive changes to law. This was significant to most participants – hunters as well as regulators – who supported voluntary approaches over those requiring legal changes.*

*Keywords: International law; climate changing; Alaska; Chukotka.*

**Recommended citation:** Elizaveta Ristroph, *Pacific Walrus Protection and Management in a Changing Climate*, 4(2) BRICS Law Journal 6–39 (2017).

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## Introduction

On both sides of the International Date Line, indigenous communities and scientists are seeing less sea ice and more walruses hauling out on land. While land-based haulouts are not a new phenomenon, the large numbers of walruses involved and changes in haulout patterns have sparked interest and concern. There are particular concerns for indigenous marine mammal hunters in Alaska (USA) and Chukotka (Russia), as they face hunting challenges due to reduced sea ice, unpredictable weather, and the northward shift in walrus movement.

## 1. Current and Future Environmental Situation

Since the 1980s, there has been a decline in sea ice in the Bering and Chukchi Seas.[1] Ice floes are now smaller and thinner, supporting fewer walruses.[2] Less sea ice or sea ice that is not solid complicates marine mammal hunting. If walruses are on other side of rough, landfast ice from hunters or in open water, hunting is difficult and more dangerous.[3] Hunters may have to hunt at different times (i.e., earlier in the spring, when there is more ice).

With less sea ice available for walrus haulouts, walruses have been hauling out in greater numbers on land at various points along the Alaska and Chukotka coasts.[4] A 2011 haulout near Point Lay had 20,000 to 25,000 walruses.[5] Numbers are even greater at Cape Serdtse-Kamen in Chukotka, where one haulout may consist of 70,000 to 100,000 walruses.[6]

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1 The information in this paragraph was discussed by several participants at the Fairbanks Seminar and also noted in research publications where specifically cited, including *Climate Change 2014: Impacts, Adaptation, and Vulnerability: Summaries, Frequently Asked Questions, and Cross-Chapter Boxes*, A Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (C.B. Field et al. (eds.), Geneva: World Meteorological Organization, 2014), at 32.

2 Henry P. Huntington et al., *Traditional Knowledge Regarding Walrus, Ringed Seals, and Bearded Seals near Barrow, Alaska*, Final report to the Eskimo Walrus Commission, the Ice Seal Committee, and the Bureau of Ocean Energy Management for contract (2015), at 6 (May 10, 2017), available at https://www.adfg.alaska.gov/static/research/programs/marinemammals/pdfs/2015_traditional_knowledge_barrow.pdf.

3 *Id.*

4 Karen L. Oakley et al., *Changing Arctic Ecosystems: Polar Bear and Walrus Response to the Rapid Decline in Arctic Sea Ice*, 2012-3131 USGS Fact Sheet (2012) (May 10, 2017), also available at http://pubs.usgs.gov/fs/2012/3131/.

5 Justin Crawford et al., *Results from Village-Based Walrus Studies in Alaska, 2011*, Alaska Marine Science Symposium, January 16–20, 2012, Anchorage, AK (May 10, 2017), available at https://www.researchgate.net/publication/290437169_Results_from_village-based_walrus_studies_in_Alaska_2011.

6 This information was provided by Fairbanks Seminar participant Anatoly Kochnev, Institute of Biological Problems of the North, Far-Eastern Branch of Russian Academy of Sciences, Magadan, Russia; *see also* Mark S. Udevitz et al., *Potential Population-Level Effects of Increased Haulout-Related Mortality of Pacific Walrus Calves*, 36(2) Polar Biology 291 (2013).

Disturbances to land-based walrus haulouts can result in stampedes toward the water, which can crush juvenile and female walruses and lead to spontaneous abortions. Disturbances are associated with air and vessel traffic, polar bears, and interactions with humans (including tourists and media trying to get images). Compared to Alaska, disturbances in Chukotka are much greater. This relates to the greater number of haulouts in Chukotka, many of which are closer to communities.

The recent haulouts are certainly not the first time walruses have been observed hauling out on land. The haulouts at Cape Serdtse-Kamen have been occurring for 60 years.[7] And walruses survived warming periods in prehistorical times, presumably by hauling out on land. Some participants at the Fairbanks Seminar were confident that walruses have adapted before and will adapt again.

Still, there is concern that walruses might not adapt so easily to current stressors, which include not only ice loss but also disturbances that did not exist in prehistoric times (i.e., vessel traffic, low-flying aircraft, commercial fishing, and industrial development).[8] There is also concern about how climate change and ocean acidification are affecting walrus food sources, along with the increased presence of predators such as orcas in the walrus range.[9] Strategies that avoid or minimize these more recent sources of disturbance may help the walrus population in the future.

Beyond providing for the well-being of the walrus population, there is a need to consider how walrus-dependent communities will adapt. Climate change-related impacts to hunting, including reduced sea ice and unpredictable weather, are increasing community stress levels. In some years, communities have not been able to harvest any walrus (i.e., St. Lawrence Island, 2013 and 2015).

Some hunters (those with good Internet access) are adapting by obtaining weather information from the National Oceanic and Atmospheric Administration (NOAA) and the Geographic Information Network of Alaska. This information can also be useful for search and rescue efforts.

In addition to relying more on the Internet for forecasts, Alaska communities are adapting by monitoring what is happening, sharing information, and cooperating and sharing in the harvest. Communities can supplement their diets with caribou and moose to make up for a lack of walrus harvest, though this can put a strain on these species. Hunters are persistent in their efforts to continue their traditional lifeways in spite of the challenges.

Some Chukotkan villages benefit from the current situation, since walrus haulouts have moved closer to these villages. But there are great challenges for villages that

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7 Kochnev, *supra* note 6.

8 The information in this paragraph was discussed by several participants at the Fairbanks Seminar and also noted in research publications where specifically cited.

9 Jeff W. Higdon et al., *Killer Whales (Orcinus Orca) in the Canadian Arctic: Distribution, Prey Items, Group Sizes, and Seasonality*, 28(2) Marine Mammal Science E93 (2012).

are no longer close to haulouts. As in Alaska, people are no longer migratory, and going back and forth between a haulout and home requires time and money. Hunters are traveling longer distances and sometimes coming back empty-handed. And it is difficult to transport harvested walruses over long distances. Unlike in Alaska, where government and non-profit entities have been able to step in and provide food in times of crisis, there is no safety net in Chukotka.

As noted at the Fairbanks Seminar, it is difficult to predict the future and its effects on walrus. There is a need to develop climate models that can be used to forecast how wildlife will respond.[10]

The future could bring less sea ice, more ship and human traffic, more new species in the area, and more industrial activities. Land haulouts are expected to increase.[11] There is concern that if walruses have to keep traveling farther for food, they will deplete more energy than their food can provide. The population could decline, but the extent of decline is uncertain.

Particularly in Chukotka, there are concerns about a loss of language, customs, culture and identity of walrus-dependent communities. This, combined with a deteriorating political and economic situation, raises fears of conditions similar to those after the fall of the Soviet Union.

## 2. Management of Walrus Disturbances in Alaska

### *2.1. Regulatory Framework*

*2.1.1. Mandatory Measures*

2.1.1.1. International

The Polar Code is an international code of safety for ships operating in polar waters. A Polar Code provision that takes effect in 2017 requires ships to consider measures to avoid marine mammals.[12] The International Maritime Organization (IMO), the entity responsible for the Polar Code, does not enforce the Polar Code and related

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[10] Caroline R. Van Hemert et al., *Forecasting Wildlife Response to Rapid Warming in the Alaskan Arctic*, 65(7) BioScience 718 (2015).

[11] *See* Crawford et al., *supra* note 5.

[12] International Code for Ships Operating in Polar Waters (Polar Code), Resolution MSC.385(94), adopted on November 21, 2014 by the International Maritime Organization's Maritime Safety Committee (MSC), and Marine Environment Protection Committee (MEPC), Part 1-A (Safety Measures), 11.3 Requirements ("…[T]he master shall consider a route through polar waters, taking into account the following… .6 current information and measures to be taken when marine mammals are encountered relating to known areas with densities of marine mammals, including seasonal migration areas; .7 current information on relevant ships' routing systems, speed recommendations and vessel traffic services relating to known areas with densities of marine mammals, including seasonal migration areas…"). Additional (voluntary) guidance appears in Part 1-B (12) ("In developing and executing a voyage plan ships should consider the following: .1 in the event that marine mammals are encountered, any existing best practices should be considered to minimize unnecessary disturbance…").

treaties – enforcement is up to the State to which a ship is registered (the flag state). In the United States, enforcement would likely fall to the Coast Guard (USCG).[13]

2.1.1.2. Federal Aviation Administration (FAA)

Requirements for aircraft to maintain minimum altitudes above walrus haulouts could reduce the risk of disturbance. FAA, the federal agency responsible for regulating aircraft, has not set any mandatory altitude restrictions for walruses or other marine mammals in Alaska.

2.1.1.3. U.S. Fish and Wildlife Service (USFWS)

USFWS has jurisdiction over walruses under the Marine Mammal Protection Act (MMPA)[14] but no regulations specific to walrus haulouts. MMPA generally prohibits "take," which includes "harassment."[15] Level A harassment is generally that which causes an injury (a fairly clear standard), while Level B is more vague (that which disrupts behavior).[16] USFWS usually seeks to prohibit behavior disruption at a larger level (i.e., harassment that would affect a population) rather than at an individual level.

Developers whose activities may disturb walrus can apply to USFWS for Incidental Harassment Authorization.[17] This usually results in a "letter of authorization" to conduct the activity, with some stipulations to protect marine mammals. Incidental take authorization for oil and gas activity in the Chukchi Sea for 2013–2018 was issued in the form of regulations, which required aircraft to maintain a minimum altitude of 1,000 feet when within 0.5 miles of walrus haulouts, except in case of emergencies or bad weather.[18]

Outside of MMPA, an agency could have jurisdiction over walruses on land that it manages. USFWS has jurisdiction over National Wildlife Refuges under the National Wildlife Refuge Administration Act.[19] A USFWS regulation provides for a general restriction on flying at altitudes that harass wildlife in Refuges.[20]

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[13] Violations of safety laws (including the Polar Code) are a basis for strict liability under the United States Jones Act, 6 USC § 30104. Thus, it is possible that if a ship were to hit a walrus and result in a U.S. lawsuit due to injuries, the ship operator would be liable for not avoiding the collision. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958).

[14] 16 U.S.C. § 1362(12); 16 U.S.C. § 1375a.

[15] 16 U.S.C. § 1371(a) prohibits "take," 16 U.S.C. § 1362(13) defines "take" to include "harassment."

[16] 16 U.S.C. § 1362(18).

[17] 16 U.S.C. § 1371 (a)(5)(D).

[18] 50 C.F.R. § 18.27 (authorizes regulations for up to 5 years); 50 C.F.R. § 18.118 (regulations specific to Chukchi Sea).

[19] 16 U.S.C. § 668dd.

[20] 50 C.F.R. § 27.34.

2.1.1.4. Cooperative Agreements with Eskimo Walrus Commission and Qayassiq Walrus Commission

The Eskimo Walrus Commission (EWC), which represents 19 Northwest Alaska villages, has had a cooperative agreement since 1997 with USFWS under MMPA[21] for walrus conservation and management.[22] Joint efforts focus on monitoring the subsistence harvest and collecting information on harvested animals. Thus far, there has not been a formal project to avoid haulout disturbances.

The Qayassiq Walrus Commission (QWC), consisting of nine villages, oversees walrus harvest activities for the Bristol Bay area. It determines walrus harvest allocation for each village and monitors harvest activities. Through a 1995 cooperative agreement with USFWS, ADF&G, and EWC, QWC regulates walrus subsistence hunting on Round Island.[23]

2.1.1.5. National Oceanic and Atmospheric Administration (NOAA)

The National Marine Fisheries Service (NMFS), a division of NOAA, has no direct jurisdiction over walruses. It does have jurisdiction over vessels conducting fishing and other activities in U.S. marine waters. One example of how it has exercised this jurisdiction is the prohibition on deploying gear 3–12 nautical miles from Round Island and The Twins (part of the State Walrus Islands Game Sanctuary) from April 1 to September 30 for vessels with federal fisheries permits.[24]

2.1.1.6. Bureau of Ocean Energy Management (BOEM)

The National Environmental Policy Act (NEPA) requires federal agencies to evaluate the likely environmental impacts of projects they are proposing or considering approving. If a project is a "major action" with significant impacts on the human environment, an environmental impact statement is required unless there is an

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21 Marine Mammal Protection Act, Pub. L. No. 103-238, § 119, 16 U.S.C. § 1388.

22 *See* Eskimo Walrus Commission (May 10, 2017), available at http://www.kawerak.org/ewc.html. In 1987, prior to the 1994 amendment to the Marine Mammal Protection Act authorizing co-management agreements, EWC entered into a Memorandum of Agreement with USFWS and ADF&G. In 1998, a Memorandum of Understanding between EWC, ADF&G, and USFWS was signed, further allowing joint management of the Pacific Walrus Conservation Fund where the majority of the funds come from the sale of raw ivory by EWC during state conferences and events. *Id.* In 2004, EWC and USFWS issued guidelines to prevent waste. Eskimo Walrus Commission and U.S. Fish and Wildlife Service, Walrus Harvest Guidelines (2004) (cooperatively developed guidelines to address waste), cited in Martin Robards & Julie L. Joly, *Interpretation of "Wasteful Manner" Within the Marine Mammal Protection Act and Its Role in Management of the Pacific Walrus*, 13 Ocean and Coastal Law Journal 171, 189 (2008).

23 Bristol Bay Native Association Marine Mammals Program, Overview of the Qayassiq Walrus Commission (May 10, 2017), available at http://www.bbna.com/wp-content/uploads/Qayassiq-Walrus-Commission-Overview.pdf; ADF&G, Pacific Walrus (May 10, 2017), available at http://www.adfg.alaska.gov/index.cfm?ADFG=walrus.management.

24 50 C.F.R. § 679.22(a)(4).

applicable exception.[25] Agencies are required to "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives."[26] An agency may avoid an environmental impact statement by issuing a Finding of No Significant Impacts subject to certain enforceable mitigation actions.[27]

BOEM has used the NEPA process to include mitigation measures aimed at reducing impacts to marine mammals in its Environmental Assessment, Finding of No Significant Impact and Letter of Approval for Shell's 2015 Chukchi Sea Exploration Plan.[28] The Environmental Assessment recommended a vessel buffer from walruses of 0.5 miles, minimum altitudes of 1,500 feet for planes within 1000 feet and 3000 feet for helicopters within one mile from walrus land haulouts, monitoring measures, and reporting requirements.[29] It supported an adaptive management approach to ice management recommended by Shell, through which Shell would call USFWS when in proximity of walrus to discuss whether ice management activities should go forward.[30] These measures were incorporated into the Letter of Approval.[31]

2.1.1.7. Bureau of Land Management (BLM)

BLM has jurisdiction over National Petroleum Reserve-Alaska (NPRA) and other parcels of land in Alaska. Like BOEM, it used the NEPA process associated with its 2012 Integrated Activity Plan for NPRA to develop mitigation measures for walruses along the NPRA coast: a minimum altitude of 2000 feet for planes within 0.5 miles and 3000 feet for helicopters within 1 mile of walrus haulouts.[32]

2.1.1.8. Alaska Department of Fish and Game (ADF&G)

ADF&G has jurisdiction over the Walrus Islands State Game Sanctuary in Bristol Bay. These islands include Round Island, where walruses occasionally haul out. ADF&G

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25 42 U.S.C. § 4332(C).

26 40 C.F.R. § 1502.14(f).

27 Memorandum for Heads of Federal Departments and Agencies re: "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact," dated January 14, 2011 ("Final Guidance") (May 10, 2017), available at https://energy.gov/sites/prod/files/NEPA-CEQ_Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

28 Personal Communication with Jill-Marie Seymour, BOEM, March 29, 2016.

29 Environmental Assessment for Shell Gulf of Mexico, Inc. Revised Outer Continental Shelf Lease Exploration Plan Chukchi Sea, Alaska (March 2015), C-4–C-7, (May 10, 2017), available at http://www.boem.gov/shell-chukchi/.

30 *Id.*

31 Letter of Approval to Shell from BOEM, May 11, 2015 (May 10, 2017), available at http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Plans/2015-05-11-Shell-EP-Conditional-Approval.pdf.

32 BLM, NPRA IAP Record of Decision, Stipulation F-1(h) (February 2013).

regulates visits to Round Island through permits,[33] which typically allow access only between May 1 and August 15. Permits provide for contact procedures between visitors and staff, points of access, and vessel specifications and modes of operation. Aircraft access to Round Island is prohibited, unless specifically permitted by ADF&G staff. Beaches are closed to access. Walrus viewing requirements are designed to avoid noise, quick movements, and visual disturbances such as bright clothes.[34]

*2.1.2. Voluntary Measures*

Voluntary guidelines or agreements, while unenforceable, may be implemented more quickly with less political capital.[35]

2.1.2.1. FAA

FAA has issued guidelines[36] that include a 2000-foot minimum altitude for fixed-wing aircraft in "noise sensitive areas" such as National Wildlife Refuges and Parks, where noise interferes with normal activities associated with the area's use. It has cooperated with other agencies by posting their guidelines on its website. Also, FAA works with USFWS to include language on visual flight rules charts regarding aviation activity in the vicinity of walrus haulouts, as shown in Figure 1.

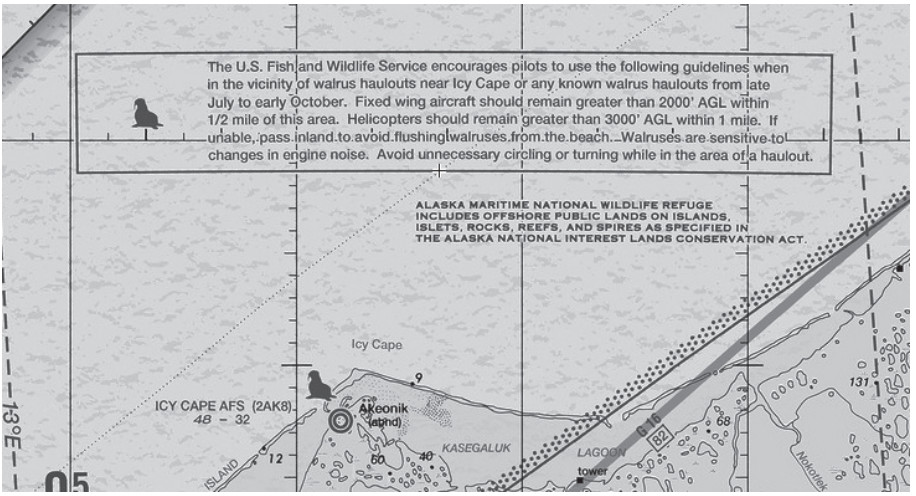


*Fig. 1: FAA, Visual Flight Chart with guidance on walrus avoidance*

[33] Permits are required under 5 AAC 92.066.

[34] Sample permit provisions from Personal Communication with Ed Weiss, ADF&G, March 16, 2016.

[35] Elizabeth B. Ristroph, *Loosening Lips to Avoid Sinking Ships: Designing a Ship Communications System for the Bering Strait Region*, 24(3) Indiana International & Comparative Law Review 581, 590 (2014).

[36] FAA Visual Flight Rules Near Noise-Sensitive Areas, Advisory Circular 91-36D, September 17, 2004.

Further, FAA has cooperated with other federal agencies to publish Flight Advisories requesting that pilots maintain certain minimum altitudes at known haulout sites. For example, in 2008, FAA, USFWS, and NOAA issued an advisory 2000-foot altitude for fixed-wing aircraft (5000-foot for helicopters) within one nautical mile seaward or one-half mile landward of Cape Seniavin and Togiak National Wildlife Refuge (which includes Cape Newenham and Cape Peirce). Marine vessels were requested to remain at least $^{1}/_{2}$ mile from shore when transiting past Cape Newenham and Cape Peirce. The same advisory set a 1000-foot altitude within one nautical mile seaward or one-half mile landward of the Pribilof Islands.

2.1.2.2. USFWS

USFWS has cooperated with EWC and the North Slope Borough (a municipal government with jurisdiction over a large portion of Arctic Alaska) on outreach efforts to raise awareness about disturbances and consequences. It has communicated informally with government entities, pilots, and communities to share information about haulouts as they develop so protection measures can be implemented. For example, in 2015, it coordinated with Point Lay, USGS, and NOAA to issue an advisory about haulouts and the need to avoid disturbance.[37]

Also in 2015, USFWS issued formal guidance to pilots[38] suggesting a minimum altitude of 2000 feet for planes within 0.5 mile and 3000 feet for helicopters within 1 mile of walrus haulouts.

USFWS has voluntary guidance for vessels operating in Bristol Bay, providing buffers that are larger for larger vessels (0.5 nautical miles from walrus haulouts for vessels up to 50 feet in length, 1.0 nautical mile for vessels 50 to 100 feet, and three 3.0 nautical miles for larger vessels). Vessels should not anchor or fish within 3 nautical miles of hauled out walrus.[39]

2.1.2.3. U.S. Coast Guard (USCG)

The 17th District of USCG (the Alaska region) issues a weekly bulletin called "Local Notice to Mariners" containing navigational information such as obstacles and port closures.[40] In the past, a few of these notices have advised vessels to minimize

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37 USFWS, Point Lay, USGS, and NOAA, If Walruses Haul-Out, Eliminating Disturbance is Essential, August 18, 2015 (May 10, 2017), available at http://www.fws.gov/alaska/fisheries/mmm/walrus/pdf/NR%2008-18-15%20Point%20Lay%20Requests%20Space%20for%20Walrus.pdf.

38 USFWS, Help Minimize the Disturbance of Walrus along the Chukchi Sea Coast (May 10, 2017), available at http://www.fws.gov/alaska/fisheries/mmm/walrus/pdf/SKMBT_C28015082811210.pdf.

39 USFWS, Guidelines for Marine Vessel Operations Near Pacific Walrus Haulouts in Bristol Bay (September 2012) (May 10, 2017), available at http://www.fws.gov/alaska/fisheries/mmm/walrus/pdf/vessel%20operations%20in%20bristol%20bay%20factsheet.pdf.

40 USCG, Local Notice Mariners, Seventeenth District (May 10, 2017), available at http://www.navcen.uscg.gov/?pageName=lnmDistrict&region=17.

disturbances to walruses at Cape Seniavin by staying 1000 yards from shore.[41] Much of the information in these bulletins is provided by NOAA's Office of Coast Survey, although USFWS has provided notice about walruses.[42]

### *2.2. Practical Steps to Avoid Disturbance*

The Alaska Native Village of Point Lay has worked to educate youth, give community warnings of haulouts, and restrict tourist access to haulouts. Point Lay has provided photos to the media to reduce the need for journalists to take additional photographs. Starting in 2010, the community adjusted local boating routes and behavior to avoid disturbances; requested planes to stay at least 1500 feet from the haulout; required planes to land and take off from the far end of the runway; and regulated visitors and media.[43] This has helped reduce stampede-related walrus deaths.

In 2015, Point Lay and USFWS got a grant from the National Fish and Wildlife Federation to work with USFWS on haulout management and monitoring efforts and carcass surveys. USFWS worked with Point Lay on a public outreach and education campaign and a media strategy.[44]

It has not been feasible for Point Lay to control ships that come too close to haulouts. There was a question at the Fairbanks Seminar as to whether this was something a Village Public Safety Officer (VPSO) could do. VPSOs are first responders in rural villages, trained by the Alaska Department of Public Safety and employed by Alaska Native non-profits.[45] They have some authority to enforce Alaska and U.S. laws,[46] although they are often stretched thin and a number of communities lack VPSOs. Incorporated boroughs like the North Slope Borough (where Point Lay is located) do have their own police departments.

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41 USCG, Local Notice Mariners, Seventeenth District, Weekly Bulletin 34/05 (August 2005) (May 10, 2017), available at http://ntm.c-map.it/upload_files/CG172005034/bk0lnm1734.pdf; Weekly Bulletin 48/06 (November 2006) (May 10, 2017), available at http://www.mxak.org/home/news/news_docs/4806.pdf; Weekly Bulletin 42/08 (October 2008) (May 10, 2017), available at http://ntm.c-map.it/upload_files/CG172008042/bk0lnm17422008.pdf.

42 NOAA, Differences Between NM and LNM (May 10, 2017), available at http://www.nauticalcharts.noaa.gov/mcd/learn_diffNM_LNM.html.

43 Henry P. Huntington et al., *Traditional Knowledge Regarding Walrus near Point Lay and Wainwright, Alaska*, Final report to the Eskimo Walrus Commission and the Bureau of Ocean Energy Management for contract (2012), at 5 (May 10, 2017), available at https://www.adfg.alaska.gov/static/research/programs/marinemammals/pdfs/2012_traditional_knowledge_pt_lay_and_wainwright.pdf.

44 National Fish and Wildlife Federation, 2015 Alaska Fish and Wildlife Fund Grants (May 10, 2017), available at http://www.nfwf.org/afwf/Documents/2015%20AFWF%20Funded%20Projects.pdf.

45 A.S. 18.65.670; Division of Alaska State Troopers, Village Public Safety Officer Program, Frequently Asked Questions (May 10, 2017), available at http://www.dps.state.ak.us/ast/vpso/faq.aspx.

46 Division of Alaska State Troopers, Village Public Safety Officer Program, Frequently Asked Questions (May 10, 2017), available at http://www.dps.state.ak.us/ast/vpso/faq.aspx; AS 12.25.010.

Communities on St. Lawrence Island, Alaska, have been noting the names of vessels that come close to haulouts, but have a hard time communicating with these ships. At a 2012 workshop on walruses, St. Lawrence Island participants described other protective measures undertaken by hunters and communities. These include keeping haulout areas clean, notifying USFWS of plane disturbances, and reviving a local hunting ordinance limiting the number of walruses taken per trip, and forming community marine mammal councils.[47]

### *2.3. Coordination and Information Sharing*

As a basis for voluntary or mandatory measures, there is a need for accurate information to be shared among regulatory agencies and between communities and agencies. Alaska Native participants at the Fairbanks Seminar and at the Walrus Research Workshop preceding this seminar expressed a desire for better communication with communities to avoid disturbances and noise. Throughout both events, participants talked about the need to coordinate agency and researcher information at one publicly available website. The Pacific Walrus International Database maintained by USGS could serve such a role, but it is incomplete and does not contain all of the data in the public domain held by agencies. Likewise, there is a need for more information from the Russia side, including translations between Russian and English of article abstracts and project descriptions.

While a coordinating website can play an important role, not all community members may have access to Internet or be comfortable using it. It may make sense to have occasional printed newsletters or community meetings (or at least teleconferences). It also helps to have face-to-face meetings when there is funding to do so. An example is the 2012 workshop ADF&G held in Barrow to talk about how communities are managing haulouts.[48]

## 3. Management of Walrus Disturbances in Russia

### *3.1. Regulatory Framework*

Russian law generally prohibits hunting and habitat destruction of endangered animals,[49] though the population of walrus inhabiting the Chukchi and Bering Seas are not listed as endangered in Russia.

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[47] Perry Pungowiyi, *Avoiding Haul-Out Disturbance on St. Lawrence Island* in *A Workshop on Assessing Pacific Walrus Population Attributes from Coastal Haulouts*, National Park Service Headquarters Anchorage, Alaska, March 19–22, 2012 (February 2013), at 83 (May 10, 2017), available at http://www.pacificenvironment.org/wp-content/uploads/2017/02/walrus-mgmt-report_final_gl.pdf.

[48] Justin Crawford et al., *Results from Village-Based Walrus Studies in Alaska, 2012*, Alaska Marine Science Symposium, January 21–25, 2013, Anchorage, AK (May 10, 2017), available at https://www.researchgate.net/publication/290437175_Results_from_village-based_walrus_studies_in_Alaska_2012.

[49] Федеральный закон от 24 апреля 1995 г. № 52-ФЗ "О животном мире", Собрание законодательства РФ, 1995, № 17, ст. 1462 [Federal law No. 52-FZ of April 24, 1995. On Fauna, Legislation Bulletin of the Russian Federation, 1995, No. 17, Art. 1462], Arts. 24, 48; Приказ Минрыбхоза СССР от 30 июня

Russian law provides for traditional subsistence hunting by indigenous peoples and residents in predominately indigenous communities.[50] Quotas for harvest are set by federal agencies.[51]

Hunting within 500 meters of a haulout is generally prohibited,[52] with an exception for Far North peoples.[53] Unless permission is received by the Ministry of Fisheries, the Law on Marine Mammal Protection and Harvests provides for a 12-nautical-mile buffer for vessels around haulouts and a 4000-meter minimum altitude for aircraft. A different article of the same law applies these limits to specific geographic points.[54] Chukotkan participants at the Fairbanks Seminar said that advocates have had no success in trying to change the law to avoid these geographic limitations, which will become less useful as walrus haulouts shift.

Russian laws do not officially provide for co-management with indigenous groups (as in the United States), although there are some provisions for local governance.[55]

1986 г. № 349 "Об утверждении Правил охраны и промысла морских млекопитающих" [Order of the Ministry of Fisheries of the USSR No. 349 of June 30, 1986. On Approval of Rules of Marine Mammal Protection and Harvest], Art. 11.1 (May 10, 2017), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ESU&n=7556&dst=100010#0.

50 Федеральный закон от 24 июля 2009 г. № 209-ФЗ "Об охоте и о сохранении охотничьих ресурсов и о внесении изменений в отдельные законодательные акты Российской Федерации", Собрание законодательства РФ, 2009, № 30, ст. 3735 [Federal law No. 209-FZ of July 24, 2009. On Hunting and the Protection of Hunting Resources and Amending Some Legislative Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2009, No. 30, Art. 3735], Art. 19; Федеральный закон от 7 мая 2001 г. № 49-ФЗ "О территориях традиционного природопользования коренных малочисленных народов Севера, Сибири и Дальнего Востока Российской Федерации", Собрание законодательства РФ, 2001, № 20, ст. 1972 [Federal law No. 49-FZ of May 7, 2001. On Territories for Traditional Natural Resource Use by Indigenous Peoples of the North, Siberia and the Russian Far East, Legislation Bulletin of the Russian Federation, 2001, No. 20, Art. 1972], Art. 2 (indigenous peoples and those residing in indigenous communities have the right to practice their traditional customs to the extent they don't conflict with Russian law).

51 Federal law No. 209-FZ on Hunting and the Protection of Hunting Resources, *supra* note 50, Art. 24.

52 Order of the Ministry of Fisheries of the USSR No. 349 on Approval of Rules of Marine Mammal Protection and Harvest, *supra* note 49, Art. 11.1; Приказ Минрыбхоза СССР от 11 июля 1975 г. № 300 "Об утверждении Правил охраны и промысла морских млекопитающих" [Order of the Ministry Fisheries of the USSR No. 300 of July 11, 1975. On Approval of Rules of Marine Mammal Protection and Harvest], Art. 9 in Сборник нормативных актов по охране природы [The Collection of Regulations on Conservation] (V.M. Blinov (ed.), Moscow: Yuridicheskaya literatura, 1978).

53 Order of the Ministry of Fisheries of the USSR No. 300 on Approval of Rules of Marine Mammal Protection and Harvest, *supra* note 52, Art. 10.

54 Order of the Ministry of Fisheries of the USSR No. 349 on Approval of Rules of Marine Mammal Protection and Harvest Law, *supra* note 49, Art 11.4; Order of the Ministry of Fisheries of the USSR No. 300 on Approval of Rules of Marine Mammal Protection and Harvest, *supra* note 52, Art. 9.

55 Федеральный закон от 6 октября 2003 г. № 131-ФЗ "Об общих принципах организации местного самоуправления в Российской Федерации", Собрание законодательства РФ, 2003, № 40, ст. 3822 [Federal law No. 131-FZ of October 6, 2003. On General Principles of Local Self-Government in the Russian Federation, Legislation Bulletin of the Russian Federation, 2003, No. 40, Art. 3822], Art. 35.

While indigenous peoples are guaranteed certain rights under Russian law,[56] these rights are often not achievable in practice.[57]

Enforcement of laws designed to protect marine mammals is weak due to financial constraints and the lack of enforcement personal. Community organizations end up doing much of the monitoring and enforcement themselves, to the extent they are able to do so. Developing management capacity may be more important than ensuring the enactment of strong laws. At the same time, there is a perception that the law is enforced more strictly against indigenous hunters than against others.[58]

Chukotkan participants at the Fairbanks Seminar described a disconnection between those who make laws and the communities in Chukotka who bear the brunt of enforcement and walrus protection. Chukotkan participants suggested that affected communities should have more of a voice in these decisions. This sentiment was echoed by Alaskan participants.

### *3.2. Practical Steps to Avoid Disturbance*

Indigenous Chukotkan hunters formed the Union of Marine Mammal Hunters as a coalition of commissions representing 15 villages of indigenous Chukotkans in marine mammal management. These functions were absorbed by the Traditional Marine Mammal Hunters of Chukotka (ATMMHC) in 2001.

ATMMHC began monitoring haulouts after large walrus mortalities were observed in the fall of 2007. In 2009, indigenous groups began working with scientists (through the Haulout Keepers project) to monitor eight haulouts. Hunters obtained significant amounts of information that enabled them to play important roles in tracking haulouts over time and providing information to villages and agencies. They made recommendations on shipping, aviation, and community and government actions.[59]

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[56] *E.g.*, Федеральный закон от 30 апреля 1999 г. № 82-ФЗ "О гарантиях прав коренных малочисленных народов Российской Федерации", Собрание законодательства РФ, 1999, № 18, ст. 2208 [Federal law No. 82-FZ of April 30, 1999. On Guarantees of the Rights of Indigenous Peoples, Legislation Bulletin of the Russian Federation, 1999, No. 18, Art. 2208]; Federal law No. 49-FZ on Territories for Traditional Natural Resource Use by Indigenous Peoples of the North, Siberia and the Russian Far East, *supra* note 50; Федеральный закон от 20 июля 2000 г. № 104-ФЗ "Об общих принципах организации общин коренных малочисленных народов Севера, Сибири и Дальнего Востока Российской Федерации", Собрание законодательства РФ, 2000, № 30, ст. 3122 [Federal law No. 104-FZ of July 20, 2000. On General Principles of Organization of Indigenous Communities with Small Populations, Legislation Bulletin of the Russian Federation, 2000, No. 30, Art. 3122].

[57] World Bank Safeguard Policies Review and Update, Dialogue with Indigenous Peoples, October 2013 – March 2014, at 9 (May 10, 2017), available at https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/final_summary_dialogue_with_ip_october_2013-march_2014.pdf; Federica Prina, *Protecting the Rights of Minorities and Indigenous Peoples in the Russian Federation: Challenges and Ways Forward*, Minority Rights Group Europe (2014), at 15 (May 10, 2017), available at http://minorityrights.org/wp-content/uploads/2014/11/mrg-protecting-rights-minorities-indigenous-peoples-russian-federation_English.pdf.

[58] The information in this paragraph was discussed by several participants at the Fairbanks Seminar.

[59] *Id*.

As mentioned above, much of the burden of walrus management has fallen to disempowered communities. One example given at the Fairbanks Seminar was the Chukotkan village of Vankarem, which is near a major haulout. Local residents had established guidelines to avoid stampedes by keeping the area quiet and calm and prohibiting perfume and bright colors. In 2013, a large cruise ship anchored offshore, and rafts ferried tourists in for a close-up look at the walruses, all with permission from authorities in Moscow. The village was not warned or consulted about the cruise ship arrival, and the cruise ship was unaware of the local protective measures.

More Russian nongovernmental organizations (NGOs) have gotten involved in recent years, but NGO involvement can be cyclical and fluid.[60] Since about 2014, NGOs have been experiencing hard times due to Russia's economic and political situation. Foreign NGOs, to the extent they are allowed and willing to operate in Russia, are important sources of funding for joint research and on-the-ground projects.[61] One bright spot in NGO and community activity has been the increased use of Skype to communicate rather than relying on infrequent in-person meetings.

Indigenous participants at the Fairbanks Seminar spoke about the need to enforce their legal rights and the potential role of an indigenous advisory board. There is an Inuit Circumpolar Council office in Russia and Association of Indigenous Peoples in Chukotka, which is an affiliate of the Russian Association of Indigenous Peoples of the North, Siberia, and the Far East.

## 4. Potential Protective Measures

### *4.1. Protected Areas*

Areas where walruses are hauling out, migrating, or feeding could be protected under international or U.S. law, or by Alaska law if within three nautical miles of the coast.

Such designations can restrict disturbances without curtailing hunting, depending on the type and wording of the designation. At the seminar, someone suggested designating a "food security zone" for Beringia. The challenge to any of the designations described in this section is that they are based on specific geographic

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[60] The information in this paragraph was discussed by several participants at the Fairbanks Seminar.

[61] Russia's foreign agent law requires any NGO that receives funding from abroad and engages in political activity to formally register as a "foreign agent." The law authorizes intrusive audits, labeling requirements, and stiff administrative fines. While NGOs that support the protection of flora and wildlife are supposed to be exempt under Art. 2, a number of conservation NGOs have been cited under the law. *See* Федеральный закон от 20 июля 2012 г. № 121-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации в части регулирования деятельности некоммерческих организаций, выполняющих функции иностранного агента", Собрание законодательства РФ, 2012, № 30, ст. 4172 [Federal law No. 121-FZ of July 20, 2012. On Amending Legislative Acts of the Russian Federation on the Regulation of Non-Profit Organizations Performing the Functions of Foreign Agents, Legislation Bulletin of the Russian Federation, 2012, No. 30, Art. 4172].

areas, and haulouts may shift after the designation is in place. This means that a relatively broad designation might be required to be effective, but this may not be politically feasible. Ideally, a designation could be adaptable, tied to regularly updated information on walrus locations.

At the international level, a Particularly Sensitive Sea Area (PSSA) can be designated by IMO with support of member states.[62] This designation provides for specific measures (called "Associated Protective Measures") to avoid ecological and subsistence harm, which might include a ship routing or reporting system near or in the area or speed limits.[63] These measures would need to be enforced by member states.

Another type of IMO designation is an Area to Be Avoided,[64] "an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or by certain classes of ships."[65] These areas may be adopted to avoid shipping accidents as well as for environmental protection.[66] One example is the 2014 Areas to Be Avoided for the Aleutian Islands region, designed to protect marine mammals and subsistence uses (as well as commercial fishing).[67] Another example is the voluntary seasonal Area to Be Avoided off the northeastern U.S. coast for Right whales, corresponding to the whale's feeding area.[68]

There have been efforts by U.S.-based groups to promote a ship routing scheme and Areas to Be Avoided in the Bering Sea, with the aim of protecting important subsistence areas and environmentally sensitive areas from ship traffic. One proposal would provide for a six-nautical mile buffer around walrus haulouts along the coast

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62 IMO, Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, Assembly Res. A.982 (24), adopted on December 1, 2005, § 1.2 (May 10, 2017), available at www.imo.org/blast/blastDataHelper.asp?data_id=14373&filename=982.pdf.

63 *Id.* § 6; *see also* Jon M. Van Dyke & Sherry P. Broder, *Particular Sensitive Sea Areas; Protecting the Marine Environment in the Territorial Seas and Exclusive Economic Zones*, 40 Denver Journal of International Law and Policy 472, 478 (2011) (suggesting that measures may include vessel traffic services).

64 IMO, Ships Routeing (May 10, 2017), available at http://www.imo.org/ourwork/safety/navigation/pages/shipsrouteing.aspx.

65 *Id.*; *see also* 33 C.F.R. § 167.5(a) (defining Area to Be Avoided as "a routing measure comprising an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships or certain classes of ships").

66 IMO, Ships Routeing, *supra* note 64.

67 United States, Proposal for Establishment of Five Areas to Be Avoided in the Region of the Aleutian Islands, submitted to IMO Sub-Committee on Navigation, Communications, and Search and Rescue, December 5, 2014 (May 10, 2017), available at http://www.nepia.com/media/258601/IMO-NCSR-2-3-5-Adopt-the-Establishment-of-Five-Areas-to-be-Avoided.pdf; IMO, Routeing Measures Other than Traffic Separation Schemes, SN.1/Circ. 331, July 13, 2015 (May 10, 2017), available at http://www.ak-mprn.org/wp-content/uploads/2015/12/IMO-SN.1_Circ.331-dated-13-July-2015.pdf.

68 *Id.*

of Diomede and St. Lawrence.[69] Since this proposal and traffic scheme only concerns the U.S. side of the Bering Strait, it would not address walrus haulouts at Round Island or the Chukchi coastline along Alaska and Chukotka.

Under U.S. law, a marine national monument or a national marine sanctuary could be designated. Monuments are designated by the U.S. President under the Antiquities Act.[70] The Act does not require any specific public process for the designation. The proclamation designating the monument determines what activities are allowed within the monument – there is no bar to subsistence or any other activity unless specifically stated in the proclamation.[71] President George W. Bush used this authority to designate the Papahānaumokuākea Marine National Monument (which is also a PSSA) in the Pacific Ocean.

Sanctuaries can be nominated by communities and designated by NOAA under the National Marine Sanctuaries Act (NMSA) after an extensive public process,[72] or they can be designated by Congress. Sanctuaries can be co-managed by states, tribes, or local groups.[73] Subsistence use and commercial fishing licenses already in existence at the time of designation may continue, but may be subject to regulation by NOAA.[74] This limitation may make sanctuaries less desirable.

Another option under U.S. law would be for USCG to designate Areas to Be Avoided or Precautionary Areas within U.S. waters.[75] The Ports and Waterways Safety Act allows USCG to establish and maintain measures for controlling or supervising vessel traffic as well as for protecting navigation and the marine environment.[76] These measures, which may be implemented in U.S. territorial waters or in areas covered by an international agreement, include ship reporting systems, ship routing systems, vessel traffic services, areas to be avoided, tracking systems, and speed limits.[77]

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69 Audubon Alaska et al., Comments to Rear Admiral Daniel Abel, USCG, RE: Recommendations on the Port Access Route Study: In the Chukchi Sea, Bering Strait and Bering Sea, Docket ID: USCG-2014-0941, June 3, 2015, at 21.

70 16 U.S.C. §§ 431–433.

71 Elizabeth B. Ristroph & Anwar Hussain, *Wilderness: Good for Alaska, Economic and Legal Perspectives on Alaska's Wilderness*, 4 Washington Journal of Environmental Law & Policy 424, 432 (2015).

72 16 U.S.C. § 1434.

73 16 U.S.C. § 1442.

74 16 U.S.C. § 1434(c); 15 C.F.R. § 922.47(a).

75 *See* 33 U.S.C. § 1223 (authority for implementing vessel routing measures); 33 C.F.R Part 167 (defining Areas to be Avoided and Precautionary Areas; describing where these areas exist in U.S. waters); Audubon Alaska et al., Comments to Rear Admiral Daniel Abel, *supra* note 69, at 21.

76 33 U.S.C. § 1223(a).

77 *Id.*

Finally, the State of Alaska could designate a new protected area in a manner similar to its designation of the Walrus Islands State Game Sanctuary.[78] This would allow the State to restrict access or set vessel buffers (out to three nautical miles). There would not be a change in subsistence regulation unless the State entered a cooperative management agreement with USFWS.

### *4.2. Altitude Restrictions*

One idea discussed at the Fairbanks Seminar was the potential for a regulation based on MMPA[79] that would identify examples of the term "harassment," which could include aircraft flying below certain altitudes. A representative from USFWS suggested that the agency did not have sufficient power under MMPA to impose altitude restrictions.

Another idea concerned FAA authority to restrict the use of airspace for a variety of reasons, including the public interest.[80] FAA used this authority to limit flights when President Obama came to Alaska in 2015,[81] and it was basis for Advisory Circular 91-36D. But there seemed to be little interest on the part of Fairbanks Seminar participants in having FAA establish altitude restrictions. An FAA representative characterized the FAA mission as aviation safety rather than wildlife protection. FAA prefers to educate aviators who fly in the vicinity of walrus and has tools to support outreach and education endeavors.

### *4.3. Endangered Species Act Measures*

In 2008, USFWS was petitioned to list the Pacific walrus as threatened or endangered under the Endangered Species Act[82] and to designate critical habitat. In 2011, USFWS determined that a listing was warranted but precluded by higher priority species.[83] USFWS has not made a determination under MMPA[84] as to whether the Pacific Walrus

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78 State of Alaska refuges, critical habitat areas, and sanctuaries provide different levels of protection, with sanctuaries like the Walrus Islands State Game Sanctuary generally providing the greatest protection. ADF&G, Refuges, Sanctuaries, Critical Habitat Areas & Wildlife Ranges. These protected areas are generally created through the legislature based on community requests and input. *See* AS 16.20.010 (state's authority); AS 16.20.092 (establishing Walrus Islands State Game Sanctuary).

79 16 U.S.C. §§ 1362(13, 18), 1371(a).

80 *See* 49 U.S.C. § 40103(b)(1) ("The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest."). It could be argued that avoiding walrus disturbance is in the public interest.

81 FAA, Flight Advisory VIP Visit Alaska, August 31 – September 2 (May 10, 2017), available at http://www.faa.gov/news/updates/media/VIP_Alaska_Advisory.pdf.

82 Sec. 4(a)(1) of the ESA and the listing regulations (50 C.F.R. Part 424).

83 USFWS, Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the Pacific Walrus as Endangered or Threatened, 76 Fed. Reg. 7634, February 10, 2011.

84 16 U.S.C. § 1383b(a).

is depleted.[85] Based on concern about climate change and development, USFWS is now reconsidering a listing, with a final decision scheduled for 2017.[86]

Other ice-dependent pinnipeds have been under similar consideration. The ribbon seal is considered a "species of concern" but not depleted under MMPA or threatened or endangered under the Endangered Species Act (ESA).[87] The bearded seal is not considered depleted, threatened, or endangered overall, but one distinct population (Okhotsk) is considered depleted and threatened.[88] Similarly, the ringed seal is not considered depleted, threatened, or endangered overall, but two subspecies are considered endangered (Ladoga[89] and Saimaa[90]), three threatened (Okhotsk, Arctic, and Baltic[91]), and five depleted (Ladoga, Arctic, Okhotsk, Baltic, and Saimaa).[92]

Many Alaska Native hunters (including participants at the Fairbanks Seminar) are concerned about potential listings under the Endangered Species Act, as this may allow hunting restrictions at some time in the future. While Sec. 10(e) of the Endangered Species Act generally provides an exemption for subsistence, USFWS could, after notice and a hearing, determine that subsistence "materially and negatively affects the threatened or endangered species" and issue regulations restricting subsistence.[93]

With a listing and critical habitat designation, buffers and potentially altitude restrictions could be imposed. An example is critical habitat for the Steller's sea lion, which includes an air zone and an aquatic zone extending 3,000 feet from each major rookery and major haulout in Alaska.[94] Further, vessel traffic is generally prohibited within three nautical miles of rookeries.[95] But these designations and buffers are

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85 USFWS, Marine Mammal Protection Act; Stock Assessment Reports, 79 Fed. Reg. 22154, April 21, 2014.

86 USFWS, Planned Listing Actions, November 13, 2015 (May 10, 2017), available at http://www.fws.gov/endangered/improving_ESA/pdf/20151113_Planned_Listing_Actions.pdf.

87 NMFS, Endangered and Threatened Wildlife; Determination on Whether To List the Ribbon Seal as a Threatened or Endangered Species, 78 Fed. Reg. 41371, July 10, 2013; NOAA, Ribbon Seal (May 10, 2017), available at http://www.fisheries.noaa.gov/pr/species/mammals/seals/ribbon-seal.html.

88 NOAA, Final Listing of the Okhotsk Sub-Species as Threatened under the Endangered Species Act, 77 Fed. Reg. 76739, December 28, 2012.

89 NOAA, Endangered and Threatened Species; Threatened Status for the Arctic, Okhotsk, and Baltic Subspecies of the Ringed Seal and Endangered Status for the Ladoga Subspecies of the Ringed Seal, 77 Fed. Reg. 76705, December 28, 2012.

90 NOAA, Endangered and Threatened Species, Saimaa Seal, 58 Fed. Reg. 26920, May 6, 1993.

91 NOAA, Endangered and Threatened Species, *supra* note 89.

92 NOAA, Ringed Seal (May 10, 2017), available at http://www.nmfs.noaa.gov/pr/species/mammals/seals/ringed-seal.html.

93 16 U.S.C. § 1539(e)(4).

94 50 C.F.R. § 226.202.

95 50 C.F.R. § 223.202.

based on specific geographic points, and marine mammal haulouts may shift with climate change.

### *4.4. Speed Limits*

In addition to establishing Areas to Be Avoided (discussed above), USCG could use its authority under the Ports and Waterways Safety Act to establish speed limits along ship routes near potential haulout areas.

Authority for speed limits could also be tied to an ESA listing. For example, in 2008, NOAA/NMFS used its ESA authority to issue a speed limit of 10 knots/per hour in certain areas at particular times of the year when endangered Right whales are expected to be present.[96]

Another example is the limit set by the National Park Service (NPS) for Glacier Bay Park. Since NPS has jurisdiction over the park, it has authority to set vessel buffers and other measures not inconsistent with its regulatory authority.[97]

Voluntary speed limits could also be effective. An example is the 10 knots/hour limit agreed upon by the Alaska Eskimo Whaling Commission and oil industry representatives for vessels "in the proximity of feeding whales or whale aggregations."[98]

### *4.5. Tracking of Vessels and Airlines*

If mandatory altitude restrictions, speed limits, or buffers were to be implemented and enforced, it could be a challenge for enforcement agencies to know when violations occurred far from villages. Tracking devices already required under U.S.[99]

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[96] *See* Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60173, October 10, 2008; 50 C.F.R. § 224.105 (outlining effective times of year and geographic boundaries). The rule applies to all vessels (except those operated by or under contract to Federal agencies) that are 65 feet or greater in overall length in certain locations, and at certain times of the year along the east coast of the U.S. Atlantic seaboard. *Id.*

[97] 54 U.S.C. § 100101 (NPS authority to promulgate rules); 16 U.S.C. § 410hh (authority to administer Alaska parks). *See, e.g.*, 36 C.F.R. § 13.1170 (generally prohibiting vessel operation within $^1/_4$ nautical mile of a whale and setting a mandatory 10 knot/hour speed limit) and 13.1176 (speed limit of 20 knots/hour from May 15 through September 30, in designated whale waters).

[98] Open Water Season Programmatic Conflict Avoidance Agreement, March 1, 2012, §§ 302(d), 501(c) (May 10, 2017), available at http://www.nmfs.noaa.gov/pr/pdfs/permits/bp_openwater_caa2012.pdf.

[99] 46 U.S.C. § 70115; 33 C.F.R. § 164.46 (requiring the following vessels to have AIS when on an international voyage: self-propelled vessels of 65 feet or more in length, other than passenger and fishing vessels, in commercial service; passenger vessels of 150 tons or more; all tankers; and vessels (other than passenger vessels or tankers) of 300 tons or more; and requiring the following vessels to have AIS when passing through a VTS: self-propelled vessels of 65 feet or more in length, other than fishing vessels and passenger vessels certificated to carry less than 151 passengers-for-hire, in commercial service; towing vessels of 26 feet or more in length and more than 600 horsepower, in commercial service; and passenger vessels certificated to carry more than 150 passengers-for-hire); 33 C.F.R. § 169.205 (requiring passenger ships, cargo ships of 300 tons or more, and mobile offshore units not engaged in drilling operations to transmit position reports while engaged on an international voyage).

and international[100] law for many vessels could help with this kind of enforcement. Long Range Identification and Tracking (LRIT) systems and Automated Identification Systems (AIS) allow communication between vessels and on-shore observers, with the objective of avoiding collisions, maintaining safe distance from maritime hazards, locating vessels in distress, and assisting in search and rescue efforts. Under both systems, vessels carry hardware which actively transmits information regarding vessel identify and location.[101] At the Fairbanks Seminar, there was not great interest in pursuing mandatory regulations enforced by such tracking devices. But ADF&G is already using AIS at Round Island in addition to other methods to identify vessels and aircraft and pursuing violations or warnings.[102]

### *4.6. Use of Drones for Monitoring*

The possibility of using drones for research, monitoring, and media purposes was not discussed at the Fairbanks seminar, but it may be a way to reduce disturbances associated with aircraft. In and near Alaska, drones have already been used to survey hauled out Steller's sea lions and ice seals.[103] If additional research suggests that drones cause less disturbance than other forms of monitoring or photographing, perhaps drone usage could be required for permit-authorized research.

### *4.7. Tribal Regulation*

Alaska Native participants at the Fairbanks Seminar were interested in what Alaska tribes might do on their own to regulate walrus, through measures such as asserting aboriginal title. In spite of limitations imposed by the Alaska Native Claims Settlement Act (ANCSA),[104] Alaska tribes retain jurisdiction over their members, the ability to issue use permits on Native allotments and townsites, the ability to issue persuasive resolutions regarding the activities of non-members, and innovative opportunities to expand jurisdiction as Native law evolves.[105]

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100 SOLAS, as amended by IMO Res. MSC.202(81), May 19, 2006, Reg. V/19-4.1.1; 19-1.2.1 (requiring cargo vessels of 300 gross tons or more, passenger ships, high speed craft, and mobile offshore drilling rigs to implement LRIT); SOLAS regs. V/19.2.4 & 19.1 (requiring all passenger vessels, all vessels of 300 gross tons and larger on international voyages, and all cargo vessels of 500 gross tons not on international voyages to be fitted with AIS equipment).

101 Ristroph 2014, at 619.

102 Weiss Communication, *supra* note 34.

103 Joel K. Bourne, Jr., *In the Empty Arctic, How to Get the Job Done? With A Drone*, National Geographic, April 14, 2016 (May 10, 2017), available at http://news.nationalgeographic.com/2016/04/160414-Arctic-drones-wildlife-fire-oil-spill-environment/.

104 43 U.S.C. § 1603.

105 *Kimball v. Callahan*, 590 F.2d 768, 777-78 (9th Cir. 1979) (inherent power to determine membership does not depend on having a territorial base, so even tribes with no Indian country may retain this power); *John v. Baker*, 982 P.2d 738 (Alaska 1999) (holding that ANCSA did not extinguish tribal sovereignty); Act of May 1, 1936, ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 473a) (amending the Indian Reorganization Act of 1934 to include Alaska Natives).

*Alaska v. Native Village of Venetie Tribal Government* suggests that Alaska tribes can still exert jurisdiction over land that is held in trust, including Native allotments and townsites[106] considered "restricted property."[107] A tribe could pass a zoning code regarding activities that can take place on restricted properties, or adopt an existing zoning code from the municipality in which the tribe is located. There will be opportunities to expand land held in trust if litigation in *Akiachak v. Jewell* is resolved in favor of Alaska Native plaintiffs. The case was brought to invalidate a portion of regulations (25 C.F.R. Part 151) prohibiting the Interior Secretary from acquiring title to land in trust on behalf of Alaska tribes. Although the Bureau of Indian Affairs (BIA) has already revised the regulation,[108] it will not approve any applications for land into trust while the appeal is pending.[109]

A tribe could adopt regulations or guidelines to govern the conduct of its own members, and ask non-members to voluntarily adhere to them. For example, in 2008, the Tribal Council of Point Lay adopted its own bylaws to protect and manage the traditional community beluga hunts.[110]

Aboriginal subsistence hunting and fishing rights are part of "aboriginal title," the possessory rights that tribes retain by virtue of their use and occupancy for centuries or even millennia.[111] There have been several court cases on the issue of whether an Alaska tribe can claim aboriginal title to parts of the ocean that have traditionally been used for hunting and fishing. In *Iñupiat Community of the Arctic Slope v. United States*,[112] the Ninth Circuit extended the effect of ANCSA to the use of sea ice many

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106 These are allotments established under the Alaska Native Allotment Act, Act of May 17, 1906, 43 U.S.C. §§ 270-1 to 270-3, repealed with savings clause, 43 U.S.C. § 1617(a) and townsites established under the Alaska Native Townsite Act, 43 U.S.C. §§ 733, 735, repealed under Federal Land Policy Management Act, sec. 701, with savings clause. *See Aleknagik Natives Ltd. v. U.S.*, 886 F.2d 237 (9th Cir. 1989).

107 *See* 25 C.F.R. 1.4(a) (prohibiting state or local regulation of "zoning or otherwise governing, regulating, or controlling the use of any real or personal property… that is held in trust or is subject to a restriction against alienation imposed by the United States"); 25 C.F.R. § 1.4(b) (giving the Interior Secretary authority to agree on zoning regulations, in consultation with the affected tribe); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d. 655 (9th Cir. 1975), *cert. denied* 429 U.S. 1038 (upholding 25 C.F.R. § 1.4); *People of South Naknek v. Bristol Bay Borough*, 466 F.Supp. 870 (D. Alaska 1979) (Taxation by local government prohibited).

108 Bureau of Indian Affairs, Interior, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888-76897 (2014).

109 *Akiachak v. Jewell*, 995 F.Supp.2d 7 (D.D.C. 2014).

110 Robert J. Wolfe, *Sensitive Tribal Areas on the Arctic Slope: An Update of Areas, Issues, and Actions in Four Communities*, Inupiat Community of the Arctic Slope, Barrow, Alaska (September 2013), at 8, citing Bylaws for the Traditional Beluga Hunt by the Tribal Village of Point Lay, June 27, 2008 (Point Lay Native Village, 2008).

111 Elizaveta B. Ristroph, *Strategies for Strengthening Alaska Native Village Roles in Natural Resource Management*, 4 Willamette Environmental Law Journal 57, 119 (2016).

112 *Inupiat Community of Artic Slope v. United States*, 548 F.Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied* 474 U.S. 820 (1985).

miles from shore. This suggests that it would be difficult for a tribe to claim exclusive sovereign rights to the outer continental shelf of the Arctic Ocean.[113] Still, a tribe may be able to claim non-exclusive rights over offshore subsistence resources.[114] Non-exclusive rights would probably mean that NOAA and USFWS would have some rights to control fisheries and marine mammals and allocate resources in the claimed area among users.[115]

### *4.8. Improved Communication*

Many participants at the Fairbanks Seminar felt that improved communication, outreach, and cooperation would be a better remedy than establishing new laws. Participants emphasized the importance of face-to-face communication through workshops (like this seminar) or one-on-one meetings.

One model for communication is that between the Alaska Eskimo Whaling Commission (AEWC) and oil vessels under the Conflict Avoidance Agreement for the bowhead whale.[116] The Agreement establishes equipment and procedures for communications between whalers and oil and gas industry participants; avoidance measures to be taken in the vicinity of subsistence hunting; and emergency measures.[117] The Agreement also lists contact information for representatives from each industry vessel and village as well as vessels that will be used in industry operations.[118]

It could be helpful to have a streamlined, regular system for communicating walrus haulouts between communities, regulatory agencies (particularly USFWS, NOAA, USCG, and FAA), and potential sources of disturbance (particularly vessel operators and pilots). A one-stop website that vessel operators and pilots are

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113 *See also Eyak Native Village v. Daley*, 364 F.3d 1057 (9th Cir. 2004), upheld by *Native Village of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012), *cert. denied* 134 S. Ct. 51(2013) (holding that "the federal paramountcy doctrine" barred the Native Villages' aboriginal title claims to the OCS, including exclusive hunting and fishing rights); *see also North Slope Borough v. Andrus*, 642 F.2d at 611-12; *see also United States v. Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980).

114 In *Village of Gambell v. Hodel*, 869 F.2d 1273, 1278-80 (9th Cir. 1989), the Ninth Circuit held that ANCSA did not extinguish aboriginal claims to the OCS and left open the question of whether a tribe could assert "non-exclusive" subsistence rights in the OCS area.

115 In *United States v. Washington* and other cases, the courts have interpreted treaty-reserved rights to be non-exclusive, and have therefore apportioned resource rights between tribal and non-tribal users. *See, e.g.*, *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *aff'd sub. nom.*, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). Such rights are also subject to regulation of seasons, manner of fishing, and size of take for purposes of conservation. *See, e.g.*, *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968).

116 *E.g.*, Conflict Avoidance Agreement, §§ 103(a)(12), 104(b)(2). The Agreement operates during "Open Water Season" – the period of the year when ice conditions permit navigation or oil and gas operations to occur in the Beaufort Sea or Chukchi Sea.

117 *See id.* § 102 (Purpose).

118 *Id.* §§ 206, 401(a).

required to consult (whether by regulations, permits, or their insurers) could be helpful. This same information could also go in publications such as USCG's Local Notice to Mariners.

Alaska Native participants at the Fairbanks Seminar emphasized the importance of government-to-government consultation. Executive Order No. 13,175 requires each agency to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."[119] USFWS and NMFS have specific consultation policies which would apply to activities related to marine mammals.[120]

### *4.9. Seasonal Calendar*

Participants at Dr. Misarti's March 14, 2016 Walrus Research Workshop discussed the idea of seasonal calendar and map showing walrus migration and haulouts, which could help avoid impacts to walrus over space and time. A model could be the map maintained by the North Slope Borough Wildlife Management Department for the bowhead whale.[121] The challenge to such a map would be the pace of change in migration and haulout patterns. Using Geographic Information System (GIS) to create and update a walrus map could address this challenge. GIS software would allow a mapmaker to create "shapefiles" (including lines for routes, polygons for feeding areas, and dots for haulouts) linked to spreadsheet data describing the applicable season for the walrus location (i.e., "walrus travel along this route annually between May and August") and the most recently known occurrence (i.e., "2007 – present" or "1960s").

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[119] Exec. Order No. 13,175, 3 C.F.R. 304, 305 (2000), *superseding* Exec. Order No. 13084, 63 Fed. Reg. 27655, May 14, 1998, requires FWS and NMFS to consult with tribes when "undertaking to formulate and implement policies that have tribal implications." Secretarial Order No. 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, August 27, 1999, explains the responsibilities of the Departments of the Interior and Commerce when actions taken pursuant to the Endangered Species Act may affect the exercise of American Indian tribal rights. Secretarial Order No. 3225, Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order No. 3206), January 19, 2001, clarifies the application of Secretarial Order No. 3206 to Alaska, and requires consultation as soon as any conservation concern arises regarding a species that is listed as endangered or threatened under the Endangered Species Act and also used for subsistence.

[120] USFWS, Native American Policy 510 FW 1, NOAA, January 20, 2016; NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations, NOAA 13175 Policy, November 12, 2013, at 9 (May 10, 2017), available at http://www.legislative.noaa.gov/policybriefs/NOAA%20Tribal%20consultation%20handbook%20111213.pdf. Examples of actions requiring consultation include: a policy or action with effects on an Alaska Native village; a policy or action that may impact tribal trust resources or the rights of a tribe; and a policy or action that affects a tribe's traditional way of life. *Id.*

[121] North Slope Borough Bowhead Whale Subsistence Harvest Research (May 10, 2017), available at http://www.north-slope.org/departments/wildlife-management/studies-and-research-projects/bowhead-whales/bowhead-whale-subsistence-harvest-research.

## 5. Areas of Cooperation between Russians and Alaskans

### *5.1. Scientific Cooperation*

There is a long history of cooperation between U.S. and Russian agencies on wildlife conservation, which continues between USFWS and its Russian Counterpart, Russia's Ministry of Natural Resources and Environment. Marine mammals, particularly polar bears, walrus, and sea otters, are a major focus of this cooperation, conducted through the Wildlife without Borders-Russia program, and USFWS's Alaska Marine Mammals Management Office.[122] This cooperation has continued despite funding challenges and political tension. One Fairbanks Seminar participant emphasized the importance of having working agreements or understandings between U.S. and Russian agencies, even if these are not binding agreements.

Fairbanks Seminar participants described collaboration on data collection and sharing. USFWS receives annual reports on subsistence harvest levels and the number of walrus deaths at coastal haulouts. Russian scientists are assisting USFWS in a project to collect walrus skin samples for DNA "fingerprinting." There were more workshops and meetings with Russian and U.S. scientists in the past to improve harvest estimates, but declines in funding have reduced these efforts to some extent.[123] In the next two years, Russian and American scientists will be collaborating on a walrus survey in the Bering Sea.[124]

Another area of scientific collaboration is the Pacific Walrus International Database, maintained by USGS, with data supplied by USFWS, USGS, UAF, and ADF&G on the U.S. side, and the Russian Academy of Science, Wrangel Island National Nature Reserve, and the Pacific Institute of Fisheries and Oceanography on the Russian side.[125] Data categories include land and ice haulout counts, sex/age composition, reproduction, mortality, harvest statistics, and morphometry.

### *5.2. Management Agreements*

There are already models for U.S.-Russia wildlife management agreements, including the U.S.-Russia Polar Bear Treaty.[126] Arts. 6, 8, and 9 provide for a subsistence

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122 US-Russia Marine Mammal Working Group (May 10, 2017), available at http://www.fws.gov/international/wildlife-without-borders/russia/us-russia-marine-mammal-working-group.html.

123 Personal Communication with Jim MacCracken, USFWS, March 28, 2016.

124 Emily Russell, *Russian and American Officials Sign Wildlife Management Agreement*, Alaska Public Media, March 29, 2016 (May 10, 2017), available at http://www.alaskapublic.org/2016/03/29/russian-and-american-officials-sign-wildlife-management-agreement/.

125 USGS, Pacific Walrus International Database (May 10, 2017), available at http://alaska.usgs.gov/science/biology/walrus/pwid/.

126 Agreement between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska Chukotka Polar Bear Population signed in 2000 and ratified by the United States in 2007 (May 10, 2017), available at http://pbsg.npolar.no/en/agreements/US-Russia.html.

harvest quota to be allocated equally between Alaska and Chukotka. Art. 8 provides for cooperation in scientific research, including traditional knowledge. In connection with the treaty, the Alaska Nanuuq Commission (which co-manages polar bear in the United States) signed a Native-to-Native Agreement with ATMMHC in 1997.

Another example is the agreement between the Alaska Eskimo Whaling Commission (AEWC) and the Association of Traditional Marine Mammal Hunters to share the bowhead quota with whaling communities in Russia.[127]

### *5.3. Other Forms of Exchange*

A number of groups have facilitated exchanges between Russian and U.S. walrus stakeholders, including Pacific Environment, World Wildlife Fund, Wildlife Conservation Society (WCS), the National Park Service's Shared Beringian Heritage Program, Eskimo Walrus Commission, North Slope Borough Department of Wildlife Management, Alaska Nanuuq Commission, and Alaska Eskimo Whaling Commission.

An example is the Workshop on Assessing Pacific Walrus Population Attributes from Coastal Haul-Outs, held March 19–22, 2012 in Anchorage, Alaska by USFWS, Wildlife Conservation Service, the Trust for Mutual Understanding, and the National Park Service. The workshop included some of the same Russian and U.S. participants as the 2016 seminar. Participants in that workshop, like those in the 2016 Fairbanks Seminar, emphasized the benefits of involving local residents in walrus management. But that workshop placed greater importance on the development of government regulations for aircraft and vessels near walrus haulouts, as well as management plans to protect haulouts and adjacent waters in the future Beringia National Park.[128]

The Shared Beringian Heritage Program has funded scientific and cultural projects related to marine mammals, sea ice patterns, climate change, reindeer herding, archaeology, and documentation of local traditions, language, and culture. This includes research to gather critical species and habitat information, documentation of traditional ecological knowledge, and the establishment of citizen-based science in the U.S. and Russia.[129]

The Bering Strait Messenger Network and the Institute of the North hold a Monthly Teleconference Dialogue between Chukotka and Alaska, on the Third Friday of each month (Alaska Time). The aim is to promote a relationship between Alaskans and Chukotkans who are interested in a changing Arctic and increased activity.[130]

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127 NMFS, Notice; Notification of Quota for Bowhead Whales, 81 Fed. Reg. 8177, February 18, 2016.

128 *A Workshop on Assessing Pacific Walrus Population Attributes from Coastal Haulouts*, *supra* note 47, at 86.

129 NPS, Shared Beringian Heritage Program, Projects and Research (May 10, 2017), available at https://www.nps.gov/akso/beringia/projects/index.cfm.

130 Institute of the North, Bering Strait Messenger Network (May 10, 2017), available at https://www.institutenorth.org/calendar/events/bering-strait-messenger-network/.

The visa-free program allowing travel by indigenous Chukotkans and Alaskans has also facilitated exchange. The program started with a 1989 agreement between the U.S. and U.S.S.R.[131] Since 2015, indigenous peoples from qualified regions in Alaska and Chukotka have been able to travel without a visa for limited periods at the invitation of a relative or tribal member.[132]

## 6. Recommendations on Policies and Practical Steps

### *6.1. Protected Areas*

Neither regulatory nor indigenous participants at the Fairbanks Seminar had a strong interest in designating protected areas for the benefit of walrus. Advocates for walrus protection should conduct further outreach to get more insight into what kinds of protected areas, if any, stakeholders would support. Stakeholders may be more likely to support measures that target specific sources of disturbance (i.e., areas that vessels of a certain size should avoid) rather than creating a sanctuary that could limit walrus harvest and fishing activity. The efforts by U.S.-based groups to promote an internationally recognized ship routing scheme with Areas to Be Avoided and speed limits in the Bering Sea could garner support from many stakeholders, as similar efforts have been supported in the Aleutians and with AEWC's Conflict Avoidance Agreement.

### *6.2. Transferring Management Responsibilities*

Both Russian and U.S. wildlife management agencies are grappling with less funding, even as management challenges (melting sea ice, increasing vessel traffic, and development prospects) are increasing. At the same time, communities on both sides of the International Dateline have expressed frustration with top-down management from afar. There may be a way to address both issues by transferring more management responsibilities to communities. This is certainly easier said than done, particularly since U.S. laws require agencies to take on certain duties, and they can be sued for failure to carry them out.

Still, U.S. law does allow for co-management. Many of the co-management agreements described by participants are focused on subsistence monitoring rather than minimizing disturbances to walrus haulouts. Agencies could work with

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131 USSR-US: Agreement Concerning the Bering Straits Regional Commission, 28(6) International Legal Materials 1429 (1989) (May 10, 2017), available at http://www.jstor.org/stable/20693380.

132 Emily Russell, *Visa-Free Travel to Russia Reinstated for Eligible Alaska Natives*, Alaska Public Media, August 11, 2015 (May 10, 2017), available at http://www.alaskapublic.org/2015/08/11/visa-free-travel-to-russia-reinstated-for-eligible-alaska-natives-2/; Jennifer Monaghan, *Bilateral Visa Waiver Announced for Indigenous Peoples of Alaska, Russia's Chukotka*, Moscow Times, July 23, 2015 (May 10, 2017), available at http://www.themoscowtimes.com/news/article/bilateral-visa-waiver-announced-for-indigenous-peoples-of-alaska-russias-chukotka/526095.html.

communities and entities like EWC on expanded management agreements, in which communities and hunters are trained to be the "first responders" to terrestrial haulouts by minimizing disturbances. Hunters could also be trained to do some of the scientific work that agencies are doing now (i.e., deploying satellite-linked tags to monitor movements and feeding behavior). NGOs could play a supporting role by facilitating training workshops and helping to draft expanded co-management agreements that provide for clear, meaningful community management rules. Some of this cooperation has already taken place organically, in the form of cooperation between ADF&G and other agencies with hunters, and Russian scientists like Anatoly Kochnev and the Haulout Keepers.

### *6.3. Cooperation with the Private Sector*

Walrus hunters (acting through an entity like EWC) and other advocates for walrus protection could explore ways to have ships and aircraft voluntarily avoid hunting and haulout areas, whether or not these areas have any official protected status. As mentioned above, AEWC has been able to get oil and gas and barging companies to voluntarily adhere to Conflict Avoidance Agreements. These agreements, updated yearly, set out hunting areas and times when these areas must be avoided. They also provide for communications between ships and a village-based communications center. A similar agreement might be made between EWC and operators of large vessels expected to transit through the Bering and Chukchi Seas.

One challenge to this is that the volume of transit is likely to be much greater than that which has been involved in oil and gas activities in the Chukchi and Beaufort Seas; and much of the traffic will be non-U.S. vessels considered to be in "transit passage" (which is difficult to regulate).[133] The development of guidelines rather than agreements could be more feasible.

EWC and advocates could consider approaching major liability insurers for ships (and possibly aircraft) to explore the possibilities of having insurance policies require or incentivize any special areas, buffers, or minimum altitudes suggested by these guidelines. Likewise, EWC and advocates could ask flag states to require their vessels to comply with these guidelines.[134]

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[133] There are limits to laws that coastal states can pass to regulate vessels in transit, though this should not stop a non-state entity from trying to obtain voluntary compliance. *See* Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 3, Arts. 38(2), 42; Restatement (Third) of Foreign Relations Law § 513 cmt. j (1987); 33 U.S.C. § 1223(d) (generally exempting foreign vessels in innocent or transit passage from the Ports and Waterways Act except where authorized by a treaty or where the vessel is destined for or departing from a port or place subject to the jurisdiction of the United States); 33 C.F.R. §§ 160.103(c), 164.02 (providing exemptions for certain foreign vessels in innocent or transit passage).

[134] Currently, there are no clear requirements by liability insurers (Protection and Indemnity Clubs) for their insured to adhere to guidelines or voluntary measures to protect marine wildlife. Layla Hughes, Marine Insurance: Measures to Protect Arctic Marine Mammal Hunters and Subsistence (November 2014) (on file with the author). A liability insurer for a ship generally requires the insured to have an "ISM Certificate" from its flag state. This certificate reflects compliance with the International Management Code for the

### *6.4. Adaptable Calendar Map with Regulatory Option*

Since walrus haulouts are likely to continue shifting with the changing climate, management policies should not be tied to particular geographic locations. As discussed above, a more adaptive response could be based on a GIS map showing walrus migration routes, feeding areas, and haulouts, with links to the time of year these are in use and the last known dates of use.[135] If there is consensus among walrus hunters and communities that they would like to include subsistence areas on the map, these could also be included. This map could cover the entire Pacific Walrus population range, from Alaska to Chukotka.

The map would need to be regularly updated in order to be effective. Routes, areas, and haulouts that are no longer in active use could be transferred to a different GIS "layer," so the current/active areas could be easily seen by any user. There would have to be willingness on the part of each agency to post its data, or a third party (perhaps a NGO) could take on the task of regularly requesting data from each agency and updating the map. As a condition of any agency-issued permit in which walrus monitoring is required, the permittee would be required to update the map with observations (or provide this information to a third-party "map keeper").

Future regulations, guidelines, and permit restrictions (whether voluntary or mandatory) could tie minimum aircraft altitudes and vessel buffers to the routes, areas, haulouts, and subsistence areas shown on the map, rather than static points. For example, a permit stipulation for a cruise ship might be "Maintain a buffer of 0.5 mile from all current/active walrus migratory routes, feeding areas, and haulouts, as shown on [GIS layer name] on [GIS map name] at [website address]. Permittee must consult [GIS map] prior to departing each port. While traveling, any walrus sightings should [or must] be reported to [name of map keeper]." There could also be provisions for Areas to Be Avoided and speed limits in these locations. If such a map proves to be a successful tool for avoiding disturbance to walruses, it could be expanded to other marine mammals.

An example of a privately maintained website used for regulatory purposes is the publicly accessible FracFocus Chemical Disclosure Registry, https://fracfocus.org/. Alaska regulations[136] (in addition to those of some other states) require those who conduct hydraulic fracturing to provide information regarding the chemical content of fracturing fluids to the entities that maintain this website (Groundwater Protection Council and Interstate Oil and Gas Compact Commission).

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Safe Operation of Ships and for Pollution Prevention, which was adopted by the International Maritime Organization through Resolution A.741(18), November 4, 1993. In the absence of such a certificate, coverage could be denied. Personal Communication with Charles Dymoke, Lodestar Marine Limited, April 8, 2016. If a flag state requires adherence to guidelines or voluntary ATBAs in order to obtain an ISM Certificate, then insurance companies will recognize this. *Id.*

[135] The idea of a seasonal calendar map was first raised and discussed at the Walrus Research Workshop.

[136] 20 AAC 25.283(i)(1).

### *6.5. Coordinating Website, Newsletters, and Calls*

Participants at the Fairbanks Seminar repeatedly emphasized the need for a coordinating website to bring together past, ongoing, and proposed research.[137] Such a website would be particularly helpful if it included information from both Russia and the United States (ideally in both Russian and English) and applicable laws and guidelines. It could also link to all of the regulatory agency and university websites applicable to walrus research and management, as well as permits issued by these agencies that contain stipulations for walrus protection.[138] If an adaptable GIS map is created, it could be hosted from this site. The existing Pacific Walrus International Database could be developed into a larger coordinating website that serves this purpose, or the website created at the Walrus Research Workshop (http://www.walrusscience.com) could be used. A NGO or division of a university (perhaps the University of Alaska-Fairbanks) could take on the role of website coordinator, ensuring that it is regularly updated.

Another NGO role would be to review the website regularly and develop newsletters on recent developments in research, management, and development activities. These newsletters could be circulated to communities and individuals that may not have regular Internet access.

Still another NGO role could be to coordinate a regularly held, toll-free conference call with a broad range of stakeholders (including walrus hunters, regulatory agencies, and vessel and aircraft operators) where community residents could report disturbances and ask for corrective action. Perhaps agencies with the regulatory authority to issue permits to vessels or vessel insurers could require participation in these teleconferences.

### *6.6. Ensure that Consideration of Walrus Haulouts is "Mainstreamed" into Bering/Chukchi Planning*

At the Fairbanks Seminar, participants emphasized the need to avoid viewing walrus management in isolation, but as part of a larger system. Stand-alone walrus protection plans and stipulations may get lost in the shuffle of efforts to protect and manage the many Bering and Chukchi species that are ecologically valuable and important to subsistence communities. It would be helpful to design plans, rules, and guidelines that apply more broadly to marine mammals. That said, walruses may have different needs from other species, relating to their dependence on sea ice and particular food sources.

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[137] The idea of a coordinating website with links to research from various agencies was first raised and discussed at Dr. Nicole Misarti's March 14, 2016 Walrus Research Workshop.

[138] It could also link weather forecasts geared toward walrus and marine mammal stakeholders, such as Sea Ice for Walrus Outlook (SIWO) (May 10, 2017), available at https://www.arcus.org/search-program/siwo.

Protection measures for walrus (and other marine mammals) should be integrated into larger plans for the Bering/Chukchi region. For example, any ship routing, vessel traffic scheme, or areas to be avoided under consideration by USCG should take into account walrus migratory routes, feeding areas, and haulout locations (in addition to those of other species). Likewise, plans to prevent and respond to oil spills should consider these locations. In the absence of an adaptable GIS map, NGOs can play a role by ensuring that planning agencies have access to current information about these locations.

### *6.7. Future Exchanges*

Bringing stakeholders together from remote communities in Chukotka and Alaska is extremely time-consuming and expensive, leading to reliance on websites, newsletters, teleconferences, Skype communications, and social media. As important as these channels of communication are, they do not adequately substitute for face-to-face conversation in terms of fostering learning and mutual respect.[139] It is important that exchanges like the 2016 Fairbanks Seminar continue to occur, and that they involve young people and non-traditional partners. NGOs and universities can play an important role by continuing to facilitate exchanges like this one.

## Conclusion

The March 15–16, 2016 Fairbanks Seminar to discuss walrus management in Alaska and Chukotka was helpful in joining stakeholders in the Pacific Walrus population – stakeholders who are seldom brought together in face-to-face meetings. The seminar highlighted common challenges in Chukotka and Alaska, including the gaps between higher level agencies and indigenous Chukchi/Bering communities who hunt walrus and manage them on a daily basis.

The following strategies for protecting walruses and supporting the communities that depend on them are based on suggestions raised at the seminar and additional research. Most are more likely to be feasible on the U.S. side, but some could involve international cooperation. While these strategies are geared toward walrus protection, they could potentially apply to other marine mammals. As emphasized at the seminar, it is important not to think of walruses in isolation, but as part of a larger ecosystem involving Chukotkan and Alaskan communities.

- **Protected Areas:** Conduct outreach to get more insight into what kinds of protected areas, if any, stakeholders would support. Consider protections that target specific sources of disturbance rather than allow for potential hunting restrictions.

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[139] *See* Frances Westley, *Governing Design: The Management of Social Systems and Ecosystems Management* in *Panarchy: Understanding Transformations in Human and Natural Systems* 402 (L.H. Gunderson & C.S. Holling (eds.), Washington, D.C.: Island Press, 1995); Richard D. Magerum, *Beyond Consensus: Improving Collaborative Planning and Management* 48 (Cambridge, MA: MIT Press, 2011).

- **Co-Management and Delegation:** Explore ways to transfer more management responsibilities to communities. This may involve better utilization of U.S. laws providing for co-management, organically created co-management agreements, or management training workshops sponsored by NGOs, universities, or agencies.
- **Cooperation with the Private Sector:** Explore ways to have ships and aircraft voluntarily avoid hunting and haulout areas through agreements with major industry operators, or by advocating for insurance policies that require or incentivize compliance with voluntary guidelines.
- **Adaptable Calendar Map with Regulatory Option:** Create a publicly accessible, regularly updated Geographic Information Systems map showing migration routes, feeding areas, haulouts, and possibly subsistence areas throughout the Bering and Chukchi Seas. Establish voluntary buffers and altitude restrictions based on this map (with the potential for mandatory measures later on).
- **Coordinating Website, Newsletters, and Calls:** Establish a single, regularly updated website to keep track of past, ongoing, and proposed research as well as guidelines, laws, permits, and advisories applicable to Russia and the United States. Prepare newsletters on recent developments in research, management, and development activities to circulate to communities and individuals that may not have regular Internet access. Hold conference calls with stakeholders where community residents could report disturbances and ask for corrective action.
- **Ensure that Consideration of Walrus Haulouts is "Mainstreamed" into Bering/Chukchi Planning:** Ensure that protection measures for walrus (and other marine mammals) are integrated into larger plans for the Bering/Chukchi region (such as oil spill plans).
- **Future Exchanges:** Facilitate exchanges that bring together stakeholders from remote communities in Chukotka and Alaska along with regulators, researchers, NGOs, and scientists from both sides of the International Dateline.

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# THE FACE OF VIOLENCE: RETHINKING THE CONCEPT OF XENOPHOBIA, IMMIGRATION LAWS AND THE RIGHTS OF NON-CITIZENS IN SOUTH AFRICA

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*Xenophobia, simply put, is the fear or hatred of foreigners or strangers; it is embodied in discriminatory attitudes and behaviors, and often culminates in violence, abuses of all types, and exhibition of hatred. Theoretically, the best and only solution is to remove enemy images; however, it is debatable whether this can be done. In the same breath, protecting migrants' rights may be the best way to enhance state sovereignty in a globalized world. The protection of fundamental human rights and freedoms transcends municipal and international laws. However, it is the state's responsibility to uphold human rights through its laws and enforcement. This work examines the constitutional rights of non-citizens in South Africa within the context of its immigration law and xenophobia. The motives of xenophobia are considered. It will be argued that foreign nationals are particularly vulnerable to the restriction of their access to justice as the immigration laws and policies have not adequately guaranteed foreigners certain inalienable rights. The states uncoordinated attitude towards xenophobic attacks raises doubt as to whether there can be compliance with the sacred constitutional obligation to protect and preserve lives of all people within the country. For on the one hand the law claims to protect non-citizens while on the other, no prosecution has been made against anyone involved in xenophobic attack. The failures of the state will be observed and necessary suggestions will be proffered by this work to aid policy makers.*

*Keywords: xenophobia; attack; policies; prosecution; violence.*

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## Introduction

Violence commonly viewed as xenophobia in nature erupted in South Africa in May 2008 leaving more than 60 people dead and tens of thousands of people displaced in its wake. The outbreak sent shock waves through the country, the continent and across the globe because for almost 15 years, South Africa had enjoyed a reputation as an exemplum of racial reconciliation.[1] Xenophobia can be traced back to pre-1994, when immigrants from elsewhere faced discrimination and even violence in South Africa, even though much of that risk stemmed from and was attributed to the institutionalized racism of the time due to apartheid.[2] After the advent of democracy in 1994, contrary to expectations, the incidence of xenophobia increased.[3] Studies show that between 2000 and March 2008, at least 67 people

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1 *Violence and Xenophobia in South Africa: Developing Consensus, Moving to Action* (A. Hadland (ed.), Pretoria: Human Sciences Research Council, 2008). It is based on a roundtable hosted in June 2008 in Pretoria that was attended by around 50 key stakeholders from government, civil society and from affected communities. It was a result of partnership between the Human Sciences Research Council and the High Commission of the United Kingdom.

2 *South Africa Xenophobia: Why is There So Much Hatred of Foreigners?*, The Week, May 18, 2015 (May 10, 2017), available at http://www.theweek.co.uk/63378/south-african-xenophobia-why-is-there-so-much-hatred-of-foreigners.

3 Olu Ojedokun, *An Ethical Approach to the Xenophobia against Foreigners in South Africa*, 11(1) OGIRISI: A New Journal of African Studies 169 (2015).

had died from this attack while in May 2008, a series of riots left 62 people dead; although 21 of those killed were South African citizens.[4] In 2015, another nationwide spike in xenophobic attacks against immigrants in general prompted a number of foreign governments to begin repatriating their citizens.[5]

The history of refugees and asylum seekers in South Africa dates back to the 1980s when the country was home to a number of Mozambican refugees, an estimated 350,000 of whom approximately 20% have since returned home.[6] Under the old Apartheid system South Africa did not recognize refugees until 1993 and when it became a signatory to the United Nations (UN) and Organization of African Unity (OAU, now African Union (AU)) Conventions on Refugees in 1994, the number of refugees and asylum seekers in South Africa had increased.[7] Globalization, political discord, environmental hardships, socio-economic strife and the desire to obtain an improved standard of living will continue to be drivers for human migration.[8] However, one of the post-apartheid shifts is the sheer volume and diversity of human traffic crossing South Africa's borders. It is increasingly host to a truly pan-African and global constituency of legal and undocumented migrants.[9] However, these groups of persons have a right to security, a right to protection from infliction of physical violence against a person.[10] As a result of these realities, it is imperative that the rights to physical security of asylum seekers and refugees are protected by adequate measures. "Physical Security" is clearly fundamental to refugee protection[11] but the 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention)[12] does not contain a specific provision on the right to physical security. It is suggested that the rationale for this could be that the drafters of the Convention took it for granted that the physical security of refugees should be protected given

4 Michael Neocosmos, *From "Foreign Natives" to "Native Foreigners"* (Dakar: Codesria, 2006).

5 Robyn Dixon, *Attacks on Foreigners Spread in South Africa; Weekend Violence Feared*, Los Angeles Times, April 17, 2015 (May 10, 2017), available at http://www.latimes.com/world/africa/la-fg-south-africa-foreigners-20150417-story.html.

6 *Xenophobic Violence in Democratic South Africa*, South African History Online (2015) (May 10, 2017), available at http://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa.

7 Ojedokun 2015.

8 *Love thy Neighbours: Exploring and Exposing Xenophobia in Social Spaces in South Africa*, *Alter*nation Special Edition No. 7 (S. Manik & A. Singh (eds.), Durban: CSSALL, 2013).

9 Ojedokun 2015.

10 Lara Wallis, *The Right to Physical Security for Refugees: A South African Perspective*, Working Paper Series, Paper 2 of 2013, University of Cape Town: Refugee Rights Unit Paper (May 10, 2017), available at http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_2_of_2013.pdf.

11 James C. Hathaway, *The Rights of Refugees under International Law* 448 (Cambridge: Cambridge University Press, 2005).

12 UN General Assembly, Convention Relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, vol. 189, at 137 (Refugee Convention).

that the very nature of refugee law lies in the provision of surrogate protection when protection cannot be secured by an individual's home state.[13] Since the right to physical security cannot be grounded in the 1951 Convention, it is necessary to derive the right from "a crisscross of rules which have some bearing on the subject."[14]

## 1. Racism and (or) Xenophobia in South Africa

Xenophobia is "fear and hatred of strangers or foreigners or of anything that is strange or foreign."[15] It is the deep dislike of non-nationals by nationals of a recipient state. Its manifestation constitutes a violation of human rights.[16] This general definition points to a perception but does not elaborate on the actual manifestation of such fear or hatred of strangers. In the South African context, xenophobia is both a negative attitude towards foreigners and a manifestation in extreme cases of violent attacks against them thereby including terms like racial discrimination.[17] Racial discrimination has been defined by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[18] as meaning "any distinction, exclusion, restriction or preference based on race, color, descent, national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[19] Although, the two phenomena are distinct as some have argued that xenophobia is a black-on-black antagonism and not racism per se as racism refers to discriminatory treatments at the hands of a race (a biological group) different to one's own,[20] they also overlap. Xenophobic attitudes may lead to discriminatory actions against foreigners on the basis of their nationality or

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13 Hathaway 2005, at 449.

14 M. Othman-Chande, *International Law and Armed Attacks in Refugee Camps*, 59(2) Nordic Journal of International Law 153 (1990).

15 Xenophobia, Merriam-Webster Dictionary (May 10, 2017), available at http://www.merriam-webster.com/dictionary/xenophobia. It is also defined as "intense dislike, hatred or fear of others." Francis B. Nyamnjoh, *Insiders and Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa* 5 (Dakar: Codesria Books and Zed Books, 2006).

16 South African Human Rights Commission's Braamfontein Statement on Racism and Xenophobia, October 15, 1998. *See also The Nature of South Africa's Legal Obligations to Combat Xenophobia*, Centre for Human Rights, Faculty of Law, University of Pretoria (2009) (May 10, 2017), available at http://dspace.africaportal.org/jspui/bitstream/123456789/33851/1/sout_africa_legal_obligations_combat_xenophobia.pdf.

17 *Id.*

18 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, United Nations, Treaty Series, vol. 660, at 195.

19 Art. 1(1) of the ICERD.

20 Maggie Ibrahim, *The Securitization of Migration: A Racial Discourse*, 43(5) International Migration 163, 164 (2005).

ethnic origin and thus be linked to racial discrimination.[21] While racism is a distinction based on difference in physical characteristics, xenophobia stems from a perception that the other is foreign to or originates from outside the community or nation.[22] The perception of "foreign-ness" may also be informed by physical characteristics that serve to identify the "other," such as an inability to speak the local language (well or at all), accents, style of dress and vaccination marks.[23]

Parallels may be further drawn between these two terms because they share similar outcomes of perceiving the other as a threat; discrimination and exclusion based on the other's cultural origin; and the tightening of immigration controls. However, by way of a distinction, racism is not merely an ideology but it is structural.[24] Rules, laws, regulations and institutions are formulated and created to reproduce racist ideology but under xenophobia institutions have been used to exclude the other, but these institutions were not deliberately designed to reproduce xenophobic sentiments.[25]

It is based on the discriminatory treatment of the "other," on the basis of the other's national origin or ethnicity. This however introduces the concept of *new racism* which is a shift in racism, from notions of biological superiority and instead the focal point is difference.[26] The proponents of new racism claim that they are not being racist or prejudiced, nor are they making any value judgments about the "others," but simply recognizing that they (the others) are different.[27] This difference forms the basis for "legitimate" and contemporary concerns of issues that are generalized as posing a threat to the values and beliefs that are cherished by the community.[28] Surveys on xenophobia in South Africa provided useful data about citizens' attitudes towards migrants and refugees.[29]

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21 Inter-Agency, International Migration, Racism, Discrimination and Xenophobia (August 2001), at 2 (May 10, 2017), available at http://publications.iom.int/bookstore/free/International_Migration_Racism.pdf.

22 *Id.*

23 Bronwyn Harris, *Xenophobia: A New Pathology for a New South Africa* in *Psychopathology and Social Prejudice* (D. Hook & G. Eagle (eds.), Cape Town: University of Cape Town Press, 2002).

24 Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62(3) American Sociological Review 465 (1997).

25 Carol Adjai & Gabriella Lazaridis, *Migration, Xenophobia and New Racism in Post-Apartheid South Africa*, 1(1) International Journal of Social Science Studies 192 (2013).

26 *Id.* at 192. *See also* Ibrahim 2005.

27 Hurriyet Babacan, *Situating Racism: The Local, National and the Global* (Newcastle, England: Cambridge Scholars Publishing, 2009).

28 Teun A. van Dijk, *New(s) Racism: A Discourse Analytical Approach* in *Ethnic Minorities and the Media* (S. Cottle (ed.), Milton Keynes: Open University Press, 2000).

29 Jonathan Crush & Wade Pendleton, *Regionalizing Xenophobia? Citizen Attitudes to Immigration and Refugee Policy in Southern Africa*, Migration policy series no. 30 (Cape Town: Idasa, 2004); Eugene K. Campbell & John O. Oucho, *Changing Attitudes to Immigration and Refugee Policy in Botswana*, Migration policy series no. 28 (Cape Town: Idasa, 2003).

The hardening of anti-migrant views between 2002 and 2008 culminated in the May 2008 violent attacks on foreign African nationals which left many migrants homeless and generally in positions of extreme vulnerability. Foreign migrants are generally identifiable on the basis of bio-cultural factors such as physical appearance and an inability to speak indigenous languages.[30] Reports revealed that several people, mostly migrants were killed in the burning and rampant looting that followed. In 2007, similar attacks on foreign nationals resulted in the deaths of at least 100 Somalis followed by looting and the setting on fire of the businesses and their properties. Likewise in May 2008 several South African cities witnessed large-scale xenophobic attacks that mostly targeted migrants of African origin.[31] This episode marked the latest development in a long series of violent incidents involving the victimization of migrants and refugees in the urban areas of the country. Alexandria township which is located to the north-east of Johannesburg was the site of one of the first waves of violence against foreign nationals, which later spread to other townships across the country in May 2008 and resulted in the deaths of more than 60 people (including South Africans nationals and foreign cross-border traders).[32]

## 2. Theories on Xenophobia

Several theories have been advanced as motives for xenophobia.

### *2.1. Scapegoating*

One of the earliest psychological theories explains prejudice and discrimination as a means by which people express hostility arising from frustration. This has been referred to as scapegoating.[33] This implies that people become so frustrated in their

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30 Daniel Tevera, *African Migrants, Xenophobia and Urban Violence in Post-Apartheid South Africa*, *Alter*nation Special Edition No. 7 (S. Manik & A. Singh (eds.), Durban: CSSALL, 2013), at 14.

31 Jonathan Crush & Wade Pendleton, *Mapping Hostilities: The Geography of Xenophobia in Southern Africa*, 89(1) South African Geographical Journal 64 (2007).

32 Jean Pierre Misago et al., *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (Pretoria: IOM Regional Office, 2009) (May 10, 2017), also available at http://www.observatori.org/paises/pais_77/documentos/violence_against_foreign_nationals.pdf. *See* Janet McKnight, *Through the Fear: A Study of Xenophobia in South Africa's Refugee System*, 2(2) Journal of Identity and Migration Studies 18 (2008); Vicki Igglesden et al., *Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008* (Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand, 2009); Oswell Rusinga et al., *Contested Alien Spaces and the Search for National Identity: A Study of Ethnicity in Light of Xenophobic Violence on Migrants in South Africa*, 1(2) Migration and Development 206 (2012); Jonathan Crush & Sujata Ramachandran, *Xenophobia, International Migration and Human Development*, Human Development Research Paper 2009/47 (September 2009) (May 10, 2017), available at https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/46474/132972.pdf?sequence=1.

33 Emmerentia Landsberg et al., *Addressing Barriers to Learning: A South African Perspective* (2nd ed., Pretoria: Van Schaik Publishers, 2011); Martin N. Marger, *Race and Ethnic Relations: American and Global Perspectives* (2nd ed., Belmont, CA: Wadsworth, 1991).

effort to achieve a desired goal that they tend to respond with aggression and the source of the frustration is unknown or too powerful to confront, so a substitute is found to release aggression.[34] This scapegoating theory may on the face of it be convincing because of the "commonness of experience" since individuals experience frustration at some points in their lives particularly when needs or desires are not met.[35] This theory explains that foreigners are blamed for limited resources such as jobs and education as well as for "dashed expectations regarding the transitional process." The underlying factor, which is poverty and violence, is directed towards foreigners on the pretext that they commit crimes and take away jobs meant for South Africans.[36]

### *2.2. Power Theory*

This is a paradigm that views the relationship between groups as a function of their competitive positions. It suggests that a threat by one particular group to another becomes a source of hate. However, when people feel insecure in the face of threat, they portray resentment and hate but the intensity of the hate does not necessarily depend on real competition in the job market but on the perception of threat which is sufficient to induce animosity.[37]

### *2.3. Power-Conflict Theory*

This theory emerged as a means of neutralizing out-groups that the dominant group perceives as threatening to its position of power and privilege. The aim is to protect and enhance the dominant group's interest.[38] Prejudice however, becomes a protective mechanism used by the dominant group in a multi-ethnic society in assuring its majority position, hence when the group is challenged, xenophobic tendencies in the form of prejudice are aroused and directed at the group perceived as threatening.[39] The intensity of the threat inevitably is beneficial in some way to the dominant group and is sustained on this basis. These tendencies may also serve as a release of frustration for both the dominant and the minority groups.[40]

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34 Marger 1991, at 13.

35 *Id.*

36 Bronwyn Harris, *A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition*, Violence and Transition series (August 2001) (May 20, 2017), available at http://www.csvr.org.za/docs/racism/aforeignexperience.pdf.

37 Matt Mogekwu, *Xenophobia as Poor Intercultural Communication: Re-Examining Journalism Education Content in Africa as a Viable Strategy* (Mmabatho: North-West University, 2002).

38 Marger 1991, at 94; Landsberg et al. 2011.

39 A.I. Alarape, *Xenophobia: Contemporary Issues in Psychology*, 16(2) IFE Psychologia – Special Issue: Xenophobia 72 (2008).

40 Marger 1991, at 111.

### *2.4. Normative Theory*

This theory explains xenophobia within the context of social norms. From this perspective, it is believed that people tend to conform to social situations in which they find themselves, hence, when negative thoughts and discriminatory behavior toward a particular group is expected, individuals feel compelled to think and act accordingly, thus the individual's social environment serves as a source for discrimination that leads to xenophobic behavior.[41] This theory concentrates primarily on the transmission of ethnic prejudices through the socialization process and social situations that compel discriminatory behavior.[42]

### *2.5. Bio-Cultural Approach*

This approach explains that xenophobia operates on the level of physical and cultural appearance, therefore animosity towards the other is not a result of competition for resources but a "product of early political and value socialization."[43] According to this view, cultural differences between people could lead to conflict and hatred, hence the issue that arises is the fear of loss of social status and identity. People prefer to be surrounded by their own kind rather than be exposed to others, consequently, foreigners are deprived of the right to belong. So the inability of minority groups to integrate into the structure and culture of society leads to xenophobic rejection.[44]

### *2.6. Isolation Hypothesis*

This hypothesis views xenophobia as a consequence of South Africa's history of isolation from the international community prior to the 1994 election. The role of international sanctions and isolation from the rest of the world can also be used to understand xenophobia in South Africa. Prior to 1994, apartheid separated South Africans from other nationalities beyond the borders of South Africa. The waiving of international sanctions opened up South Africa's borders to the rest of Africa. This brought South Africans into contact with many "unknown" people. Strangers of various nationalities were in contact with previously secluded South Africans, which resulted in "bitterness to build up."[45]

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41 Marger 1991, at 99; Landsberg et al. 2011, at 256.

42 *Id.*

43 Mogekwu 2002, at 1; Landsberg et al. 2011, at 256.

44 *Id.*

45 Hilma Shindondola, *Xenophobia in South Africa and Beyond: Some Literature for a Doctoral Research Proposal* (Johannesburg: Rand Afrikaans University, 2003).

### 3. Immigration Law and Xenophobia

South Africa has a deep history and sizeable scholarship on internal and cross-border migration.[46] Regional population and migration dynamics are not new phenomenon: the history of South Africa is effectively a history of migration. However, the precolonial, colonial and post-colonial periods are characterized by continuity and change in population and migration patterns.[47] The principal legal instrument defining refugees is the 1951 Convention and the 1967 Protocol.[48] More than 120 states are party to the Convention and (or) Protocol and South Africa became a party to both in January 1996.[49] According to the Convention as amended by the 1967 Protocol, a refugee is one who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence… is unable or, owing to such fear, is unwilling to return to it."[50] The 1969 Convention adopted by the African Union is broader in the scope of its definition

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46 Alan H. Jeeves, *Migrant Labour in South Africa's Mining Economy: The Struggle for the Gold Mines' Labour Supply, 1890–1920* (Kingston and Montreal: McGill-Queen's Press, 1995); Christian M. Rogerson, *Forgotten Places, Abandoned Places: Migration Research Issues in South Africa* in *The Migration Experience in Africa* (J. Baker & T. Aina (eds.), Uppsala: Nordiska Afrikainstituut, 1995); Jonathan Crush, *Cheap Gold: Mine Labour in Southern Africa* in *The Cambridge Survey of World Migration* (R. Cohen (ed.), Cambridge: Cambridge University Press, 1995); Jonathan Crush, *Migration Past: An Overview of Cross-Border Migration in Southern Africa* in *On Borders: Perspectives on International Migration in Southern Africa* (D.A. McDonald (ed.), Cape Town and New York: SAMP and St Martin's Press, 2000); *Transnationalism and New African Immigration to South Africa* (J. Crush & D.A. McDonald (eds.), Cape Town and Kingston, Canada: Southern African Migration Project (SAMP) and Canadian Association of African Studies (CAAS), 2002).

47 *Migrants, Citizens and the State in Southern Africa* (J. Whitman (ed.), Basingstoke: Macmillan, 2000).

48 Throughout the 20th century, the international community steadily assembled a set of guidelines, laws and conventions to ensure the adequate treatment of refugees and protect their human rights. The process began under the League of Nations in 1921. In July 1951, a diplomatic conference in Geneva adopted the Convention Relating to the Status of Refugees, which was later amended by the 1967 Protocol. These documents clearly spell out who is a refugee and the kind of legal protection, other assistance and social rights a refugee is entitled to receive. It also defines a refugee's obligations to host countries and specifies certain categories of people, such as war criminals, who do not qualify for refugee status. Initially, the 1951 Convention was more or less limited to protecting European refugees in the aftermath of World War II, but the 1967 Protocol expanded its scope as the problem of displacement spread around the world. These instruments have also helped inspire important regional instruments such as the 1969 OAU (now AU) Refugee Convention in Africa, the 1984 Cartagena Declaration in Latin America and the development of a common asylum system in the European Union. Today, the 1951 Convention and the 1967 Protocol together remain the cornerstone of refugee protection, and their provisions are as relevant now as when they were drafted.

49 Israel Chokuwenga, *The Refugee Crisis: A South African Perspective* in *Migrants, Citizens and the State in Southern Africa* 119 (J. Whitman (ed.), Basingstoke: Macmillan, 2000).

50 Art. 1(A)(2) of the 1951 Convention.

than the internationally-accepted definition found in the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. It does not include any temporal or geographical limitations, or any reference to earlier categories of refugees. The AU Convention also regulates the question of asylum. In addition, it unanimously stipulates that repatriation must be a voluntary act.[51] To date, 34 African states have ratified this Convention, a few countries having taken the initiative to formulate their own refugee legal instruments to localize the convention to suit their own situation.[52]

Immigration rules establish the basis upon which sovereign states receive immigrants and typically include procedures for the selection, admission and deportation of non-citizens wishing to enter the country[53] as well as rules that control entrants once they are within the territorial confines of the state.[54] Before 1994, foreign workers were recruited under agreement[55] between the employing organization, which in most cases were the big mining conglomerates, and the governments of the supplying countries and most of the neighboring countries were suppliers of labor to South Africa.[56] These workers were undocumented migrants and severely restricted and no doubt a source of cheap labor.[57] With independence, the pattern of migration subsequently changed with the new government lifting most of the restrictions.[58] Since 1994, South Africa has deported 1.7 million undocumented migrants to neighboring states like Mozambique, Zimbabwe, and Lesotho. In 2006 alone, 260,000 migrants were arrested and deported. Human rights groups, including the South African Human Rights Commission (SAHRC), criticized the deportation

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51 United Nations High Commissioner for Refugees, The State of the World's Refugees: The Challenge of Protection (London: Penguin, 1993); Chokuwenga 2000.

52 *Id.*

53 Grete Brochmann, *Mechanism of Immigration Control* in *Mechanisms of Immigration Control: A Comparative Analysis of European Regulation Policies* (G. Brochmann & T. Hammer (eds.), New York: Berg Editorial Offices, 1999).

54 Jonathan Crush, *Immigration, Human Rights and the Constitution* in *Beyond Control: Immigration and Human Right in Democratic South Africa* (J. Crush (ed.), Cape Town: Idasa, 1998).

55 Jonny Steinberg, *A Mixed Reception: Mozambican and Congolese Refugees in South Africa*, ISS Monograph Series 117 (Pretoria: Institute for Security Studies, 2005); Fatima Khan, *Patterns and Policies of Migration in South Africa: Changing Patterns and the Need for a Comprehensive Approach*, Paper drafted for discussion on Patterns on Policies of Migration in Loreto, Italy, October 3, 2007 (May 20, 2017), available at http://www.refugeerights.uct.ac.za/downloads/refugeerights.uct.ac.za/patterns_policies_migration_FKhan.doc.

56 Hania Zlotnik, *Migrants' Rights, Forced Migration and Migration Policy in Africa*, Paper prepared for Conference on African Migration in Comparative Perspective, Johannesburg, South Africa, June 4–7, 2003 (May 10, 2017), available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.586.5923&rep=rep1&type=pdf.

57 Steinberg 2005.

58 Khan, *supra* note 55.

system. Most criticisms focus on the methods of arrest and removal, which these groups say are no different from those deployed to control black South Africans during the apartheid era.[59] Initially the movement of refugees was regulated by the Aliens Control Act[60] of the apartheid era but, in 1998, a new Refugee Act was passed. The 1998 Refugee Act governed the admission of asylum seekers and details their rights and responsibilities. The law came into effect in 2000.[61]

However, pursuant to the domestication of the Conventions and Protocols, the South Africa's Immigration Act of 2002[62] became the main piece of legislation dealing with the admissibility of foreigners into the Republic. In 2004, it was amended (as Immigration Amendment Act No. 19 of 2004) to clarify issues on entry and stay in the country and roles of officials.[63] There was also the Immigration Regulations of June 2005. According to this Act, generally, immigrants who are in a position to contribute to the broadening of South Africa's economic base are welcomed to apply for residence.[64] The Act laid out a more immigration-friendly framework focused on attracting skilled migrants. It also committed the government to rooting out xenophobia in society although it did not specify how this was to be achieved. However, the act also included still more draconian measures to control undocumented migrants through what was euphemistically called "community policing" (that is, expecting South Africans to spy on people and report their suspicions to the authorities).[65] Other amendments have included Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 12 of 2004, Immigration Amendment Act No. 3 of 2007, Immigration Amendment Act No. 13 of 2011, Prevention and Combating of Trafficking in Persons Act No. 7 of 2013 and the Immigration Amendment Act 2016.[66] The result of these changes included visa types, visa processing requirements and travel requirements; new application forms and application fees; and stricter

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59 Jonathan Crush, *South Africa: Policy in the Face of Xenophobia*, Migration Policy Institute, July 28, 2008 (May 10, 2017), available at http://www.migrationpolicy.org/article/south-africa-policy-face-xenophobia.

60 The Aliens Control Act No. 96 of 1991, October 1, 1991 (May 10, 2017), available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=52c148c94.

61 Republic of South Africa Immigration Bill. *See* Compendium of Migrant Integration Policies and Practices, at 183 (May 10, 2017), available at http://rosanjose.iom.int/site/sites/default/files/Compedium_of_Migrant_integration.pdf.

62 The Immigration Act No. 13 of 2002, Government Gazette No. 23478, Notice No. 766, May 31, 2002. After eight years of negotiation, it repeals the Aliens Control Act of 1991 and the Aliens Control Amendment Act No. 76 of 1995.

63 Khan, *supra* note 55.

64 *Id.*

65 *Id.*

66 The Immigration Amendment Act No. 8 of 2016, Government Gazette No. 40302, Notice No. 615, September 27, 2016.

penalties for non-compliance. It is believed that these changes are critical to beef-up national security and ensure economic interests in fulfilment of international obligations and a review of the approach to migration.[67] It remains to be seen whether the changes to South Africa's immigration law have even begun to give effect to these objectives. For instance the recently passed Immigration Amendment Act of 2016 which seeks to amend the 2002 Act, 2004 and 2011 Acts, has been met with severe criticism in view of the sweeping changes made to the Act.[68] The visa application system has been made more complicated for professionals to conduct business in the country and partners of South African citizens to remain together. Also, by the provision of the 2002 Act, spouses whether married or in common law relationships will have to prove a two year relationship before application for permanent residency.[69] This provision it is suggested contravenes international obligations as it becomes tasking for newly married to apply for permanent residency. The boiling point of the Immigration Amendment Act is the change of fines for foreigners who overstay their temporary visa. The import of the provision is that persons leaving the country without a valid permit or visa in their passports will no longer be fined, but will instead summarily be declared as "undesirables for between 12 months and five years."[70] This is so irrespective of whether they simply overstayed or correctly and timeously applied for an extension of their status but it had not yet been processed by the Department of Home Affairs (DHA). Furthermore, the duration for or to amend a visa is 60 days before it expires.[71] Failure to do so will result in a person being declared illegal in a specific country. This new legislation is considered unconstitutional as benchmarked against the South African Constitution. Also the impact of the immigration rules on the business community is to the effect that foreigners looking to set up businesses in South Africa have to ensure that 60% of their workforce comprises South Africans. The Department of Trade and Industry and Department of Labor will be involved in every application for foreign

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67 According to the Department of Home Affairs in South Africa (May 10, 2017), available at http://www.caveatlegal.com/unravelling-south-african-immigration-law/#sthash.x8TeeJqF.dpuf.

68 The essence of the Act is couched thus "To amend the Immigration Act, 2002, so as to provide for an adequate sanction for foreigners who have overstayed in the Republic beyond the expiry date on their visa; and to provide for matters connected therewith." Amendment of sec. 32 of Act No. 13 of 2002, as amended by sec. 33 of Act No. 19 of 2004; amendment of sec. 50 of Act No. 13 of 2002, as amended by secs. 46 and 47 of Act No. 19 of 2004 and sec. 25 of Act No. 13 of 2011.

69 Sec. 26 of the Immigration Act No. 13 of 2002.

70 Nina Oosthuizen, *Immigration Law Change Met with Stern Criticism*, SABC, May 29, 2014 (May 10, 2017), available at http://www.sabc.co.za/news/a/227dde80442cb97aabbfff9a75bb7e80/Immigration-law-change-metwith-stern-criticism-20142905.

71 South Africa Immigration (May 10, 2017), available at http://southafricanimmigration.org/extensions/2304/. *See* Department of Home Affairs – New Immigration Regulation, South Africa (May 10, 2017), available at http://www.intergate-immigration.com/blog/new-immigration-regulations-visa-application-south-africa/.

businesses to set up in South Africa while the provisions for local procurement will offer employment to South Africans.[72] It has been suggested that though the 60% requirement is commendable, as a panacea to the country's high unemployment rate. It is however argued that the burden on applicants, lack of training of staff at regional offices of Home Affairs on the new regulation, slow processing of applications, compulsory overseas filings and a generally unfriendly set of rules, may discourage investors and affect the level of investment the country sees. This piece of legislation and its subsequent amendments swing back and forth between the idealism of the post-apartheid "African Renaissance" and the pervading deep-seated fear of immigrants and immigration.[73] For on the one hand, the immigration policy guarantees the harmonization of rights between citizens and foreigners and pledges amity towards migrants from the South African Development Community (SADC) region while on the other, the policy justifies restricting legal immigration into the country, especially from the SADC region, using the popular lexicon of the xenophobe.[74] While avowing a strongly anti-xenophobic tone, the Act justifies restricting legal immigration by echoing the popular logic that migrants are linked to crime, unemployment, increased pressure on social services and corruption.[75] From this standpoint, the history of this legislation is "distinguished above all by the constitutive restlessness and relative incoherence of various strategies, tactics and compromises that nation-states implement at particular historical moments… to mediate the contradictions immanent in social crisis and political struggles… around the subordination of labour."[76] From this perspective, the immigration law can be perceived as an instrument of control, discipline and coercion through the deployment of these laws as tactics.[77] In many ways, this racially-biased immigration policy has been carried forward to the modern post-apartheid state for some of these policies towards migrants are embedded in the Aliens Control Act of 1991.[78]

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72 Ray Mahlaka, *New Immigration Rules Effective under a Cloud of Criticism*, Moneyweb, May 29, 2014 (May 20, 2017), available at https://www.moneyweb.co.za/archive/new-immigration-rules-effective-under-a-cloud-of-c/.

73 Steven L. Gordon, *Migrants in a "State of Exception,"* 1(1) Transcience Journal 1 (2010).

74 *Id.* at 8.

75 *Id.*

76 Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 Annual Review of Anthropology 419 (2002).

77 Gordon 2010.

78 The Aliens Control Act was based on the 1913 Act that excluded "blacks" and was amended in 1930 and 1937 to exclude Jews. In terms of the Act, it was an offence to "employ, enter into any agreement with, conduct any business with, harbor, or make immovable property available to illegal immigrants." Brij Maharaj, *Immigration to Post-Apartheid South Africa*, Global Migration Perspective No. 1, Global Commission on International Migration (June 2004) (May 20, 2017), available at http://www.refworld.org/pdfid/42ce45074.pdf.

Although the racial requirements were removed from the Aliens Control Act during the early 1990s, the restrictive and draconian nature of the Act remained.[79] The Act was criticized as being premised on the principles of control, exclusion and expulsion and that the post-apartheid migration management system was characterized by corruption, racial double standards and special privileges for certain employers.[80]

## 4. Immigration Policy and Developments in South Africa

International population movements are complex to measure, as they are influenced by a variety of socio-economic, political, environmental and other factors. There are no official figures available on the total number of foreign residents in South Africa other than projections based on census data.[81] The global movement of people, information, technology and capital across the globe provides huge opportunity and at the same time immense risk.[82] There is a cross-border connection and integration of societies, economies and culture[83] and South Africa has been a migrant-receiving country for many decades.[84] Much of the immigration policy paradigm in South Africa in the late 19th and early 20th centuries was dominated by the discourse of recruiting "desirable" whites and excluding migrants from Asia and India in particular but with regard to African migrants, domestic and foreign, the primary concern of apartheid and pre-1948 South African governments was to ensure colonial domination and an abundant supply of cheap migrant labor.[85] The challenges of managing migration in South Africa became more complex by the fact that the end of apartheid opened up the country to new forms of global, continental

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79 Gordon 2010.

80 Jonathan Crush, *Fortress South Africa and the Deconstruction of Apartheid's Migration Regime*, 30(1) Geoforum 1 (1999).

81 Figures from the 2011 Census suggest that 3.3% or about 1.7 million of the country's 51.7 million population are foreign born. According to AfricaCheck, data collated by the World Bank and the UN, suggests a migrant population of about 1.86 million people. The IOM estimates that the total migrant population rose from 2% of population in 2000 to over 5.5% in 2015, which aligns with the census projections. *See* Green Paper on International Migration, Department of Home Affairs, June 24, 2016 (May 20, 2017), available at http://webcache.googleusercontent.com/search?q=cache:W7e3_epdeRgJ:www.gov.za/sites/www.gov.za/files/40088_gon738.pdf+&cd=1&hl=ru&ct=clnk&gl=ru.

82 *Id.*

83 Ian Goldin, *Globalization and Risk for Business: Implications of an Increasingly Interconnected World*, Lloyd's 360 Risk Insight (May 20, 2017), available at https://www.lloyds.com/~/media/lloyds/reports/360/360-globalisation/lloyds_360_globalisaton.pdf.

84 Guy Standing et al., *Restructuring the Labour Market: The South African Challenge* 61–62 (Geneva: ILO, 1996).

85 *Id.*

and regional migration.[86] The ensuing integration of South Africa with the SADC region brought a major increase in legal and undocumented cross-border flows and new forms of mobility and the region's reconnection with the global economy opened it up to forms of migration commonly associated with globalization.[87] This process generated a number of social, economic and political challenges, and necessitated bold new policies. This necessity was for regional economic integration to proceed[88] hence migration can be considered an instrument of development, which has the potential to facilitate economic, social and political freedom. It may also hinder economic activities, and create social instability and anarchy.[89] According to international studies, immigrants are said to contribute to economic development of host countries. For instance, in South Africa, there is improvement or indirect impact on the economy especially in the informal and formal businesses such as supermarkets, crafts, taxis and upholstery. They contribute via purchasing of goods and subsistence and other living expenses.[90] Hence it is often argued that South Africa is stereotyped into thinking that foreigners, whether legal or illegal are a threat to the economy and security of the South Africans.[91]

South Africa has undergone a protracted process of developing policy and legislation on migration and refugees since 1994.[92] This process has included the drafting of a Green Paper on International Migration in 1997, a Refugee White Paper on International Migration accompanied by a Draft Immigration Bill and the adoption of the first comprehensive Immigration Act in 2002, which was subsequently amended.[93]

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86 Jonathan Crush & Vincent Williams, *International Migration and Development: Dynamics and Challenges in South and Southern Africa*, United Nations Expert Group Meeting on International Migration and Development, United Nations Secretariat, New York, July 6–8, 2005 (May 20, 2017), available at http://www.un.org/esa/population/meetings/ittmigdev2005/P05_Crush&Williams.pdf.

87 Brian Williams et al., *Spaces of Vulnerability: Migration and HIV/AIDS in South Africa*, Migration policy series no. 24 (Cape Town: Idasa, 2000); *Mobile Populations and HIV/AIDS in the Southern African Region* (Pretoria: IOM and UNAIDS, 2003).

88 Sandy Johnson & Antony Altbeker, *South Africa's Migration Policies: A Regional Perspective*, CDE Workshop no. 8 (February 2011) (May 20, 2017), available at http://www.cde.org.za/wp-content/uploads/2012/12/South%20African%20Migration%20policies%20A%20Regional%20perspective%20Full%20Report.pdf.

89 Census 2011: Migration Dynamics in South Africa, Statistics South Africa, Report No. 03-01-79 (May 20, 2017), available at http://www.statssa.gov.za/publications/Report.

90 David A. McDonald et al., *The Lives and Times of African Migrants & Immigrants in Post-Apartheid South Africa*, Migration policy series no. 13 (Cape Town: Idasa, 1999). *See* Maharaj, *supra* note 78.

91 *Id. See also* Daniel Tevera & Lovemore Zinyama, *Zimbabweans Who Move: Perspectives on International Migration in Zimbabwe*, Migration policy series no. 25 (Cape Town: Idasa, 2002).

92 Towards a White Paper on International Migration in South Africa, Guidelines for Public Consultation, June 15, 2016 (May 20, 2017), available at http://www.home-affairs.gov.za/files/Guidelines_for_Consultation-GreenPaper.pdf.

93 Green Paper on International Migration, *supra* note 81.

The Refugee White Paper was developed in 1998 as a first step towards developing a system of protection for refugees and asylum-seekers, following South Africa's ratification of the 1951 Convention and its 1967 Protocol and the 1996 OAU (now AU) Convention Governing the Specific Aspects of Refugee Problems in Africa. The White Paper also included a Draft Refugee Bill which, following amendments was adopted and legislated as the Refugees Act.[94] The White Paper outlined a number of principles guiding the treatment of refugees in South Africa, including: the international principle of non-refoulement: non-prosecution on the basis of illegal entry into the country; non-deportation, except where there is a threat to national security or the public order; basic security rights; basic human dignity rights and basic self-sufficiency rights, including the rights to work and education.[95] The shortcoming of this White Paper is that it is not holistic because it does not deal with emigration and it adopts an approach that does not align with South Africa's historical and geographical realities or to using international migration strategically to achieve development goals. It also assumes immigration as a routine function that falls mainly under the Home Affairs rather than adopting a "whole of the state and society" approach.[96] The White Paper did advocate establishing an immigration service and the Immigration Services (IMS) branch of the Department of Home Office which was established but was poorly funded.[97] However, the 2016 Green Paper on International Migration[98] addressed the question of how to engage with South African emigrant communities abroad and provided a holistic approach towards international migration in view of the various interconnectivity which manifests in concrete processes and in the lives of people. For example, providing protection to refugees and asylum seekers falls in the human rights domain; but it also carries security risk for the host country that must manage it using the same security systems that cover immigration.[99]

At the level of policy, legislation, strategy and systems, the asylum seeker and refugee regime that was established through the White Paper Refugees Act has serious gaps that have only been partially addressed through amendments.[100] This was caused by the assumption that numbers of asylum seekers would be low, given the relative stability of SADC and the distance from refugee sending countries. Also, the high level of activity of human smugglers and traffickers who bring in people under the guise of being asylum seekers from as far as Asia and North East Africa was also

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94 The Refugees Act No. 130 of 1998, Government Gazette No. 19544, Notice No. 402, December 2, 1998.

95 Green Paper on International Migration, *supra* note 81.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

a factor.[101] There was also no provision made for indigent asylum seekers with basic food and accommodation, leading to the courts obliging the Department of Home Affairs to consider issuing deserving cases with permits allowing them to work or study. This further burdened the asylum system, leading to many adjudication cases being delayed for years.[102] The Department of Home Affairs amended the Immigration and Refugee Acts and implemented strategies to address gaps in legislation.[103] What is required, however, is a comprehensive review of the policy framework that can inform systematic reform of the legislation and administration of immigration. There was a comprehensive national discussion on the international migration policy prior to the publication of the White Paper on International Migration in 1999. Since then, South Africa and the world have undergone profound changes and there is a better understanding of the way in which international migration should be managed by states, regions and internationally.[104] However, within South Africa, the thinking and attitudes to international migration are currently influenced by an unproductive debate between those who call for stricter immigration controls and those who call for controls to be relaxed. The discourse is in general characterized by strong emotions, stereotypes and contested statistics.[105] The overall contention of the Green Paper is that it is neither desirable nor possible to stop or slow down international migration. In general international migration is beneficial if it is managed in a way that is efficient, secure and respectful of human rights. Managing international migration in the interest of the states is not a new idea. As states develop with rules, they are codified into laws which concern the rights and duties of citizens.[106]

## 5. Access to Justice for Non-Citizens in South Africa

The rights entrenched in the Bill of Rights in South Africa's final Constitution are, with a few exceptions, guaranteed to citizens and non-citizens alike. Ordinarily, citizenship can be acquired by being born in a country (*jus soli* or the law of the

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101 Green Paper on International Migration, *supra* note 81.

102 Kate Jastram & Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (May 15, 2017), available at http://www.ipu.org/pdf/publications/refugee_en.pdf.

103 Overview of the New Immigration Laws and Regulations and Their Implications, by Home Affairs Director-General Mkuseli Apleni, Department of Home Affairs, April 24, 2015 (May 15, 2017), available at http://www.dha.gov.za/index.php/statements-speeches/600-overview-of-the-new-immigration-laws-and-regulations-and-their-implications-by-home-affairs-director-general-mkuseli-apleni.

104 Guidelines for Public Consultation, *supra* note 92.

105 Louise Flanagan, *Home Affairs Looking at Refugees in a New Light*, Daily News, July 4, 2016 (May 15, 2017), available at http://www.iol.co.za/dailynews/opinion/home-affairs-looking-at-refugees-in-a-new-light-2041493.

106 Green Paper on International Migration, *supra* note 81.

place); being born to a parent who is a citizen of the country (*jus sanguinis* or the law of blood); naturalization; or a combination of any of these paths. Persons falling outside of these borders are non-citizens.[107] These include people who reside in the country but were not born there and owe no allegiance to it, and also some people who owe allegiance to the country and have been living in it for generations but still find themselves in this category.[108] Non-citizens however, include refugees, asylum seekers, documented migrants and undocumented migrants.[109]

### *5.1. Asylum Seekers and Refugees*

An asylum seeker is one who has left his or her own country of origin in order to seek international protection as a refugee.[110] In South Africa, a person becomes an asylum seeker when he or she states his or her decision to apply for refugee status. The fact that a person is fleeing from his or her home country to seek international protection does not automatically make him or her an asylum seeker. Under the South African Law, such a person must first make the claim for asylum before he or she can be considered an asylum seeker.[111] The difference between an "asylum seeker" and a "refugee" though sometimes used interchangeably is that an asylum seeker has not yet been granted protection status whereas a refugee has been granted such status[112] and the right to seek asylum is provided for under the Universal Declaration of Human Rights (UDHR)[113] and the African Charter on Human and Peoples' Rights.[114]

Subsequent to its accession to various international treaties on the status of refugees,[115] South Africa committed itself to the principle of non-refoulement. This principle finds expression in sec. 2 of the Refugees Act which prohibits the return of refugees and asylum seekers to a country from which they are fleeing persecution based on the grounds specified in it. Most asylum seekers do not enter the country through

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107 UN Office of the High Commissioner for Human Rights (OHCHR), The Rights of Non-Citizens, 2006, HR/PUB/06/11 (May 15, 2017), available at http://www.ohchr.org/documents/publications/noncitizensen.pdf.

108 Patricia Ehrkamp & Helga Leitner, *Beyond National Citizenship: Turkish Immigrants and the (RE) Construction of Citizenship in Germany*, 24(2) Urban Geography 127, 127–128 (2003).

109 The Rights of Non-Citizens, *supra* note 107.

110 David Weissbrodt, *The Human Rights of Non-Citizens* 110 (Oxford: Oxford University Press, 2008).

111 Sec. 23 of the Immigration Act No. 13 of 2002 as amended by sec. 15 of the Immigration Amendment Act No. 13 of 2011.

112 Weissbrodt 2008.

113 UDHR (1948) UN Doc A/810 Art 14(1).

114 OAU, African Charter on Human and Peoples' Rights ("Banjul Charter"), June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

115 Art. 33(1) of the 1951 Convention. Refoulement is also prohibited by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 3), and the International Covenant on Civil and Political Rights (Art. 7) to which South Africa is a signatory.

the designated entry point for fear that they would be denied the right of entry if they present themselves at the port of entry.[116] Consequently, they only seek asylum after their irregular entry into the country.[117] And by the provisions of the Immigration law, a person who enters and remains in the country must do so within the confines of the law[118] because an asylum seeker who enters the country through irregular means could potentially be regarded by authorities as undocumented migrants, especially if they are not in possession of any other form of documentation. They are usually arrested and detained if found to have no document or to be in possession of expired asylum seeker permits.[119] However, where an asylum seeker declares his intention to seek international protection, he must be issued with a temporary visa[120] because by virtue of his status other documents like a valid passport or other identity document is beyond his reach.[121] The temporary visa is to enable him to have access to a Refugee Reception Office where he is issued with a permit in the prescribed form setting out the conditions for stay in the country in line with the constitution and international obligations.[122] Refugees are also entitled to certain rights and protection under the South African law.[123] In view of the well-founded principles of international law, South Africa has an obligation not to extradite, expel or return a refugee to any country if such action would see the person being subjected to "persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group" in the other country.[124]

116 Weissbrodt 2008.

117 *Id.*

118 Secs. 9(1),(4) and 10(1) of the Immigration Act No. 13 of 2002.

119 *Arse v. Minister of Home Affairs and Others*, (25/2010) [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA); [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA) (March 12, 2010); *Hassani v. Minister of Home Affairs*, (01187/10) SGHC (February 5, 2010) (unreported); *Kibanda Hakizimana Amadi v. Minister of Home Affairs*, (19262/10) SGHC (June 1, 2010) (unreported); *Jean Paul Ababason Bakamundo v. Minister of Home Affairs and 2 Others*, (17217/09) SGHC (May 12, 2009).

120 In terms of sec. 23 of the Immigration Act No. 13 of 2002.

121 Lawyers for Human Rights Situation Report: Refoulement of Undocumented Asylum-Seekers at South African Ports of Entry, With a Particular Focus on the Situation of Zimbabweans at Beitbridge (September 2011) (May 15, 2017), available at http://www.lhr.org.za.

122 Sec. 22(1) of the Refugees Act.

123 *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others*, (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC) (December 12, 2006), para. 99: "To understand the special position of refugees, it is important to understand how refugee status is conferred in our law, as well as South Africa's international obligations in respect of refugees."

124 Weissbrodt 2008, at 153. *See* the following: European Union, Charter of Fundamental Rights of the European Union, October 26, 2012, 2012/C 326/02, Art. 18; Cartagena Declaration on Refugees, November 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93 (1984–85); Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), September 10, 1969, 1001 U.N.T.S. 45. *See* sec. 2 of the Refugee Act, which ensures that refugees enjoy asylum in South Africa without hindrance. It encompasses both the "seeking" and "enjoyment" of asylum.

The United Nation Refugee Convention[125] sets out the criteria that qualifies a person for the status of refugee as follows: (1) such a person should be outside his or her country of nationality and (2) should be unable to return to his country of nationality or unwilling to do so owing to; (3) a well-founded fear of persecution for reasons of race, religion, political opinion or membership of a certain social group[126] while for a stateless person to qualify for international protection under this definition, such a person needs to be outside his/her country of habitual residence.[127] The Refugees Act[128] accentuates the UN Refugee Convention on the definition of Refugee in South Africa and also acknowledges the fact that South Africa is a signatory to the AU Convention Governing the Specific Aspects of Refugee Problems in Africa and sec. 3(b) of the Act includes the definition found in the AU document. There are however disparities between the definition of the AU Convention on Refugees and that of the 1951 Convention for while the AU Convention makes provision for an objective inquiry into conditions prevailing in the applicant's country of origin, thus making it more suitable for cases of forced mass movements of people,[129] the 1951 Convention requires a subjective test focusing on the individual applicant.[130] Under the requirement of the AU Convention, there is no need to demonstrate a "well-founded fear of persecution," it is sufficient that the country of origin is subjected to foreign aggression, occupation or domination resulting in serious public disorder, consequently, the grant of asylum to larger groups is easier under the AU Convention unlike the 1951 Convention that requires individual screening.[131] The system of refugee determination in South Africa involves an interview between

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125 Art. 1(A)(2) of the 1951 Convention.

126 Jens Vedsted-Hansen, *Refugees, Asylum Seekers and Migrant Workers* in *International Protections of Human Rights: A Textbook* 303 (C. Krause & M. Scheinin (eds.), Turku: Abo Akademi University, 2009). *See also* Weissbrodt 2008, at 153.

127 *Id.*

128 Sec. 3(a).

129 Example, the Great Lakes Region: the Great Lakes is one of the regions in Africa that has been affected by a high number of refugee-related problems. Conflicts, famine and violence have pushed millions of people away from their places of origin. For several decades, the region has been engulfed in violent intrastate and proxy interstate conflicts. The Rwandan genocide in 1994, the Burundi and South Sudan civil wars, and the conflict in the Democratic Republic of the Congo (DRC) are still ongoing deadly conflicts that have caused an irregular migration of refugees and internally displaced persons (IDPs) in the region. Scholars have identified the Great Lakes Region as consisting of not only the DRC, Uganda, Burundi, Rwanda, Kenya and Tanzania, but also including South Sudan, Somalia, Sudan, Angola, Ethiopia, Eritrea all of which share the ravages and fallout of these intractable conflicts. *See Conflict and Peacebuilding in the African Great Lakes Region* 3 (K. Omeje & T.R. Hepner (eds.), Bloomington: Indiana University Press, 2013).

130 Weissbrodt 2008, at 153.

131 Paul Kuruk, *Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees*, 35 Stanford Journal of International Law 313, 325 (1999). *See also* Weissbrodt 2008, at 161; Jastram & Achiron, *supra* note 102.

the claimant and the Refugee Status Determination Committee (RSDC) which is an administrative process provided for under the South African Constitution which guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair.

### *5.2. Migrants*

Apart from refugees and asylum seekers, non-citizens consist of migrant workers, foreign students, business visitors, tourists and undocumented migrants or "illegal foreigners."[132] There is a disjuncture between the guaranteed rights and the realities that face non-citizens.[133] Xenophobia leads to denying non-citizens their rights and access to justice which are guaranteed in domestic and international law.[134] The overarching international instrument for the protection of human rights remains the UDHR with its ancillary treaties like the International Covenant on Civil and Political Rights (ICCPR)[135] and the ICERD among others.[136] Since these instruments apply to all human beings, they apply to both citizens and non-citizens[137] alike irrespective of where one comes from and they safeguard everyone from arbitrary arrest and detention,[138] arbitrary killing,[139] torture and inhuman treatment.[140]

Against the backdrop of these constitutional and human rights provisions, Parliament enacted the Immigration Act which has been subject to several amendment to govern entry and departure from the Republic. The Act recognizes two groups of migrants: "Legal foreigners" who are in the country in terms of the provisions found within the Act and "Illegal foreigners" who are in the country in

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[132] This terminology comes from sec. 32 of the Immigration Act No. 13 of 2002. It was contested at the time of drafting by the SAHRC who felt it was offensive and objectified the persons concerned – *see* in SAHRC Submission on Immigration Bill (2002) (May 15, 2017), available at https://www.sahrc.org.za/home/21/files/7%20SAHRC%20Submission%20on%20Immigration%20Bill%20%28Parl.%29%20April%202002.pdf.

[133] Weissbrodt 2008, at 2.

[134] *Id.* at 3.

[135] UN General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, United Nations, Treaty Series, vol. 999, at 171.

[136] *See* the following treaties: African Charter on Human and Peoples' Rights; UN General Assembly, Convention on the Rights of the Child, November 20, 1989, United Nations, Treaty Series, vol. 1577, at 3; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, United Nations, Treaty Series, vol. 1249, at 13. All these treaties have been ratified by South Africa and contain similar protections applicable to all, including migrants.

[137] Art 2 of the UDHR; Art 1 of the ICERD.

[138] Art. 9 of the ICCPR.

[139] Art. 6 of the ICCPR.

[140] Art. 7 of the ICCPR.

contravention of the Act[141] hence legal foreigners can be defined based on the reasons for their entry and stay in the country such as a grant of temporary residence visa upon application for the purposes of work,[142] study,[143] visiting,[144] uniting with relatives,[145] applying for asylum,[146] medical treatment,[147] etc. On the other hand illegal foreigners or undocumented migrants are those who are declared prohibited and (or) undesirable persons in terms of the Act.[148] The Immigration Act, in stark contrast with the Refugees Act,[149] does not contain a specific section outlining and detailing the rights of legal foreigners in South Africa. It, however, contains provisions dealing with the right of permanent residents.[150] The Act encourages the promotion of human rights based culture in respect of immigration control and also encourages the Department of Home Affairs to educate communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees and conduct activities to combat xenophobia.[151] The consideration of rights of illegal foreigners in the first place is progressive, although these rights are mostly envisaged in the event of the arrest, detention and deportation of undocumented migrants.[152] However, the provision in sec. 44 of the Act that obliges State actors to report undocumented migrants but at the same time not to deny them services can be seen as a limited form of recognition of undocumented migrants' rights.[153] Although it is presumed that once a person is legally in the country, he can enjoy the rights conferred upon him or her by their status; this is not the case in practice. The Immigration Act in its current form encourages community enforcement in the policing of illegal

141 Sec. 1(xviii) states that "illegal foreigners" means "a foreigner who is in the Republic in contravention of this Act and includes a prohibited person." *See also Lawyers for Human Rights and Other v. Minister of Home Affairs and Other*, (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (March 9, 2004), para. 4.

142 Sec. 19.

143 Sec. 13.

144 Sec. 11.

145 Sec. 18.

146 Sec. 23.

147 Sec. 17.

148 Secs. 29 and 30. *See Lawyers for Human Rights and Other v. Minister of Home Affairs and Other*, *supra* note 141, para. 4.

149 Sec. 27.

150 Sec. 1(xxxvii) states that "status" means "the permanent or temporary residence issued to a person in terms of this Act and includes the rights and obligations flowing therefrom, including any term and condition of residence imposed by the Department when issuing any such permit."

151 Sec. 2(2)(e).

152 Sec. 34(1).

153 Sec. 44.

entry into the country.[154] This means that in addition to the police and immigration officials,[155] other state organizations,[156] private businesses,[157] learning institutions[158] and private individuals among others must always ascertain the status of anyone suspected of being a foreigner before engaging in any business with them. Such provisions are very intrusive and could mean that a foreigner does not enjoy a free and undisturbed sojourn within the country. Consequently, the focus is shifted from border control to control by institutions and members of the community.[159] Such an environment encourages vigilantism and may degenerate into xenophobic witch-hunts. Ultimately, the mistreatment of undocumented migrants results in their alienation and criminalization in the eyes of the community.[160] The result is that all foreigners, even documented migrants are under constant suspicion and becomes targets for police harassment and xenophobia.[161] In essence, the rights of non-citizens are infringed by the requirements of constantly having to verify their status at every turn for fear of arrest, detention and deportation. One of the frustrating aspects for non-citizen is being on the wrong end of the immigration authorities. Enforcement is often done with blatant disregard for the procedural and substantive protections put in place by the Immigration Act.[162] Once detained, very few detainees can afford private counsel, leaving most asylum seekers and other detained migrants with no recourse through which to exercise their basic rights.[163] This is exacerbated by the fact that immigration detention has fewer safeguards than criminal detention and it lacks external oversight and monitoring.[164] A study of immigration detention carried out by the SAHRC in 1999[165] established that

154 Sec. 2(1) of the Immigration Act No. 13 of 2002.

155 Sec. 41.

156 Sec. 44.

157 Sec. 42.

158 Sec. 39.

159 Surplus People? Undocumented and Other Vulnerable Migrants in South Africa, Report, International Federation for Human Rights (FIDH), February 1, 2008 (May 15, 2017), available at http://www.fidh.org/surplus-people-Undocumented-and.

160 *Id.* at 20.

161 *Id.*

162 Lawyers for Human Rights Report: Monitoring Immigration Detention in South Africa (September 2010) (May 15, 2017), available at http://www.lhr.org.za.

163 *Id.*

164 *Id.*

165 SAHRC Report into the Arrest and Detention of Suspected Undocumented Migrants, Launched in Parktown, Johannesburg, March 19, 1999 (May 15, 2017), available at https://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf.

there were repeated violations of the Aliens Control Act.[166] Several detainees are incarcerated for periods of over 5 months (or 150 days), which was in excess of the allowable 120 days during which time their detention had not been subject to judicial review.[167] In the case of *Aruforse v. Minister of Home Affairs*[168] the applicant challenged his prolonged detention in terms of sec. 34(1)(d) of the Act, after having been held in Lindela center for over 6 months.[169] The court took the view that sec. 34(1) only permits the extension of the initial 30 day period by a magistrate's Court for a further 90 calendar days. The court had recourse to the case of *Consortium for Refugees and Migrants in South Africa and Others v. Minister of Home Affairs and Others*[170] *where Motloung J interpreted sec. 34(1) of the Immigration Act to mean "that the maximum period for which any person can be detained in terms of the Immigration Act is a period of 120 days."*[171] *Accordingly the court held that for the detention of the applicant to be unlawful, it must be beyond the statutory period of 120 days. In Hassani v. Minister of Home Affairs*, a similar ruling was handed down based on the excessive length of the applicants' detention.

## 6. The Role of Law in Xenophobia in South Africa

Understanding the reason and the role of law in curbing this violence is important for the country for several reasons: on a micro-level it would help prevent future attacks, while on a macro-level, the country would be able to meet the basic tenets of

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166 Sec. 55 of the Aliens Control Act:

(5) such a detention shall not be for a longer period than is under the circumstances reasonable and necessary, and (that) any detention exceeding 30 days shall be reviewed immediately, by a judge of the Supreme Court of the provincial division in whose area of the jurisdiction, the person is detained, designated by the Judge, President of that division for the purpose, and provided that such detention shall be reviewed in this manner after the expiry of every subsequent period of 90 days.

167 SAHRC Report, *supra* note 165.

168 *Aruforse v. Minister of Home Affairs and Others*, (2010/1189) [2010] ZAGPJHC 59; 2010 (6) SA 579 (GSJ); 2011 (1) SACR 69 (GSJ) (January 25, 2010). The court held that no detention beyond 120 days is lawful and that the appropriate remedy is the applicant's immediate release. *See also AS & 8 Others v. Minister of Home Affairs & 3 Others*, 2010/101 (SGHC) (unreported). After more than 4 months in administrative detention, the High Court declared applicants' detention unlawful because DHA had failed to follow the correct administrative procedures when the family was first detained. The court importantly held that a warrant of detention that was not issued in accordance with procedural requirements of the Immigration Act, in this case within the correct time frame, could not legitimize, after the fact, a detention that was initially unlawful.

169 *Id.* para. 2.

170 *Consortium for Refugees and Migrants in South Africa and Others v. Minister of Home Affairs and Others*, WLD, July 7, 2008, Case No. 6709/08 (unreported).

171 *Aruforse v. Minister of Home Affairs and Others*, *supra* note 168, paras. 14, 15.

regional cooperation such as tolerance and acceptance of non-citizens.[172] According to Sachs J minority judgment in *the Union of Refugee Women*[173] case

> xenophobia is the deep dislike of non-nationals by nationals of a recipient State. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances.[174]

He cautioned however, that the manifestation of this phenomenon struck at the heart of the Bill of Rights, warning that it could subconsciously sip into the mainstream of life through biased interpretation and application of laws.[175] In an attempt to explain why xenophobia exists in South Africa, blame has been placed on the country's immigration laws which are perceived as exclusionary in context and operation.[176] The immigration law[177] is structured in such a way as to rope in the citizenry, businesses, schools, tertiary institutions, hospitals, hotels and other local entities to identify and report undocumented migrants.[178] The Act requires that non-citizens should prove their lawful status in the country at all times, even to non-state actors such as landlords, businesses, schools, hospitals, banks and colleges.[179] The effect of this law is that it paints all non-citizens as "others" who, in accessing public and private services, must continually prove and justify the legality of their presence in the country. These xenophobic attitudes and practices by institutions of the state dehumanize foreign nationals in the country, rendering them easy and soft targets for non-state actors.[180]

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172 Nina Hopstock & Nicola de Jager, *Locals Only: Understanding Xenophobia in South Africa*, 33(1) Strategic Review for Southern Africa 120, 121 (2011).

173 *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others*, *supra* note 123.

174 Para. 143.

175 *Id.*

176 Hopstock & de Jager 2011, at 127. The delay in implementing a new immigration system meant that the Aliens Control Act with its emphasis on security, sovereignty and exclusion continued in force until 2002. *See also* Neocosmos 2006. In 1997, the Department of Home Affairs led by Chief Mangosuthu Buthelezi (IFP) specifically rejected a Draft Green Paper on International Migration that was produced by an independent task team which called for a right-based approach to immigration.

177 The Immigration Act No. 13 of 2002.

178 Secs. 38 to 45 of the Immigration Act No. 13 of 2002. *See also* Darshan Vigneswaran, *Enduring Territoriality: South African Immigration Control*, 27(7) Political Geography 783 (2008).

179 Vigneswaran 2008.

180 Jean-Pierre Misago et al., *May 2008 Violence against Foreign Nationals in South Africa: Understanding Causes and Evaluation Responses*, Forced Migration Studies Programme (FMSP), University of the Witwatersrand and Consortium for Refugees and Migrants in South Africa (CoRMSA) (April 2010) (May 15, 2017), available at www.migration.org.za/uploads/docs/report-27.pdf.

Constitutionally, both citizens and non-citizens have equal right to political participation which is also supported by international human right treaties[181] but the exclusion of non-citizens from participation in political life even at a municipal level explains why community meetings held to discuss them normally degenerate into violent protests.[182] This exclusion has unintended consequences as non-citizens exclude themselves from local community policing forums and similar structures where it would have been desirable to have their input in order to counteract xenophobic tendencies and prejudgment.[183] Decisions with negative impact on the lives of non-citizens are consequently taken without their participation. The court tried to reverse this trend in the case of *Mamba v. Minister of Social Development*[184] by requiring the parties to engage with each other. The parties were internally displaced non-nationals who were being evicted from temporary camps set up after the 2008 xenophobia attacks, on the one hand, and on the other hand were being evicted by the State. The court ordered parties to

> engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters.[185]

This order was unsuccessful because of the relative weakness of non-citizens as a group in comparison to the state and because the negotiating positions were skewed in favor of the state. Nothing the court did could save the negotiations which further emphasize the fact that although the court may make an order, the state is often reluctant to engage with non-citizens who are deprived of vote and political power.[186] This further explains why states often repeat the same negative behavior against non-citizens, ignoring court orders and effectively running roughshod over their rights.[187]

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181 Sec. 19 of the Constitution of South Africa. Misago et al. 2009.

182 *See Osman v. Minister of Safety & Security & Others*, [2011] JOL 27143 (WCC).

183 In any case, chapter 7 of the South African Police Service Act No. 68 of 1995 which sets out the objects and procedural requirements for Community Policing Forum (CPF) places no conditions on membership in the CPF, thus there should be no legal impediment to representation of non-nationals.

184 *Mamba v. Minister of Social Development*, CCT 65/08 (August 2008).

185 Brian Ray, *Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy*, 9 Washington University Global Studies Law Review 399 (2010), quoting *Mamba v. Minister of Social Development*.

186 Misago et al. 2009.

187 Roni Amit, *Winning Isn't Everything: Courts, Context, and the Barriers to Effecting Change through Public Interest Litigation*, 27 South African Journal on Human Rights 8 (2011).

W. le Roux agrees with the International Organization for Migration Report[188] that attributes the outbreak of violence to the "breakdown of democratic governance, the rule of law and participatory democracy at local government level."[189] He discussed the theory of disaggregation of citizenship[190] which theory means the legal integration of migrants by giving them rights previously preserved for citizens only. This theory calls for the expansion of the current rights available to non-citizens (which consists for the most part of civil and socio-economic rights).[191] It argues that there is already "urban activism" on the part of non-nationals living in multi-cultural and ethnic inner-city neighborhoods. Non-citizens in this case interact with citizens in whose communities they live and organize around issues of common interest such as environmental concerns, representation on school boards and labor relations.[192] Le Roux[193] calls this "street democracy" and it is in favor of a residence-based understanding of political rights. Taking issue with the expatriate voting rights lobby, which has interpreted the judgment in *Richter v. Minister for Home Affairs and Others*[194] to mean that voting rights are based on "a de-territorialized notion of national identity and patriotism" he argues that democratic citizenship must be tied to the locality of one's place of ordinary residence. This would allow for an extension of voting rights at the local government level to resident non-citizens, which would give non-citizens a greater political stake within their residence and help integrate them into the life of the community.

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188 Misago et al. 2009.

189 Wessel le Roux, *Economic Migration, Disaggregate Citizenship and the Right to Vote in Post-Apartheid South Africa* in *Citizens of the World: Pluralism, Migration and Practices of Citizenship* 119 (R. Danisch (ed.), Amsterdam, New York: Rodopi Press, 2011). The court in *Larbi-Odam and Others v. Member of the Executive Council for Education (North-West Province) and Another*, (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (November 26, 1997), para. 19, quoted from the Canadian case of *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, recognizing that non-citizens have no voice within the legal and sociopolitical system of the host country.

190 Propounded by S. Benhabib. *See* Seyla Benhabib & Judith Resnik, *Citizenship and Migration Theory Engendered* (May 20, 2017), available at http://www.nyupress.org/webchapters/benhabib_intro.pdf.

191 Wessel le Roux, *Migration, Disaggregation Citizenship and Voting Rights*, unpublished paper presented at FMSP's Migration and Society Seminar Series hosted by the Forced Migration Studies Programme at the University of Witwatersrand September 29, 2009 (May 10, 2017), available at http://www.migration.org.za/presentation/le-roux-w-2009-migration-disaggregated-citizenship-and-voting-StellenboschUniversity. *See* Seyla Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times* in *Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship* 247 (T. Faist & P. Kivitso (eds.), Hampshire, UK: Palgrave Macmillan, 2007).

192 *Id.*

193 Le Roux, *supra* note 191.

194 *Richter v. Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)*, (CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (March 12, 2009).

## Conclusion

This work has examined the "violent face" of xenophobia in the face of "the rule of law" in South Africa. It is observed that the plight of foreigners is exacerbated by ineffective legal and governmental institutions. The complex immigration laws and onerous policies defeats the concept of inalienability of rights which deserves protection in line with the provisions of international instruments of which South Africa is a party. Xenophobia poisons social interactions between locals and migrant groups and at the same time undermines the positive effects of migration on human development and international relations.

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# COMPARATIVE FEDERALISM WITH REFERENCE TO CONSTITUTIONAL MACHINERY FAILURE (EMERGENCY) IN INDIA AND PAKISTAN

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*The constitutions and courts both in India and in Pakistan have shown their aspirations and fundamental faith in the federal structure but in practice there is a strong centripetal bias in each of their constitutional-political structures. This bias becomes more evident when the constitution sanctions power to the centre to proclaim emergency situations in the provinces on the basis of Constitutional Machinery Failure. Emerging from their colonial roots, the constitutions of India and Pakistan contain an identical provision on Constitutional Machinery Failure Emergency which has been misused and abused regularly and has been the biggest question mark on federal claims of the two States. This unique system of Constitutional Machinery Failure Emergency has also gone through a number of radical changes in India and Pakistan, which often have been influenced by each other. The article specifies the socio-political-constitutional background of Constitutional Machinery Failure resulting in Provincial Emergency, both in India and in Pakistan, their respective use and abuse by the Executive, legislative attempts to amend and control such power, and judicial response, with similarities and differences in respect of justifiability of such Emergency Proclamations.*

*Keywords: India and Pakistan; comparative federalism; Constitutional Failure Emergency Model; Constitutional Machinery Failure Emergency; defunct federalism; defunct democracy.*

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## Introduction

Federalism in South Asia and particularly in India and Pakistan has a different and distinct history because of the efficiency and implementation of their federal plans and democratisation level. The difference in the federal design of the two countries is visible in their constitutional and federal polity. The difference can be measured by the degree of consociation within the federal plans proposed before independence, the constitutions created after independence and their performance.

## 1. Federalism and Comparative Law Jurisprudence

### *1.1. Methodology of Comparative Law*

Comparative constitutional and political jurisprudence contains groundbreaking insights. J.S. Mill introduced the "method of difference" strategy for "controlled comparisons" in two political systems with a similar background and comparative independent variables.[1] In this article, Constitutional Machinery Failure in both countries, India and Pakistan, has been compared as an independent variable with reference to their federal constitutional structures. Several comparative federal and political studies of South Asia, particularly of India and Pakistan, exist,[2] and they provide in-depth background for the development of this article, but in respect of "President's rule" or Constitutional Machinery Failure in India and Pakistan there is a scarcity of comprehensive studies.[3] This article specifies the socio-political-

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[1] John S. Mill, *A System of Logic Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Method of Scientific Investigation. Vol. 1* 205–206 (9th ed., London: Longmans, Green, Reader, and Dyer, 1875); John McGarry & Brendan O'Leary, *Introduction: The Macro-Political Regulation of Ethnic Conflict* in *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts* 1–40 (J. McGarry & B. O'Leary (eds.), London and New York: Routledge, 1993).

Mill has recommended two strategies for controlled comparisons between two political structures: Method of Difference versus Method of Agreement. He recommends the Method of Difference approach is best suited for political structures with a very similar if not identical background and an independent variable is compared which makes the difference between political structures of identical background. The Method of Agreement approach is best suited for political structures of diverse backgrounds with a similar independent variable. In the case of the federal political structures of India and Pakistan, they both share similar if not identical backgrounds but the federal polity has changed drastically in comparison to each other. If summarized in terms of the constitution, the provisions and impact of constitutional emergency or presidential rule provisions plays a vital role in the development of their diverse federal polity.

[2] Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* Ch. 1 (Lahore: Pakistan Sang-e-Meel Publications, 1995); Ayesha Jalal, *The Struggle for Pakistan: A Muslim Homeland and Global Politics* (Cambridge: Belknap Press of Harvard University Press, 2014).

[3] Imtiaz Omar, *Emergency Powers and Courts in India and Pakistan* 23–79 (Leiden, Boston: Martinus Nijhoff Publishers, 2002); Katharine S. Adeney, *Federal Formation and Consociational Stablisation: The Politics of National Identity Articulation and Ethnic Regulation in India and Pakistan*, PhD thesis, The London School of Economics and Political Science (LSE) (2003), at 164 (May 10, 2017), available at http://etheses.lse.ac.uk/428/; Mahendra Pal Singh, *Comparative Constitutional Law* in *Comparative Constitutional Law: Festschrift in honour of Professor P.K. Tripathi* 178–211 (M.P. Singh (ed.), 2nd ed., Lucknow: Eastern

constitutional background of Constitutional Machinery Failure resulting in Provincial Emergency, both in India and in Pakistan; their respective use and abuse by the Executive; legislative attempts to amend and control such power and the judicial response, with similarities and differences in respect of the justifiability of such Emergency Proclamations.

### *1.2. Methodology of Comparative Federalism*

Federalism is the division of powers between two territorial units, for example centre and provinces, which includes at least two defined sets of government, independent in their own spheres from each other. In this division of power there should be no interference between the units, but there should be enough scope for co-operation between them. Such "*co-operative non-interference*" can be ensured by a written constitution to be interpreted by an independent judiciary. Academically, federalism is a matter of debate and serious discussion. According to political scientists and legalists, "federalism is the merger of sovereignties." As per M. Vile, the division of sovereignties into forms of powers has been established in constitutions to ensure proper federalism.[4] He further classifies it into asymmetrical and symmetrical federalism, where the constitution of the former does not establish the complete merger of sovereignties and the division of power is strongly in the hands of the centre. Professor Wheare followed the same line of thought and looked upon the Constitution of India as quasi-federal.[5] There is another chain of thought of McGarry and O'Leary that adopts a practical approach to federalism and considers "federalism as a means to manage rather than eliminate ethnic and geographical differences, as it is necessary to manage diversity such as consociationalism and multiculturalism with constitutionalism."[6] Federalism is also a "normative and ideological concept", as Watts sees "Federalism as a broad genus of political organisation that is marked by the combination of Self-Rule and Shared-Rule."[7] This approach could be traced

Book Company, 2011); Swarna Rajagopalan, *State and Notion of South Asia* (Boulder: Lynne Rienner Publishers, 2001); Jai Prakash Sharma, *Federal Systems in India and Pakistan: A Comparative Perspective* 89–110 (Jaipur: Printwell, 1987).

4 Maurice J.C. Vile, *Federalism and Confederation: The Experience of the United States and the British Commonwealth in Political Cooperation in Divided Societies* 216–228 (P. Rea (ed.), Dublin: Gill and Macmillan, 1982).

5 Kenneth C. Wheare, *Federal Government* (4th ed., London: Oxford University Press, 1963). Wheare's institutional design of federalism and America-centric definition of federalism: "Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is coordinate with the others and independence of them? If so, that government is federal. It is not enough that the federal principle should be embodies predominantly in the written constitution of the country…" As per this definition only the USA, Canada, Switzerland and Australia could be classified as federations.

6 McGarry & O'Leary 1993, at 1–40.

7 Ronald L. Watts, *Contemporary Views on Federalism* in *Evaluating Federal Systems* (B. De Villiers (ed.), Cape Town: Juta, 1994).

in the self-rule movements of India and Pakistan and also is the foundation of their respective constitutional make-up. The analysis of federalism is also linked with the aspirational struggle for Self-Rule.

## 2. Federalism and Constitutional Emergency Model

Ferejohn and Pasquino developed two famous emergency models which detail distinct structural models for the exercise of emergency powers: the Executive Model and the Legislative Model.[8] On the basis of the proclaiming authority of the emergency (i.e. the executive or the legislature), the classes of emergency powers permissible, the framed time period for the emergency, and the review and control of emergency powers, the two scholars determine whether the particular emergency is based on executive dominance or on legislative checks and balances. On the basis of this classification India and Pakistan both emphatically follow the Executive Model of emergency which is borrowed from colonial times. There is scholarly literature[9] in political jurisprudence which lays down that any emergency – and particularly constitutional failure emergency – has to be used as the "last resort" in a "time-bound framework" and should be checked and balanced by the legislature.

### *2.1. Pre-Independence India: Emergency Model under the Government of India Act 1935: A Colonial Instrument to Suppress Shared Power*

India and Pakistan have inherited the emergency model from the same colonial source – the Government of India Act 1935[10] (hereinafter – GoIA 1935). The basic object of Emergency Provisions in GoIA 1935 was to manage law and order in the colony and ensure effective administration of the British Raj, even at the cost of Indian lives.[11] Federalism in India and Pakistan in respect of Constitutional Machinery Failure Emergency has to be traced from its historical colonial roots and their making

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[8] John Ferejohn & Pasquale Pasquino, *The Law of Exception: A Typology of Emergency Powers*, 2(2) International Journal of Constitutional Law 210 (2004).

[9] Giorgio Agamben, *State of Expression* 1–31 (Kelvin Attell (trans.), Chicago: University of Chicago Press, 2005); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 1–207 (George Schwab (trans.), Chicago: University of Chicago Press, 1965).

[10] The Government of India Act 1935 (25 & 26 Geo. 5 c. 42) was enacted by the British Parliament to regulate and control the government in British India in 1935. This Act was very comprehensive, comprising 321 sections and 10 schedules. This Act played a vital role in the development of the constitutions in India and Pakistan. This Act was the base on which India and Pakistan developed constitutions and constitutionalism.

[11] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: The University of Michigan Press, 2003); Rande W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford and New York: Oxford University Press, 2008).

of a constitutional system.[12] With the colonial roots of constitutions in both States the constitution-making bodies were entrusted with a vital responsibility to amend the nature of colonialism from the texture of governing laws and the constitution so that the alleged Constitutional Machinery Failure Emergency provision could co-exist with the newer format of "federal democratic republics of India and Pakistan."

### *2.2. Constitution-Making Process in India and Pakistan and Development of Emergency Model in India and Pakistan, 1950 Onwards*

India and Pakistan have a shared history, they both gained independence from British Colonial Rule by the same Act – the Indian Independence Act 1947.[13] Although the division of British India was along religious lines,[14] the legislative history and legacy is shared by the two countries. Prior to independence, the governing constitutional document was GoIA 1935 until both countries formulated their own constitutions through their respective constituent assemblies. India became a republic on January 26, 1950 after intensive work of the Constituent Assembly for almost three years (well compiled in the Constituent Assembly Debates[15]). The Indian constitution-making process was the cornerstone of India's polity and constitutionalism.[16]

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[12] *Warped Federalism*, DAWN, March 29, 2008 (May 13, 2017), available at http://www.dawn.com/news/955152 ("From the days of the first Governor General, Warren Hastings, until 1937, the subcontinent was ruled as a unitary state by successive Governors General. On Fools' Day that year, the Government of India Act 1935 went into force, granting autonomy to the provinces of British India. What was given by one hand was taken away by the other in the very same statute. Section 45 empowered the Governor General to show his council of ministers the door and assume direct governance at the centre. Section 93 conferred similar power on governors of the provinces. In both cases, the pre-condition was an honest belief 'that a situation has arisen in which the government... (of the federation or of the province) ... cannot be carried on in accordance with the provisions of this act'").

[13] The Indian Independence Act 1947 (1947 c. 30 (10 & 11. Geo. 6)) was formulated and received assent on July 18, 1947. It is an Act of Parliament of the UK which parted two independent dominions, India and Pakistan, with several small territorial units, free to join any one of them or stay independent and sovereign.

[14] Henry V. Hodson, *The Great Divide* (London: Hutchinson & Co. Publisher Ltd., 1969); Maulana Abul Kalam Azad, *India Wins Freedom* (Stosius Inc/Advent Books Division, 1989); Vapal Pangunni Menon, *The Transfer of Power in India* (Calcutta: Orient Longmans, 1957) (for details of the events during and before the division of British India).

[15] Constituent Assembly Debates: Official Report is an outstanding work compiling all the arguments and debates that took place in the entire process of constitution-making in India. Constituent Assembly Debates: Official Report was later published by the Parliament of India in 10 volumes in both Hindi and English.

[16] Benegal Shiva Rao, *The Framing of Indian Constitution: A Study* (New Delhi: Indian Institute of Administration, 1968); Granville Austin, *The Indian Constitution: Cornerstone of the Nation* (Oxford: Clarendon Press, 1966).

*2.2.1. Pakistan's Struggle for a Constitution and Constitutionalism 1956, 1962 and 1972–1973*

In contrast, due to political and social turmoil[17] Pakistan confirmed its republican status in 1956. Pakistan has had two more constitutions, one in 1962[18] and another in 1973[19] as a result of abrogation of the Constitution of Pakistan 1956 and 1962. The present Constitution of Pakistan was adopted in 1972 and gives broad discretionary powers[20] to the President of Pakistan, powers which even include the extra-ordinary power to dismiss the Prime Minister and National Assembly. Some of these arbitrary powers were curtailed by subsequent constitutional amendments to the Constitution of Pakistan 1972 by the 13th Amendment 1997[21] and the 18th Amendment 2010.[22]

The foundational promise behind the idea of Pakistan is federalism,[23] but in reality Pakistan is still struggling to find its bedrock of federalism in the Pakistani polity because of the existence of various so-called "democratically autocratic" and "autocratically democratic" military and civil government rule. The climate in Pakistan has remained authoritarian and centripetal despite the apparent federal claims and aspirations of the first two constitutions of Pakistan (the 1956 and 1962 constitutions) in particular. Unlike India, Pakistan failed to devise the institutional arrangements of power-sharing and accommodate its diversity at different levels of the polity,[24]

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17 Sir Ivor Jennings, *Constitutional Problems in Pakistan* (Cambridge: Cambridge University Press, 1957); Herbert Feldman, *Constitution of Pakistan* (Karachi: Oxford University Press, 1956) (for an account of the reasons for the Short-lived Constitution of Pakistan 1956).

18 The Constitution of Pakistan 1962 was a result of the abrogation of the Constitution of Pakistan 1956. Ghulam W. Chaudhary, *Constitutional Development in Pakistan* (Vancouver: Publications Centre, University of British Columbia, 1969) (for details of the abrogation of this Constitution of Pakistan 1956).

19 The Constitution of Pakistan 1973 as a result of the abrogation of the Constitution of Pakistan 1962. Mohammad Munir, *Constitution of the Islamic Republic of Pakistan, being a commentary on the Constitution Pakistan, 1962* (Lahore: All Pakistan Legal Decisions, 1965) (for details of the abrogation of the Constitution of Pakistan 1962).

20 The Constitution (Eighth Amendment) Act 1985 (Act No. XVIII of 1985) was the major source of arbitrary powers of the executive, even to dissolve the National and Provincial Assemblies and Prime Minister. The changes were made in Arts. 48(2) and 58(2) of the Constitution, which were relied upon by the President in 1990 and 1993 to dissolve the National Assembly(ies) and Prime Minister(s), Benazir Bhutto and Nawaz Sharif, respectively. The Supreme Court of Pakistan examined the scope of these amended provisions in *Khawaja Ahmad Tariq Rahim v. Federation of Pakistan and Others*, PLD 1992 SC 646 and *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473.

21 Constitution (Thirteenth Amendment) Act 1997 (Act No. I of 1997), the statement and object of reasons for adopting it is as follows: "In order to strengthen parliamentary democracy it has become necessary to restore some of the powers of the Prime Minister which were taken away by the Constitution (Eighth Amendment) Act 1985."

22 Constitution (Eighteenth Amendment) Act 2010 (Act No. X of 2010).

23 Muslim League's Resolution 1940 at Lahore, which promised that Pakistan shall be a federal state based on the principle of shared power.

24 Mahendra Prasad Singh & Veena Kukreja, *Federalism in South Asia* 75–77 (Delhi: Routledge, 2014).

which led to the disintegration of Pakistan and the creation of the new nation state Bangladesh in 1971. The Constitution of Pakistan 1972 accommodated provincial autonomy, but failed to provide equitable and sustainable power-sharing[25] to reduce the "Punjabisation of Pakistan."[26] No doubt in whatever form hints of federalism can be found in today's Pakistan, it is largely because of the Constitution of Pakistan 1972, which is why M. Waseem[27] classified Pakistan into Pre-Federalisation (1947–1971) and Federalisation (1971 onwards).

*2.2.2 Rule of Colonial Instrument (GoIA 1935) as Interim Constitution in Pakistan to Suppress Federalism*

Federalism and Constitutional Machinery Failure Emergency provision has an interesting development in Pakistan. At independence, Pakistan incorporated the Government of India Act 1935 as its interim constitution, thus sec. 45 automatically found its scope in the "asymmetrical federal polity" of Pakistan. In the constitution-making process, an identical provision to sec. 45 of GoIA 1935 was also incorporated. Under this interim constitution, the centre maintained a dominant role over the provinces right from the beginning. The dismissal of the Khan Sahib Ministry in the North-West Frontier Province on August 22, 1947, M.A. Khuhro on April 20, 1948 in Sindh, Mamdoth's on January 25, 1949 and Fazl-ul-Haq's in 1954 in East Pakistan (under sec. 92-A of the 1935 Act), despite the fact each government enjoyed a majority in its Assembly, were a reflection of the federal principles the country was founded on; this led to a precedent which later on led the centre government to restore their reserve powers to dismiss provincial ministries.[28] The rise of the military to power in October 1958, March 1969, July 1977 and October 1999 undermined the prospects of federalism and provincial autonomy. The military governments either abolished the prevailing constitutions (October 1958 and March 1969) or suspended them completely or partly (July 1997 and October 1999), collapsing the basis of federalism. Under military rule Pakistan became a totally centralised state, because military government was not subject to any Constitution and was supreme authority for both federal and provincial systems although the official sources continued to describe the country as a federal state.

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25 Singh & Kukreja 2014, at 112.

26 The constitutional and political arrangements in Pakistan have always favored the dominant ethno-national group "Punjabi," which has led to the term Punjabisation of Pakistan where the interests of smaller states are unheard and unaddressed in front of a bigger province like Punjab.

27 Mohammad Waseem, *Federalism in Pakistan* (August 2010) (May 10, 2017), available at http://www.forumfed.org/pubs/Waseem-Fed-Overview.pdf.

28 Zulfikar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* 191 (Karachi and New York: Oxford University Press, 1995).

*2.2.3. The Constitution of Pakistan 1956: A Failed Attempt of Federalism*

The Constitution of Pakistan 1956 was the first hope for constitutionally established federalism in Pakistan, but because of strongly centralised themes like "One Unit System" and "Parity Formula,"[29] hope remained only in words. The Constitution of Pakistan 1956 proclaimed the Federal Islamic Republic of Pakistan under Art. 1, but actually the Constitution was based on GoIA 1935 with firmer centripetal bias; in addition to the division of subjects in lists, provisions such as Art. 193 ensured arbitrary constitutional emergency powers to the Central Government. Other than that, the Central Government gained the power to make laws in matters of the State under Arts. 107, 108 and 191, and even administratively provinces were under strong domination from the centre (Arts. 125 and 126). Unlike Art. 45 of GoIA 1935 and Art. 356 of the Constitution of India 1950, Art. 193[30] ensured that imposition of Constitutional Emergency could only be done on the "Receipt of Governor, if the President has [been] satisfied that the situation cannot be carried on in accordance with the provision of the Constitution."

*2.2.4. The Constitution of Pakistan 1962: Federalism Only in Words Not in Actions*

The Constitution of Pakistan 1962 referred to federalism in the Preamble, not in Art. 1 as the previous Constitution of 1956 had done. On the one hand, the Constitution of Pakistan envisaged the residuary power of law-making in the provinces, but it ensured that the provinces did not reach the position to use such powers. The Constitution was an attack on federalism as it made the president-appointed Governors the heads of provincial governments and provided provisions such as Art. 131(2) by which the centre government may as per the national interest in respect of the security of Pakistan have overruling power to make and execute laws

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[29] The One Unit System was adopted in 1954, in which Pakistan was divided into two zones: East and West Pakistan, so that any voice raised for rights and autonomy from West Pakistan could be controlled with one stronger unit from East Pakistan, which was mainly Punjab followed by the smaller states. The One Unit System was also supplemented with the parity formula so that in the National Assembly of Pakistan, centralised superiority could be ensured.

[30] Constitution of Pakistan 1956, Art. 193(1): If the President, on receipt of a report from the Governor of a Province, is satisfied that a situation has arisen in which the government of the Province cannot be carried on in accordance with the Provisions of the Constitution, the President may by Proclamation – (a) assume to himself, or direct the Governor of the Province to assume on behalf of the President, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, anybody or authority in the Province, other than the Provincial Legislature; (b) declare that the powers of the Provincial Legislature shall be exercisable by, or under the authority of, Parliament; (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to anybody or authority in the Province: Provided that nothing in this Article shall authorize the President to assume to himself, or direct the Governor of the Province to assume on his behalf, any of the powers vested in, or exercisable by, a High Court, or to suspend either in whole or in part the operation of any provisions of the Constitution, relating to High Courts.

in matters of the provinces too. Interestingly, the second Constitution of Pakistan 1962, under Art. 74,[31] provided wide-ranging powers to the provincial Governor to dissolve the Provincial Assembly; such dissolution could take place even in matters of differences between the Governor and the Assembly, the only requirement for this was assent from the National Conference and the President's concurrence. Art. 30 of the Constitution of Pakistan 1962 widened the Emergency Proclamation provisions, which included any imminent danger that threatened the security of Pakistan, because of war or external aggression, while in respect of the provinces emergency could be declared on the basis of security or economic life having been threatened by internal disturbance beyond the power of a provincial government to control. Thus, with the joint impact of Arts. 30[32] and 74 the Provincial Assembly could be dissolved if there was conflict between the Governor and the Provincial Legislative Assembly, decided in favour of the Governor by the National Conference, approved by the President and in regard to internal disturbance beyond the control of the provincial system.

*2.2.5. The Constitution of Pakistan 1972: A Hope of Federalism by Redefining Constitutional Failure Emergency Model in Pakistan*

The natural growth of the Constitution of Pakistan 1973 was hampered by two military takeovers, in July 1977 and October 1999. These coups strengthened centralisation and hindered the evolution of the Constitution to respond to the changing political, economic and developmental demands of the provinces. The Constitution of Pakistan 1972 did not contain a Provincial List; it contained the Federal List of 67 subjects and the Concurrent List of 47 subjects. Part X of the Constitution of Pakistan 1972 made special mention to "Emergency Provisions" in six broad articles, Arts. 232 to 237; wherein Art. 234 specifically mentions, "Power to issue proclamation in case of failure of Constitutional Machinery in a province," which details the procedure as:

> (1) If the President, on the receipt of a report from the Governor of a Province is satisfied that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution, the President may, or if a resolution in this behalf is passed

[31] Constitution of Pakistan 1962, Art 74: Where a conflict on a matter has arisen between the Governor of Province and the Assembly of the Provinces; the conflict has been referred to the National Assembly in accordance with this Article for decision, the National assembly has decided the conflict in favor of the Governor; and the President has concurred in the dissolution of the Provincial Assembly by the Governor may dissolve the Assembly of the Provinces.

[32] Constitution of Pakistan 1962, Art. 30(1): If the President is satisfied that a grave emergency exists (a) in which Pakistan or any part thereof is in imminent danger by war or external aggression or (b) in which the security or economic life of Pakistan is threatened by internal disturbance beyond the power of provincial government to control, the President may issue a Proclamation of Emergency.

by the each house separately shall, by proclamation (a) assume to himself or direct Governor to assume on his behalf all or any of the functions of the Government of the province…[33]

Though the most damaging features of the amendment were done away with by the 13th Amendment, they made a spectacular comeback in the 17th Amendment, then again neutralised by the 18th Amendment 2010.

*2.2.6. Eighteenth Amendment to the Constitution of Pakistan 2010: A Symbol of Real Change in Constitutional Failure Emergency Model and Federalism in Pakistan*

The 18th Amendment to the Constitution of Pakistan has been an astonishing change for the establishment of Self-Rule and Shared Rule. Some cardinal changes in favour of federalism brought about by the 18th Amendment are reproduced as follows. The amendment increased the membership of the Senate, resulting in raising more voices for the provinces; presidential power to appoint the Governor was altered such that it could be done as per the aid and advice of the Prime Minister; Art. 144 added to the powers of the provincial legislatures which were now empowered to amend and repeal laws made by the Parliament which has legislated with the consent of one or more provincial assemblies – such a change is unprecedented in the history of federalism in South Asia, because the Constitution of India still does not empower the provincial legislatures to do likewise.[34] Additionally, the 18th Amendment abolished the concurrent list and instituted the residuary power of law-making exclusively in the provinces, which is also unprecedented in South Asian federalism;[35] it established the Council of Common Interests, the National Economic Council, the National Finance Council and vested the ownership of mineral and natural gas resources in the joint ownership of the province and the centre, again something that is unprecedented, and remarkable, all to establish the federal bedrock in Pakistan. In respect of constitutional emergencies, the 18th Amendment, Constitution (Eighteenth Amendment) Act 2010[36] provides Art. 234. The original Article in the 1972 Constitution used the phrase "on the receipt of a report from the Governor *or otherwise*," and the original Article also paved the way for the resolution

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33 Syed Mujawar Hussain Shah, *Federalism in Pakistan: Theory and Practice* (Islamabad: Quaid-i-Azam University, 1994).

34 Constitution of India 1950, Art. 252: Power of Parliament to legislate for two or more states by consent and adoption of such legislation by any other state. Art. 252(2) further clarifies that any act so passed by the Parliament may be amended or repealed by an act of Parliament but shall not be, as respect any state to which is applies, be amended or repealed by an Act of the legislature of that state.

35 Unlike the Constitution of India 1950 which institutes the residuary powers of legislation exclusively in the Parliament, under Art. 248, "Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List and State List."

36 Sec. 88.

to be approved at the "joint sitting,"[37] replaced by the phrase "by each House." These changes are welcome, but provisions like Art. 234 in the name of Constitutional Emergency have been invariably used in Pakistan (as well as in India) as a weapon against the provinces, particularly those governed by parties opposed to the federal government. Subsequently, the 8th Amendment to the Constitution 1972 empowered the President to dissolve the provincial (as well as federal) assemblies and governments on his own initiative. The enjoyment of the presidential right to dissolve the centre government (in 1988, 1990, 1993, 1996) under sec. 58-B ultimately dismissed all four provincial governments too, including the one that remained in opposition to the centre. Now the Emergency Proclamation cannot be introduced until and unless the Governor has recommended it, which requires the backing of a resolution by the provincial legislature and within ten days it has to be approved by both houses of the Parliament.

### *2.3. Constitution of India 1950 and Influence of Government of India Act 1935*

Constitutional Machinery Failure Emergency in India is detailed under Art. 365 of the Constitution of India, which is reflective of the approach and intention of sec. 45 of GoIA 1935 that provides a system for the *Failure of Constitutional Machinery* for the federation in Part II, Chapter V of the Act. Sec. 45 provided power to the Governor General to issue a proclamation, if satisfied that the situation had arisen in which the government of the federation could not be carried on in accordance with the provision of the Act. An identical provision existed in GoIA 1935 regarding the government of the federation under sec. 93.[38]

#### *2.3.1. Emergency Model Secs. 45 and 93 (GoIA 1935) Paved the Way for Arts. 355 and 356 of the Constitution*

It is to be noted that GoIA 1935 was in reply to the demand by the Congress Party for constitutional reform and self-government in Imperial India, thus reasonable caution was maintained there, so that the demands of the Congress Party were met while keeping the interests of the British government well protected. Art. 12(1) of GoIA 1935 is an example of such caution and protectionism in favour of imperialism – the Governor General shall have special responsibility in "(a) the prevention of any grave menace to the peace or tranquillity of India or any part thereof." This section (12(1)) must be read along with sec. 102, which empowered the Governor General to make an Emergency Proclamation. The reasoning behind secs. 45, 93, 12(1) and 102 was to keep the Governor General at the apex and supreme authority, and no popularly elected government by any stretch of the imagination will have any say

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[37] *Id.* substituted by the words "by each House separately."

[38] Sec. 93 of GoIA 1935 was *mutatis mutandis* in which "Governor of Provinces" and "Government of Province" were substituted for "Governor General" and "Government of Federation," respectively.

against the Governor General. In the form and in the name of constitutional reform such provisions actually made a mockery of the principle of responsible government and constitutionalism. Under sec. 45 the "satisfaction of the Governor General" was not justified, thus the grounds on which the Governor General's satisfaction was reached that the constitutional machinery had failed was unexplained by the Act. Similarly, although the chapter under which secs. 45 and 93 were instituted is titled "Provisions in the case of failure of Constitutional Machinery," the language under secs. 45 and 93 was as broad to include "that a situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Act." Even though the power under secs. 45 and 93 was so great and emergent in nature, it was never referred to as "Emergency Provision," rather it was referred to as "Provisions in the case of failure of Constitutional Machinery." Only sec. 102, in its marginal notes, referred to it as the "power of the Federal Legislature to legislate if an Emergency is proclaimed." Sec. 102 paved the way for Arts. 352 and 353 in the Constitution of India 1950, under the heading of "Emergency Provision," and rightly so secs. 45 and 93 paved the way for Arts. 355 and 356 under the same heading.

There is no doubt that such provisions are needed in any workable democratic structure and particularly when a democracy is embarking upon a federal structure through a constitutional set-up. But the correct drafting was needed when the transformation of secs. 45 and 93 into Art. 356 was taking place in the constitution-making process. First and foremost, what was needed was that if secs. 45 and 93 are transformed into Art. 356 as "Emergency Provision" and as "provision for failure of Constitutional Machinery," then the intentionally kept broad language and misinterpreted secs. 45 and 93 have to be kept within constitutional limits. The reasons for keeping almost the identical language in Art. 356 as was found in secs. 45 and 93 is beyond explanation. Secs. 45 and 93 were an intentional step by the imperial legislature to keep every element of the federal polity and responsible government under direct control and check by the Governor General. There is no space for such broad terms as "if satisfied" or "a situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Act." Such broad terms make federalism dilute itself and authoritarianism dominate to a large extent.

*2.3.2. Constitution-Building Process and Debates on Constitutional Failure Emergency Model in India*

The Draft Constitution of India[39] was submitted to the President of the Constituent Assembly of India by Dr Ambedkar, with the changes that the Drafting Committee

[39] Prepared by the Drafting Committee and published under the authority of the Constituent Assembly of India, 1948.

thought desirable in the footnotes of the draft constitution.[40] Arts. 277 and 278 in Part XIII of the draft constitution were titled "Emergency Provisions." Amazingly, and contrary to the letter of Dr Ambedkar, these articles were sidelined, but no footnote was there for the changes made by the Drafting Committee. Dr H.M. Seervai, in his valuable book *Constitutional Law of India*,[41] has shown his amusement at the absence of any footnotes with these articles in the draft constitution.

*2.3.3. Principle and Application of Constitutional Failure Emergency Model in India from 1950 to 2016*

The Constitution of India 1950 prescribes the provision in case of failure of constitutional machinery in states under Art. 356, as per the article: "If the President, on the receipt from the Governor of a state or otherwise, is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provision of the constitution, the President may by proclamation…" The provision is similar to the parent provision under sec. 93 of GoIA 1935 and two prior provisions in the Constitution of Pakistan 1956 and 1962, unlike the Constitution of Pakistan 1972 (Art. 234). The language and application of Art. 356 in the Indian Constitution had always been debated and often criticised. The notorious 38th Constitutional Amendment Act 1975 under the regime of Mrs Indira Gandhi had added clause (5) to Art. 356 which barred any form of judicial review, on any grounds, over an Emergency Proclamation. This arbitrary and unconstitutional provision was substituted and removed by the 44th Constitutional Amendment Act 1978. Now judicial review of the proclamation would lie[42] as held by the nine-judge decision of the Supreme Court on any grounds upon which an executive determination which is founded on "subjective satisfaction" can be questioned. This part is dealt with in detail in the next paragraphs. Other than that, Art. 257(1)(2)(3) empowers the Union Government to give directions to a state as therein provided non-observance of which would result in conceiving that the constitutional machinery has failed in the state, as per Art. 365. In this respect Art. 355 also places the duty on the Union to protect every state against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of the Constitution. This duty acts as a justification for exercising the

[40] Dr Ambedkar submitted the Draft Constitution with a covering letter he wrote *inter alia*, "[T]here were however some matters in respect of which the Drafting Committee felt it necessary to suggest certain changes. All such changes have been indicated in the Draft by underlining or side-lining the relevant portions. Care has also been taken by the Drafting Committee to insert a footnote explaining the reasons for every such change." Draft Constitution of India, p. (iii).

[41] Hormasji Maneckji Seervai, *Constitutional Law of India* 3086–3089 (4th ed., New Delhi: Universal Publication House, 1991).

[42] *A.K. Roy v. Union of India*, AIR 1982 SC 710; anything contrary said in *State of Rajasthan v. Union of India*, AIR 1977 SC 1361, is no longer good law; *S.R. Bommai v. Union of India*, 1994 (2) JT 215 [Sawant J, para. 187; Pradhan J, para. 2].

extra-ordinary centralised power under Art. 356, with yet to be concretely defined and open ended expressions, specifically used to empower the centre over the states.

## 3. Judicial Approach in Pakistan and India to Redefine Constitutional Emergency Model and Application in the Light of Shared Power

### *3.1. The Supreme Court of Pakistan: A Courageous Interpretation of Constitutional Emergency Model and Federalism 1956 to 2010*

One of the most regressive provisions of the Constitution of Pakistan 1972 was to place Constitutional Emergency under Art. 236(2),[43] which bars judicial review of the proclamation issued under Art. 234. In *Pir Sabir Shah v. Federation of Pakistan and Others*,[44] the court interpreted Art. 236(2) with Art. 234 and observed that the constitutional bar on the judicial review of the proclamation will not cover the proclamation without jurisdiction, *coram non judice* or *mala fide* and superior courts will have jurisdiction to examine a proclamation from three jurisdictional aspects. Justice Saeeduzzaman Siddiqui while pronouncing the important judgment held the constitutional spirit above the man-made constitutional mandate. The judgment was reflective of the passionate words of Justice Fakhruddin G. Ebrahim in *Niaz Ahmed Khan v. Province of Sindh*,[45] while interpreting the rationality of judicial review in Pakistani Islamic Jurisprudence under Art. 227,[46] the "obligation to do justice to all at all times is the paramount duty and cardinal principle of Islam and to deprive courts of their functions to adjudicate upon complaints by its citizen against the State violated a fundamental concept of Islam."[47]

Pakistan's struggle for the establishment of a meaningful "federal democracy" with the "rule of law" and an "independent judiciary" has seen a chain of arbitrary Emergency Proclamations (by civilian as well as military Executives) of both national emergency and Constitutional Machinery Failure Emergency along with the suspension of the Constitution through military coup; but it has also seen the spirited reaction of the Pakistani citizenry, lawyers and the judiciary through several landmark judgments of the Supreme Court of Pakistan. The Supreme Court responded after

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[43] Constitution of Pakistan 1972, Art. 236(2): The validity of any proclamation issued or order made under this Part shall not be called in question in any Court.

[44] PLD 1994 SC 738.

[45] PLD 1977 Karachi 604.

[46] Constitution of Pakistan, Art. 227: Provisions relating to the Holy Quran and Sunnah, (1) all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah… and no law shall be enacted which is repugnant to such injunctions.

[47] *Supra* note 45, at 669–670.

the radical judgment of legitimising a military coup in *State v. Dosso*,[48] later reversed in *Asma Jilani v. the Government of Punjab*,[49] where the Court mandated "limited condonation of the acts of usurper" while considering the legitimation of the military coup. Finally, in *Begum Nusrat Bhutto v. Chief of Army Staff*[50] there arrived the spirited response from the Supreme Court of Pakistan in a cautious application of the doctrine of necessity to acts of martial law by the regime which put in abeyance the provisions of the Constitution of 1972.[51]

In another leading judgment, *Mian Manzoor Ahmad Wattoo v. Federation of Pakistan and Others*,[52] Justice Malik Muhammad Qayyum pronounced the ideal for Pakistani federalism in the context of the Constitutional Machinery Failure Emergency. His impactful words in the majority opinion:

> Article 1 of the Constitution admits Pakistan is an Islamic Republic having federal character… and in such a system federation the division of power between the federation and its units must yield to supreme interest of unity and solidarity of the federation, federation must possess necessary power to intervene but this power in any way must not destroy the equilibrium between federation and federating units and their autonomy.[53]

Justice Malik Muhammad Qayyum referred to several illustrations of Albert Venn Dicey's *An Introduction to the Study of the Law of Constitution*[54] and notable Pakistani constitutionalist A.K. Brohi's *Fundamental Law of Pakistan*[55] to determine that the State should be cautious when invoking Art. 234, as it is an exception and emergency mechanism. Justice Qayyum strongly observed that:

> [O]n the language of Article 234 it is apparent that the power granted to the President under Article 234 is not unbridled and uncontrolled, firstly it can be reviewed that the President may be satisfied and secondly that the satisfaction

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48 PLD 1958 SC 533.

49 PLD 1972 SC 139.

50 PLD 1977 SC 657.

51 Upendra Baxi, *Constitutional Interpretation and State Formative Practices in Pakistan: A Preliminary Exploration* in *Comparative Constitutional Law: Festschrift in honour of Professor P.K. Tripathi* Ch. IX, 202–205 (M.P. Singh (ed.), 2nd ed., Lucknow: Eastern Book Company, 2011).

52 PLD 1997 Lahore 38.

53 *Id*. at 60.

54 Albert V. Dicey, *An Introduction to the Study of Law of Constitution* 151 (10th ed., London and New York: Palgrave Macmillan, 1985).

55 Allahbukhsh Karimbukhsh Brohi, *Fundamental Law of Pakistan* (Karachi: Din Muhammadi Press, 1958).

must be that the affairs of the Province cannot be run in accordance with the constitution, such satisfaction must be more than his personal opinion.[56]

Contrary to the case in India, in Pakistan presidential satisfaction is not subjective, rather it is objective, and such satisfaction must be based on some materials having a nexus with the purpose of Art. 234; the court can review the materials submitted before the President and satisfaction obtained out of that. In many ways the judgment of the Pakistani court was influenced by the judgment of the Indian Supreme Court in *S.R. Bommai v. Union of India*[57] and particularly by the opinion of Justice P.B. Savant. In both judgments the Court made it clear that any violation of the Constitution will not be qualified as Constitutional Machinery Failure, whether permanent or temporary there has to be a constitutional deadlock and the imposition of Art. 234 has not be the only remedy left to break the deadlock, and whether the government has made an attempt or not to use the alternative remedies is also a subject of judicial scrutiny.[58]

### *3.2. The Supreme Court of India: Redefining Constitutional Failure Emergency Model and Federalism in India 1950 to 2016*

In *Rameshwar Prasad (VI) v. Union of India*,[59] the Supreme Court of India made it clear that the satisfaction of the President means the satisfaction of the Council of Ministers headed by the Prime Minister, which refers to India's belief in the parliamentary model rather than in the presidential exercise of emergency powers. Yet the post of Governor, who is a centre appointee, is critical and nowadays a matter of open favouritism towards the centre in India. Adding more complication, contrary to the current Pakistani constitutional provision the President may satisfy to proclaim emergency not only on the report of the Governor but also "otherwise." The word "otherwise" is of "wide amplitude,"[60] and most often it is the report prepared and

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56 *Supra* note 52, at 53–63.

57 AIR 1994 SC 1918.

58 The facts of *Mian Manzoor Ahmad Wattoo v. Federation of Pakistan and Others* is an interesting situation. In this case, the petitioner has pointed out that the Cabinet headed by the petitioner comprised of 225 Ministers and 224 Advisors out of whom 14 Ministers and 4 Advisors resigned. There is nothing on the record to show that these resignations resulted in impairment of the functions of the Government of Punjab in any manner. As already observed, resignations of Ministers are by itself not a ground for arriving at the conclusion that a situation had arisen where the affairs of the Province cannot be run in accordance with the Constitution. Even on factual plain therefore it is not shown that on account of resignations of the Ministers a Constitutional breakdown had occurred or that the functioning of the Government had been impaired. Thus the court pointed out that on the basis of mere resignations of some of the Ministers from the Provincial Cabinet the functionaries of two Governments could have come to the conclusion that the affairs of the Province cannot be run in accordance with the Constitution where there was no deadlock, impasse or breakdown of Constitutional machinery even temporary in the Province.

59 (2006) 2 SCC 1, para. 96.

60 *Arun Kumar Rai Chaudhary vs Union of India and Other*, AIR 1992 All 1, para. 7.

submitted by the Union Council of Ministers or the Union Home Ministry. Thus the satisfaction as well as the proclamation are in the hands of the Union Council of Ministers headed by the Prime Minister. More so, in *Rameshwar Prasad (VI) v. Union of India*[61] the Supreme Court also established that the sufficiency or the correctness of the factual positions indicated in the Governor's report is not open to judicial review. The truth and correctness of the materials cannot be questioned by the court nor would the court go into the adequacy of the materials, and it would also not substitute its opinion for that of the President. Interference is called for only when there is a clear abuse or misuse of power, and the court will make allowance for the fact that the decision-making authority is the best judge of the situation.[62]

The Supreme Court of India has remained critical in determining "whether or not the situation has arisen that the government of the state cannot be carried out in accordance with the constitution." The Court has followed Rameshawar Prasad's principle of minimalist interference in respect of the particularities of the report rendered to the President for his satisfaction by the Governor, or otherwise, but the court can interfere when there is no connection reflecting Constitutional Machinery Failure as in the case of the suspension of a state government because the Chief Minister belongs to a particular caste or creed.[63] *State of Rajasthan v. Union of India*[64] has an interesting interpretation where Chief Justice Beg expressed his views that Indian federalism has "watered down" national integrity, but this view does not express the intent of the makers of the Constitution. The very fact that the framers enacted a federal constitution with a parliamentary form of government for the Union and the states shows that internal sovereignty was to be divided between the Union and the states. A literal construction of the broad general words of Art. 365 which would enable the Union Executive to cut at the root of the democratic parliamentary form of government in the states must be rejected in favour of the construction which would preserve that form of government. The exercise of this power must be limited to "a failure of constitutional machinery," that is, to preserving the parliamentary form of government from internal subversions, or from a deliberate deadlock created by a party or a group of parties, or from a deadlock arising from an indecisive electoral verdict which makes the carrying on of government practically impossible.[65] Thus although it is difficult to list just when the power under Art. 356 can be exercised, it is possible, negatively, to state the situations in which the power cannot be exercised. On the basis of the facts of the *Rajasthan* case, Chief Justice Fazal Ali summarised that the satisfaction of the President is subjective, and if on these facts the President

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61 Para. 96.

62 *Rameshwar Prasad (VI) v. Union of India*.

63 *State of Rajasthan v. Union of India* [Chandachud J., Beg J. and Fazal Ali J. (1977) 2 SCC 592: 1978(1) SCR 1].

64 *Id.* at para. 22.

65 Seervai 1991, at 3092, paras. 4, 5.

was satisfied that action under Art. 356 was called for, and the legislative assemblies should be dissolved and fresh elections ordered, could such a conclusion be said to be unreasonable or malicious or based on extraneous consideration… The Court decided negatively.

The justiciability of the proclamation issued under Art. 356 was established by the 44th Amendment, but it is still disputed as to its scope and application. The question was widely discussed by the panel of nine judges[66] in multiple opinions in *S.R. Bommai v. Union of India*[67] in which all of them agreed on the justiciability and judicial review of the proclamation whereas there was wide disagreement on the "extent of justiciability." Justices Ahmadi and K. Ramaswami were of the opinion that the advice rendered by the Council of Ministers is not immune from judicial review, while Justices Verma, Dayal, Sawant and Kuldeep were of the opinion of limited judicial review of the proclamation and advice so rendered is outside the purview of review. However, the majority viewed that any grounds upon which an executive determination is founded on "subjective satisfaction" can be questioned:

(1) if the proclamation was issued as per presidential satisfaction based on "no ground" at all [Justices Sawant, Pradhan, Jeevan Reddy and Aggrawal[68]];

(2) if the proclamation was based on consideration which is irrelevant and extraneous wholly [Justices Chandrachud, Bhagawati and Gupta in *State of Rajasthan v. Union of India*[69]], as in this case there will be no satisfaction. This point of view is reaffirmed in the *S.R. Bommai* case;

(3) if the proclamation is issued with "malice" it will also render satisfaction as "no satisfaction"; the proclamation can be challenged only on grounds of legal *mala fide* or high irrationality in exercise of the discretionary power to issue a proclamation [Justices Sawant, Pradhan, Jeevan Reddy and Agarwal[70]]. Thus, whenever the constitutionality of a proclamation is challenged it becomes necessary that the Union must produce the materials on which such action has been taken [Justices Sawant, Jeevan Reddy and Agarwal[71]];

(4) on the submission of the material which has rendered satisfaction, the court will determine whether the material is "relevant to the action," the court will not look into the "correctness of the material or its adequacy." But before calling upon the Union to produce the material the court must find a "strong prima facie" case that the proclamation is unconstitutional, and the court shall record the reason for ordering so.

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66 Ahmadi J., Yogeshwar Dayal J., Verma J., Sawant J., Kuldeep J., K Ramaswami J., Jeevan Reddy J., Pradhan J., Aggrawal J.

67 (1994) 3 SCC 1.

68 *Id.* paras. 187(1), 223 and 452(3).

69 *State of Rajasthan v. Union of India*, paras. 28 and 144.

70 (1994) 3 SCC 1, paras. 187(1) and 432.

71 *Id.* paras. 2 and 452(2).

## 4. Lessons from Comparative Federalism with Reference to Constitutional Machinery Failure (Emergency) in India and Pakistan

The *Bommai* judgment is a "watermark of judicial review" in respect of constitutional failure emergencies on both sides of the border; the Indian as well as the Pakistani Supreme Court has often quoted from the judgment. As observed by Soli J. Sorabjee, "[This] is a very salutary development and will go a long way in minimizing the onslaught on the State."[72] On this basis the Indian Supreme Court has laid down several instances as permissible proclamation or as impermissible proclamation. These judgments have guided the judiciary in Pakistan too to restrict arbitrary actions of state machinery in the name of constitutional emergency.

Both Art. 234 of the Constitution of Pakistan and Art. 356 of the Constitution of India use the phrase "the government of a State *cannot be carried* on in accordance to this constitution". In the *Bommai* case, Justices Sawant and Kuldeep contemplated that there must be such a situation where the governance of the state is not possible by any alternatives. The word "cannot" emphatically describes a situation of impasse. If a remedy is available, then an Emergency Proclamation will not be used. This also justifies the aspiration of Dr Ambedkar, who played an instrumental role in shaping the Indian Constitution and particularly Art. 356, claiming it to be "a dead letter" and "would never be called into operation."[73] This approach of the *Bommai* case is influenced by the judgment of the Pakistani Supreme Court in the case of *Khawaja Ahmad Tariq Rahim v. Federation of Pakistan and Others*,[74] where Art. 58(2)(b) of that time was under review. As per Justice Shafiur Rahman for the majority opinion, "[S]ituations which can be remedied or do not create impasse, or do not disable or interfere with the governance of the State, cannot attract the situation of 'cannot' under the Constitution. The situation of 'cannot' is not an optional situation; it is the expression of 'the last situation' or 'the only option.'" The majority opinion in *Rahim* went on to interpret "cannot" as the last resort, and the same opinion was referred to in *Bommai* to interpret Art. 356. Thus, post *Bommai* judgments in India and post *Pir Sabir Shah*, *Niaz Ahmed Khan* and *Rahim* judgments and the 18th Constitutional Amendment 2010 in Pakistan, now courts on both sides of the border have clearly instructed that Constitutional Machinery Failure as it is titled in their respective chapters is an Emergency Provision and will be used as such, not on the basis of centralised adventure to usurp federalism, but always used as a "last resort."

Both in *Rajasthan* and in *Bommai* the main zone of disagreement was about the area and extent of judicial review and justiciability of Presidential Proclamation, but

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72 Soli J. Sorabjee, *Decision of the Supreme Court in S.R. Bommai v. Union of India: A Critique*, (1994) 3 SCC (Jour) 1.

73 Constituent Assembly Debates: Official Report, Vol. IX, 170, 151, 131, 135, 148 and 177.

74 PLD 1992 SC 646.

there is agreement on the existence of such broad power in a federal democratic set-up, though claiming it under judicial review. Similarly, reference Pakistan's Supreme Court in *Dwarkadas v. the State*[75] and *Pir Sabir Shah v. Federation of Pakistan and Others*, Justice Saeeduzzaman Siddiqui remarked:

> Article 234 is necessary to preserve the system but the exercise of this power, which undoubtedly has far reaching and drastic consequences is not left by the framers of Constitution totally unbridled and uncontrolled… where it is discovered that the power has been exercised either outside the scope of Constitutional provision, or tainted with mala-fide or power has been exercised to achieve objects not contemplated in the Constitution, the Court has to scrutinize it.

But Indian courts have adopted the principle of limited judicial review of the proclamation, claiming the satisfaction of the President in India is to be reviewed subjectively only. The correctness or adequacy of the materials on which such satisfaction has been based is not subject to judicial scrutiny, the court will only examine "whether the materials are relevant for the action, if there is a strong prima facie case of its abuse." On the other hand, in *Mian Manzoor Ahmad Wattoo v. Federation of Pakistan and Others* the Lahore High Court mandated that Pakistan, unlike India, will not follow only the Subjectivity Test of the Proclamation but will judge the satisfaction of the President of Pakistan on the materials submitted before him/her objectively too. This judgment was the extension of the *Pir Sabir Shah v. Federation of Pakistan and Others* guideline which states the existence of a situation in which the government of the province cannot be run in accordance with the provisions of the Constitution cannot be treated subjectively. The satisfaction of the President in this regard must be based on objective conditions justifying the issuance of a proclamation under Art. 234.

In comparison, when Pakistan's judiciary had to affirm the justiciability of the proclamation under Art. 234 of the Pakistani Constitution 1972, the court used the rulings in *Rajasthan* and *Bommai* in *Begum Nusrat Bhutto v. Chief of Army Staff*, *Niaz Ahmed Khan v. Province of Sindh* and *Pir Sabir Shah v. Federation of Pakistan and Others*. Courts on both sides of the border wanted to establish the legitimacy of judicial review with caution and balance as to prevail between the Executive's use of power in an emergency and the arbitrary use of the same power to destroy the federalism which has been the centre theme of the constitution of both countries. Both in India and in Pakistan, Constitutional Machinery Failure Emergency has taken its distinct route and gone through major changes. Both countries have made this provision to subvert provincial autonomy.

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[75] PLD 1957 SC (Pakistan) 72.

## 5. Reasons and Suggestions

India and Pakistan both claim to be federal, both believe in their claimed federalism; contrary to that, both countries have watered down the elements of federalism for the aspiration of national integration and centralised co-ordination. The constitutions of India and Pakistan have shown their fundamental belief in *Union of States* and *Federal Islamic Republic*, respectively, likewise their struggles for freedom, led by the Indian National Congress and the Muslim League, respectively. This aspiration has not gained the desired prominence in their respective constitutions, and it was an intentional and deliberate act of the constitution-making bodies of the two States to keep federalism in words and titles as an adjective, but not in spirit. Constitutions both in India and in Pakistan have been guided by their colonial source, GoIA 1935, which was to keep the provinces within the grip of the centre. The constitution-building process in India and Pakistan deliberately denied changing the colonial instrument of Constitutional Machinery Failure Emergency and conceived it to remain "a dead letter" and that it "shall not be used." In this situation, the constitution and polity have been guided not only by their colonial source but also by the colonial mindset to keep shared power only in words and not in actions, to keep provincial units within the overpowering supervision of the centre and yet claiming the country to be "perfectly uniquely federal." The Emergency Proclamation on the basis of Constitutional Machinery Failure has been instrumental in ensuring the centre's dominance over the provinces in India and Pakistan, as this power, as in colonial times, remains in the hands of the centre, unchecked, uncontrolled and more often than not even uncared for by jurists, or researchers as a matter for comparative and debated discussions. Abrogation of the Constitution of 1956 and 1962 in Pakistan and imposition of Constitutional Machinery Failure Emergency Proclamations more than one hundred times in India are reflective of abuse of the process in favour of the centre, both in India and in Pakistan. The Constitutional Machinery Failure Emergency Model in India and Pakistan has gone through progressive changes via judicial interpretations in India by the *Rajasthan* and *Bommai* cases and the 18th Constitutional Amendment 2010 in Pakistan. This progressive outlook has been influenced by internal misuse of the provision and also by the developments on the other side of the border. The *Begum Bhutto* judgment influenced the approach of the judges in *Bommai*, and *Bommai*'s mandate of judicial reviewability of the proclamation gave strength to the judges in Pakistan to maintain its strong impartial and democratic outlook regarding the reviewability of the Pakistani Emergency Proclamation in the *Pir Sabir Shah* and *Niaz Ahmed Khan* rulings. Post 18th Amendment in Pakistan, there is scope for positive and progressive deliberations in respect of shared power and federalism in Pakistan, which are under scrutiny and research.

The aim of this article is to motivate and provide the base for such comparative researches in India and Pakistan as well as in South Asia on the Provincial Emergency Model. The words of Professor Upendra Baxi, referring to the struggle of the Pakistani

Supreme Court (PSC) has been the guiding force of this article: "The story of baptism by fire of the PSC also makes the community of Indian lawpersons a little more uncomfortable in their mimetic modes of doing jurisprudence, which truly ignores the developments next door, in the search for wisdom across the seven seas."[76]

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# THE *SUI GENERIS* OF NUCLEAR FATWA UNDER CUSTOMARY INTERNATIONAL LAW

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*Due to the fluctuating nature of the Customary International Law, emerging customs have had good potential to appear in several forms during the past decade. In other words, there are various legal mechanisms indicating the genesis of CIL. One of these forms is the internationally known unilateral act of State which can be potentially recognized as a customary rule. The best example of a unilateral act of State would be Truman Proclamation which was transformed into a customary international rule concerning law of seas. With regards to the same legal framework and acts like Truman Proclamation, this research tries to answer the question that how the sui generis of fatwa in a custom-construction process concerning international law of WMD and through the modernized methodology can contribute. Illustrating the superiority of fatwa over the sui generis treaties on one hand and restricting mechanisms like NPT on the other, it can be indicated that the first steps concerning the genesis of a new customary approach in the field of international law of WMD has been derived from nuclear fatwa.*

*Keywords: nuclear fatwa; customary international law; law of treaties; NPT; WMD.*

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## Introduction

According to the features emanating from the principles of justice and security, the legal regime of the nuclear fatwa[1] is offering a new approach in the field of disarmament and non-proliferation of the weapons of mass destruction. The growing international acceptance of this approach in the realm of customary international law and the fluid nature of the boundaries of the international law development underlie the genesis of a new custom which is originated from legal regime of the

[1] Fatwa in the Islamic faith is an authoritative legal opinion or learned interpretation that a qualified jurist can give on issues pertaining to the Islamic law. On the other words, fatwa is the expression of God's view towards something. This view is extracted from the specified sources by a highly qualified jurist.

nuclear fatwa.[2] This fact requires the necessity of studies in the field of religion and religious beliefs, particularly in religious communities. And more pronounced that, the purpose of international law and monotheistic religions is placed in one direction. This means that if we want to consider a common denominator between them, it will be the maintenance of global peace and security. The only difference here is in a word, and that is "justice," i.e. maintaining international peace and security in terms of justice. Therefore, this fact was noted in the message that Iran's Supreme Leader sent in response to President Obama[3]. In his speech in Berlin, President Obama uttered that international peace and security is recognizable only in terms of justice and asserted that if this matter is recognized, there will be no war in the world. It is evident that the function of religious values has a specific capacity that can be very effective in the genesis of modern international law, as in most of the customary rules which are based on the values of religious beliefs. Thus, it can be said that the values derived from religion and monotheistic thoughts, in addition to influencing the creations of international customs, have a constructive role in sourcing the genesis of international law. The general principles of law or peremptory norms of international law are as follows: the principle of fulfilment of the obligation, good will, non-violence, non-aggression, prohibition of genocide, prohibition of crimes against humanity, prohibition of war crimes, non-racial discrimination, non-polluting the environment, respect for fundamental human right, etc. What is evident is that in formation of the international custom, the position of persons gets stronger, in comparison to States that once were the main subjects of international law. This change of direction in the process of formation and recognition of international law is very important. This can be viewed from two perspectives: first, Ayatollah Khamenei's fatwa, as a person, and in the framework of individual system, led to the development of customary international law and second, as the governmental practice of IRI leads to the development of international law. Even though there are some special international bi or multilateral acts[4] in the prohibition of weapons of

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[2] In this respect various efforts, in primary formation of an international custom emanating from the mentioned legal regime can be listed such as; hold of international conference on disarmament in Tehran, bilateral and multilateral meetings with international high level authorities on clarifying IRI's peaceful approach and idea, the global idea of the formation of an international convention on investigation of nuclear threats after the issuance of nuclear fatwa, documentation of nuclear fatwa as an internationally legal act in the United Nations (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/326/00/PDF/N1032600.pdf?OpenElement); and support of the noted Christian, Jewish religious figures from the issuance of nuclear fatwa and many other relevant cases.

[3] Available at http://www.dw.de/a-16894996.

[4] Hague convention on prohibition of poisonous gases (1907), Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993), Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, or Biological Weapons Convention (BWC) (1972), Comprehensive Nuclear-Test-Ban Treaty (CTBT) (1996), Geneva Protocol (1925), Brussels Declaration concerning the Laws and Customs of War (1874), Strasbourg Agreement (1675), Treaty

mass destruction (WMD), none could have made a general prohibition which, in the light of a unit system proscribes any access, production, stockpiling, and use of "all sorts of" weapons of mass destruction. The nuclear fatwa, accordingly, has potential to be a precursor of the formation of such a process as it is structured by a custom in several phases. The processes that can be studied are as follows: first, it can only be the crystallization of nuclear fatwa in the frame of a custom. Second, the building a custom from its content and what is reflected by fatwa, and third, the subtraction for the formation of other emerging customs. In other words, what is meant by relationship between the international custom and this fatwa is that; not only this fatwa becomes or has become a customary rule, but not using WMD based on general principles of law and other sources of international law has been accepted as a customary practice under international law and this fatwa accordingly contributes in the formation and consolidation of both material and *opinio juris* elements. At another level, it can be argued whether the *Valliye Faqih*'s[5] issued fatwas which have the same international features, can cause the formation of a regional custom or not – particularly with regard to the Islamic nature of the Middle East Area. Currently, there are many discussions about the moral war under international law. It must be considered whether Iran's Supreme Leader's edict could take a positive step in this respect or not. And also, has it been effective in the formation of moral war customs or not? Generally, there is no treaty powerful enough to make a custom. All treaties and all unilateral acts are effective in this process, more or less. In this section, first we pay attention to the governing rules on the formation of the custom from the perspective of international law. Several approaches related to the formation of the custom are introduced including: traditional, modern, and postmodern, and at the same time, we try to recognize and compare these ingredients with the contents of legal regime of nuclear fatwa and finally, the related limits will be determined.

of Versailles (1919), Washington Naval Treaty (1922), Seabed Arms Control Treaty (1971), Outer Space Treaty (1967), Statute of the International Atomic Energy Agency (1956), Convention on the Physical Protection of Nuclear Material (1980), African Nuclear-Weapon-Free Zone Treaty (1996), Antarctic Treaty (1959), Central Asian Nuclear-Weapon-Free-Zone Treaty (2006), Treaty on the Final Settlement with Respect to Germany (1990), Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) (1967), South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) (1985), Southeast Asian Nuclear-Weapon-Free Zone Treaty (1995), India–United States Civil Nuclear Agreement (2005), Fissile Material Cut-off Treaty (not completed), Intermediate-Range Nuclear Forces Treaty (INF Treaty) (1987), Partial Test Ban Treaty (PTBT) (1963), SALT I (Strategic Arms Limitation Talks) (1972), SALT II (1979), Strategic Offensive Reductions Treaty (SORT) (2002), START I (Strategic Arms Reduction Treaty) (1991), START II (1993), START III (not completed), New START (2010), US–UK Mutual Defense Agreement (1958), Nassau Agreement (1962), Polaris Sales Agreement (1963), Quebec Agreement (with Canada) (1943).

[5] *Valliye Faqih* is the head of State and highest ranking political and religious authority in the Islamic Republic of Iran particularly and generally his position among Muslims is like the position of Pope among Christians.

## 1. Definition of International Custom

Custom in the first step, is an action or omission of a joint action among countries and, in some cases, among international organizations, meaning that it is resulted from the repetition of a legal documented action in a notable period. This characteristic is named material element. Custom in the second step displays as obligatory legal approach that this characteristic is named immaterial element.

## 2. Material Element

Regardless of theoretical disputes about Art. 38(1)(b) of the Statute of the International Court of Justice (ICJ), this concept consists of two material (practice) and immaterial (legal belief) elements whose combination will lead to a legal rule (custom) at international society level. These elements will be considered in details later. Generally, material element at the first step implies government's practice. As it was mentioned, there are no written and specific rules about what qualifications the practice should have. Issues including length at which the practice should be considered, repetition of the practice, degree of the practice coherence and integrity, generality of the practice, essence of the practice, and practices that are different criteria in this framework, and finally, makers of the practice other than the governments are parts of the most important issues that should be noticed in determination of material element. Without doubt, lawyers' ideas regarding the international juridical practice are considered as very valuable reservoirs to achieve applicable standards for realizing the custom material element.

### *2.1. The Practice Makers*

*2.1.1. States*

Art. 38(1)(b) of the Statute of the ICJ, basically indicates State practices and this issue is well inferred from Court views. States do not have physical entity. They are a collection of connected governing institutions (organs) that have a complete legal personality. Sovereignty is considered as constitution and the main emblem of government due to international law and is explanatory of its place in international relations. In Max Huber's view in judgment related to the Island of Palmas (1928), sovereignty indicates the independence in relations between States.[6] Independence also has been put at his personal theory by Anzilotti in advisory view of the Permanent Court of International Justice in 1931 regarding tariff regimes between Austria and Germany, meaning that the State which according to international law has sovereignty, and receives its entity and authority from that

[6] *Island of Palmas Case (United States v. the Netherlands)*, Scott, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829, at 838.

same international law.[7] State practices through qualified organs appear to form the main movement of rulemaking at an international level. Determination of State-qualified organs according to international law has been allotted to its own internal legal system. According to Art. 4 of the International Law Commission's Draft Articles on Responsibility of States for International Wrongful Acts (2001), behavior of each governmental organ due to international law is considered as the practice of that government regardless that whether the organ has a decorative, legal, executive function or another function and what position the organ has in governmental organizations and also if this organ is an element of central government or an element of local governmental unit (para. 1).[8] The way of separation of power and competency domain among governments' different organs also has been allotted to their inner system. The following considerations should be mentioned:

1. Although the determination of formal organs' competency domain is the responsibility of a government's inner system, international law regarding some senior governmental authorities (e.g. the head of the state) considers these organs among government ostensible representative who even have competency behind what is defined in a domestic system framework for them. With regard to making an agreement, such a situation has been affirmed by the ICJ in the case related to maritime and territorial boundary between Cameroon and Nigeria in 2002. The Court about this case has based its own judgment on Art. 7(2) of the Vienna Convention on the Law of Treaties (1969).[9] There is no reason to conceive that there is a substantial difference in the relation between treaty-making and the process of custom-building.[10] Nevertheless, we emphasize that the form of exerting such a judgment will include some of state's senior formal authorities.

2. When a government's formal ordinary organ acts over its authorities, its behavior will not contribute to the process of building a custom-, albeit by doing a violating act, the issue is ascribed to the State and consequently, will be followed by its international responsibility.[11] In other words, behavior beyond authority domain of state's formal organs – other than a few numbers of senior authorities that were already mentioned – cannot be noticed as making an element in rule-making process, although it is possible – if being violating – to lead to the responsibility of states at

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7 *Customs Regime between Germany and Austria, Advisory Opinion*, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5), Individual Opinion of Judge Anzilotti, at 57.

8 Draft Articles on Responsibility of States for International Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), Art. 4(1)(2).

9 *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, at 430.

10 Gennady M. Danilenko, *The Theory of International Customary Law*, 31 German Yearbook of International Law 9 (1988).

11 Draft Articles on Responsibility of States for International Wrongful Acts, *supra* note 8, Art. 7.

international level. Concerning this issue, it needs to be stated that the executive power measures must be considered in addition to foreign ministry. Leading international negotiations and occasions through today's modern method is not always the responsibility of a foreign ministry. This task can be done by economy, transportation ministry, etc. Other than the cases in which an executive organ takes measures beyond its authority domain and its action is rejected by senior authority, apparently there are no appropriate reasons regarding why state capacity of practice creation must be confined to a foreign ministry.[12] ICJ in the Nottebohm case (1955) states that a governmental rule can be considered as the manifestation of that state practice.[13] The Court's judgment in the Lotus also emphasizes on this issue in the same manner that inner courts are part of governmental organs and their decisions must be considered as a part of state practice.[14] Legislation of territorial rules and their reflex ion in judicial judgments during legal procedure can be viewed as notable indicatives of a government's behavior; particularly, basic and main rules of each country regarding limitation or development of government's competencies, separation and resignation of authorities, and promotion of human rights. Also, judgments issued from inner courts particularly can be suitable delineations of executive condition of legal processes, recognition of justice immunities and extradition. In many cases, we see the state practice-building through association of the triple powers with each other. For example, a request of extradition is made. In this case, approving or disapproving national rule, inner court decision, and accomplishment or not doing extradition by executive government can be a manifestation of government's real practice regarding the mentioned issue. Also about the governments that have confederation or federal position like the U.S. and Switzerland, it must primarily be told that practices of each inner territorial unit that do not have international independent personality cannot be viewed as state practice, unless their practices are on behalf of central government and (or) approved and passed by the central government.[15] Thus, state practice, as it was described, has a determining role in creating rules of customary international law. Indeed, States as main subjects of international system and their behavior and approach as the basic element of rule-making in this domain, have the most important and dominant role in the area of practice makers. As it was considered, act of State can appear in acts of its entities, and executive power entities are not only under power of president or prime minister rather they can contain measures of

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12 ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Art. 9, commentary (b).

13 *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] I.C.J. 1, at 22.

14 *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at 23, 26, 28–29.

15 Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 8.

a system as a whole. Eventually it is obvious that issuing nuclear fatwa by the Supreme Leader is equal to the act of executive power, because based on the Constitution of the Islamic Republic of Iran, the final decision maker in Iran is the Supreme Leader and determination of general and strategic policies are under his authority.[16] As the first hypothesis, the primary element of custom making – practice – is referred to as the act of *Valliye Faqih* in issuing concerned fatwas and acknowledgement of peaceful activities and emphasis on nuclear fatwa by representatives of international communities.[17] As the second hypothesis, the primary element of custom making is related to the act of Iran in none (usage, proliferation, and stockpiling) of weapons of mass destruction. And as the third hypothesis, practice is related to prohibitive and consistent act of inclined States to assist Iran in connection with the weapons of mass destruction. Furthermore, studying the other factors of practice-building under international law and their role in process of custom-building of nuclear fatwa are necessary to be considered.

*2.1.2. International Organizations*

Albeit "general practice" as the material element of custom-building basically indicates State's practice, international organizations that are created to organize disorder in international relations to generate systemic order have increasingly been developed these days and actually are considered as an inseparable part of international life and play roles in different areas. This increasing development has been the outcome of international relations extension particularly in the 20th century. International organizations that first just took step in international domains in limited areas and the framework of technical issues, presently have generalized their own activity domain to the most important international issues including legal, political, and security issues. Thus, due to having subjective legal personality, international organizations are considered one of the active subjects of international law and therein, can be both producers of right and obligation, and its subject. Although organizations firstly take their own personality form State will, they continue their activities act as an independent legal personality.[18] Nevertheless, international organizations' practice also can be effective in practice-building process and codifying legal rules because the practice of all subjects of international systems contribute to generating and creating legal rules. Generally, as international organizations have capacity of treaty-making in international legal area to implement their missions and achieve aims that have been set for their realization – that its borders have been defined in the Vienna Convention on the Law of Treaties between States and International Organizations or

[16] Arts. 5, 57, 60, 91, 107, 108, 109, 110 of the Constitution of the Islamic Republic of Iran.

[17] For more information *see* Jaber Seyvanizad, *Nuclear Fatwa under International Law* 220–250 (Los Angeles, CA: Supreme Century, 2017).

[18] Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organization* (Cambridge: Cambridge University Press, 1996); Leo Gross, *Essays on International Law and Organization, Volume I/II* (The Hague: Martinus Nijhoff Publishers, 1984).

between International Organizations of March 21, 1986[19] – as they also can participate in the formation process of general customary international law through the practice of their organs.[20] Such association is actually from main impacts and consequences of having independent international legal personality. Of course, we should note that the acceptance of legal personality for international organizations should not lead to this conclusion that State members of an organization do not have any independent practice in involved organization framework anymore, and what is efficient in deduction of customary rules is only the practice of the organization itself. International organizations' privilege of independent legal personality of constitutive members will not have any conflict with obtaining independent practice of State members of the organization, because one State does not lose its own entity and identity due to enrollment in an international organization, rather it assigns some of its own competencies and authorities to the related organization to achieve a specific aim. As we will see in the following, international organization resolutions, particularly, United Nations' General Assembly resolutions are very appropriate places to assess State practices in discussed issues and a manifestation and reflection of their legal belief. ICJ in advisory judgment concerning the reservation right to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) – in explanation of customary law regarding the reservation – noted the practice of the United Nations Secretary-General as a trustee of many multilateral treaties along the State practice of national authorities.[21]

On this basis, act of the United Nation in documentation of nuclear fatwa can indicate UN practice, in addition, the Secretary-General of the United Nations in his bilateral session with Iran's Supreme Leader showed his satisfaction in relation to issuing nuclear fatwa and appreciated Iran's confidence-building measures. Also issuing the resolution in supporting Iran and in condemnation of violence and extremism as double examples of WMD were other instances of UN in custom-building process of nuclear fatwa. In addition to UN, the other international organizations and movements like the Organization of Islamic Cooperation (OIC), the Organization of Islamic Cooperation (OIC), the Non-Aligned Movement (NAM), the International Atomic Energy Agency (IAEA), and the World Health Organization (WHO) admired Iran for issuing nuclear fatwa and directly or indirectly respected its nationally peaceful nuclear approach in several periods of time through several mechanisms, which symbolize the custom-building practice of these organizations. Hence, international organizations as the main subjects of international law system

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19 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM 543 (1986)/Doc. A/CONF.129/15.

20 Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 11.

21 *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, May 28, 1951 (May 10. 2017), available at http://www.refworld.org/cases,ICJ,4023a7644.html.

can participate in practice-building process and forming rules of law, whether in the framework of inner organs and (or) in relation to other States at international relations level.

*2.1.3. International Judicial Authorities*

International court and tribunals are not legislation authorities. The point that must be noted here is that whether international judicial authorities themselves can make practice in the process of forming customary international law or not. In other words, whether decisions of these authorities can be considered as a "general practice" that constitutes the material element of custom. This issue can be represented from three perspectives. One is considering international court and tribunals as constitutions that take their competency and authorities from governments. Thus, their judgments are viewed as a form of State practice. The other perspective considers these authorities as inner organs of an international organization and thus viewing their decisions as the approach of that organization. Finally, the judicial practice of judicial authorities can find the presence of customary rules in different areas. From each perspective, the issue is that whether international courts and tribunals can be material element of custom-building practice. Regarding this issue, some authors have considered these authorities' decisions as a form of State delegation practice.[22] Professor Wolfke believes this fact that States accept judgments and ideas of judicial organs means that such decisions *per se* can be viewed as a form of State practice.[23] In his viewpoint, such an idea also has been already affirmed by Guggenheim. Then, Wolfke clearly has pointed out the ICJ practice and accordingly analyzes planned references of the Court to its own prior decisions and also refers the other international constitutions including States themselves, international organizations, non-governmental organizations, the International Law Commission, and doctrine to such decisions in this framework.[24] From his view, it is completely natural that we assess judicial history in the framework of the international practice leading to formation of customary law. It has explicitly been accepted by States.[25] Also, some judgments of the Court are adduced by this lawyer to prove the claim. For example, the Court in the case of boundaries limitation of continental shelf between Canada and the United States in 1984 has specified that "Court judgment... in the cases of North Sea Continental Shelf has been considered as the greatest participation of this authority in application of governing customary law in the discussed area."[26]

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[22] Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 10 (commentary).

[23] Karol Wolfke, *Custom in Present International Law* 74 (2nd ed., Dordrecht: Martinus Nijhoff, 1993).

[24] *Id.* at 74.

[25] *Id.* at 75.

[26] *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984, p. 246, at 292.

Art. 38(1)(d) of the Statute of the ICJ that due to it "judicial decisions… as subsidiary means for the determination of rules of law" is considered, also is another reason that has been posed by Wolfke regarding the practice-building role of international judicial authorities' judgments. He believes that this part of Art. 38 indirectly guarantees the acceptance of some degrees of rulemaking by judicial authorities.[27] Therefore, in the context of custom making of nuclear fatwa, by referring to judiciary judgments of the ICJ,[28] we can refer to general practice of the ICJ in accepting unilateral declarations in position of an international document, based on this fact and several judgments of the ICJ, nuclear fatwa as an unilateral declaration and based on customary practice of the ICJ is recognized as an international evidence. Accordingly, the unilateral measurements of other States in acceptance of nuclear fatwa are supported by international judiciary practice in custom-building process.

*2.1.4. Non-Governmental International Organizations*

Non-governmental international organizations are not active subjects of international law and cannot cause right or obligation. They can merely be the subject of right of obligation. Unlike non-governmental international organizations that directly participate in the practice-building process leading to the formation of customary material element, role of non-governmental organizations is only limited to some secret lobbies in backstage and influence on State agents in diplomatic conferences and international assemblies.[29] Therefore, non-governmental organizations can play important roles in all steps related to the formation of customary law, from the beginning of the negotiations and reasons gathering to identifying and final ratification of rule, but they do not have direct participation in the process. Also, – clearly about treaties – non-governmental organizations can possibly enter extensive strains on international society members to put a specific treaty draft in the agenda of future negotiations and (or) even, in some cases, it's possible to present a specific draft text by themselves to merge with text developed by States. However, it is ultimately these States – and not non-governmental organizations – that participate in the conclusion of treaties. The situation governing on the creation of the norms of customary international law is in this way that the mentioned organizations can indirectly affect States practice and evolve their approaches. For example, the International Red Cross has had a very efficient role in development and promotion of international humanitarian law. In some lawyers' viewpoint, any surveying of humanitarian law without reference to the International Red Cross will be deficient. The Red Cross consists of the International Committee of the Red Cross (ICRC), 190 National Societies, one coordinator center,

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27 Wolfke 1993.

28 *Nuclear Tests Case (Australia & New Zealand v. France)*, I.C.J. Reports 1974, p. 253, at 269–270, para. 51, and 474–475, para. 53.

29 *See* Malgosia Fitzmaurice, *Actors and Factors in the Treaty-Making Process* in *Contemporary Issues in the Law of Treaties* 49, 57–58 (M. Fitzmaurice & O. Elias (eds.), The Hague: Eleven International Publishing, 2005).

and the Assembly. The ICRC that each of the Geneva Conventions knows as a neutral international institution is responsible for the development and exaltation of substantial humanitarian law. Nobody can ignore the role of this effective international constitution in the codification process and ratification of the Geneva Conventions of 1949, the Additional Protocols of 1977, and other documents related to humanitarian law. Viewing the function of the International Law Association, it can be stated that almost all the tasks of this organization lead to development of Conventions drafts and (or) issuance of resolutions that has been the basis for international rules formal codification. Nonetheless, it must be emphasized again that the International Law Association's activity as a non-governmental constitution has been merely planning for possible realization of generating international law rules and no direct participation is made in this framework. In this regard, the widespread support of NGOs from the issuance of nuclear fatwa is very notable, because it has the potential to be considered as a ground-maker tool in advent of a new legal regime in prohibition of threat, utilization and proliferation of WMD.

### *2.2. Verbal and Material Acts*

Generally counting practices and behavior that guarantee international practice leading to the formation of customary rule is not a simple task. Primarily, material elements or practice can include both physical and material act of States and their verbal act. Nevertheless, lawyers' views on this issue are not the same because some of the related specialists only accept physical acts as practice, while it seems that the dominant view about this issue regarding international judicial practice indicate any kind of behavior as the material element of custom-formation. Then, this discussion will be continued in detail. As it was mentioned, there is a disagreement concerning the nature of State practice – like other posed issues in the present writing. Some lawyers like D'Amato and Wolfke view only State material and physical acts as a manifestation of the practice and representing a strict concept regarding this issue. They believe that any claims or general statements per se cannot be explanatory of State practice. Accordingly, Professor D'Amato asserts that a claim is not an act. Although the claims may articulate a legal norm, they can't constitute the material component of custom.[30] According to him, sending missiles, nuclear procedures, receiving ambassadors, making levies on customs duties, expelling an alien, capturing a pirate vessel, setting up a drilling rig in the continental shelf, visiting and searching a neutral ship are among the most important State's practices. For a State that has not done anything when it makes a claim, until it takes enforcement action, the claim has little value as a prediction of what the State will actually do.[31] The situation is the same in the cases that a State decides to support or oppose the development or changing

[30] Anthony A. D'Amato, *The Concept of Custom in International Law* 88 (Ithaca, NY: Cornell University Press, 1971).

[31] *Id.*

of an act. D'Amato provides an example in this regard: sending the first Sputnik to the globe and at the same time the development of the customary law related to passing the satellite over other countries' territories. Specially, with regard to Wolfke's point of view and other similar views, there is no reason for not paying attention to the verbal acts or general declarations of the States. In this regard, pointing out professor Mullerson's ideas would be logical. Although he will not clearly show the component of the actions that comprise the States practice, he puts the acceptance of the wide concept of the evidences that formulate material component of the custom against the same challenge, as was put by D'Amato. At first he acknowledges that there is a distinction between what the States claim and how the States act; for example, the "claim" of having the right of innocent passage in waters of a territory and it's "enforcement". But he asserts that in the case of accepting the wide definition of practice, what would be the way to distinguish it from the legal beliefs of the States?[32] In this regard, also Red considers the distinction between act and legal belief where verbal acts are paid attention to as the reason for creating practices. Nevertheless, Mullerson does not clearly assert that he agrees with the acceptance of verbal acts as the State's practices or not. Finally, he states his analysis that the State's practice can contain both subjective component (verbal acts) and the objective component (physical acts) but the subjective component is not always defined as legal belief.[33] Mullerson believes that subjective attitudes of the States about their act may be implied in their actions.[34] Specifically, about the attitudes of Professor Thirlway, the acts of the States, foundations and international judicial authorities show that simply general statements and declarations without considering any special situation can be paid attention to as evidences for creating the material component of custom, and as previously mentioned, basically, the framework that this lawyer poses for the acceptance of verbal acts of the States is not logical and real. Also Professor Mendelson is among the other lawyers that effectively discusses about the contribution of the verbal acts in the process of the formation of customary international law.

Totally, diplomatic statements including complaints and declarations which show the State policy, State counsel advice, press releases, statute books and official instructions related to juridical issues such as the instructions related to the military law, participation in voting in the international organizations, State remarks about the projects which are under the consideration of the International Law Commission and other similar institutions, national legislation, decision of domestic courts, bills before the international courts and so on are examples of the States' actions which Mandelson believes they contribute to the process of practice-building which lead

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[32] Rein Mullerson, *The Interplay of Objective and Subjective Elements in Customary Law* in *International Law: Theory and Practice: Essays in Honour of Eric Suy* 161 (K. Wellens (ed.), The Hague: Martinus Nijhoff Publishers, 1998).

[33] *Id.*

[34] *Id.*

to the formation of the material component of custom.[35] Under the influence of the Professor Mendelson's viewpoints, the International Law Association's statement about the principles governing the formation of customary law has considered the verbal acts as the State's practice. Art. 4 of the Declaration states: "verbal acts of the States, not only the physical acts, are also considered as the State's practice." According to the Association, in the interpretation of this article, verbal acts mean statements or general declarations which in fact form a commoner shape of the State's practice in comparison to the physical act. Diplomatic statements (such as complaints), political statements, press releases, official instructions (such as military law), armed forces' circular, States' interpretations about the drafts of the treaties, domestic legislation, Judgements of the national courts and executive authorities, the views of the governments before international courts, international organizations' statements and resolutions and so on are all examples of the verbal acts. Thus, the International Law Association besides Akehurst and Mendelson discusses the quality of participation of verbal acts similar to the physical acts in the process of practice-building which lead to the formation of the material component of custom. Thus, despite of the content above, it acknowledges, some of the declarations can be more usefully considered as just stating the beliefs than the official acts of the State's practice. Professor Dinstein believes that the view which only considers physical acts as the component of custom is a highly exaggerated view.[36] This lawyer believes that in a wide level, a physical act is of a greater importance in comparison to a verbal announcement, warning, or censures (totally verbal acts); however, there is no difference between them in terms of their validity. Actually, Dinstein considers a higher value for some actions such as laws authorized by parliaments and the judgements issued by the courts than other verbal acts. In his opinion, undoubtedly, laws authorized by legislative institutions and domestic courts' decisions have a higher value like physical acts – or even more value – in the process of practice-building; however, in other cases, the general declarations of the States including statements, announcements, and notices only have an auxiliary role[37] and they cannot make a practice which leads to the formation of the material component of custom without the States' physical acts.[38]

Thus, although at first, he considers physical and verbal acts of States in the same way, he finally makes some distinctions between them in relation to their role quality in the process of practice-building which leads to the creation of customary rules. Yet, this dissociation is not at all comparable to the Thirlway's viewpoints who considered verbal acts totally as the evidences for building practices. Dinstein believes in this framework, when the preconditions are available, the general statements of the

35 Mullerson 1998, at 204.

36 Yoram Dinstein, *War, Aggression and Self-Defence* 215 (3rd ed., Cambridge: Cambridge University Press, 2003).

37 *Id.*

38 *Id.* at 276.

States can put their actions in a special situation, especially by making clarification of that action or by making explanation of that as an exception to the rule. In other words, there would be a kind of impact on the delimitation of the discussed rule. But this cannot contribute to the process of making the quantitative component of custom on its own.[39] Besides the judicial practices, the International Law Commission in 1950 clearly mentions treaties, domestic courts' decisions, national rules, diplomatic correspondences, and national legal advisors' beliefs as examples of the possible different forms of the State practice as well.[40] Also the States' considerations, especially great States, imply the acceptance of verbal acts as a kind of the State practice. The Foreign Relations Law of the U.S. (sec. 102) states: actions and diplomatic instructions and other governmental acts and official statements whether they have been taken unilaterally or in a form of collaboration with other States; for example, in the framework of international organizations, they can establish different forms of the States' practice.[41] Relying on the verbal acts of States for recognizing the customary rules is the current reality of the international system and is of great importance, especially for those States which fail to have enough material facilities for taking actions in a special field. For example, the land-locked States have no material possibility for the participation in the formation of CIL in the field of law of seas. Only they may participate in formation of CIL by resorting to the verbal acts.[42]

As it was considered, practice can enjoy both material and oral aspects, in both hypothesis, custom-building process towards consolidation of legal regime of a nuclear fatwa is attainable; because first, official representatives of several States mostly in high levels and in different diplomatic and non-diplomatic events supported issuance of nuclear fatwa and its derived disarmament system repeatedly and therefore, manifested the approach of their State to this legal regime. In practice, also with several measures like assistance in completion of Iran's nuclear establishment played a major role. Based on our triple assumptions from mechanisms of custom-building process of fatwa, these practices play a determinative role in this process.

*2.2.1. Verbal Element: Emergence in the Practice or Legal Belief?*

As was stated, the majority attitude toward the defining the nature of material component of custom contains both physical and verbal acts. Here the problem is that when verbal acts are considered as both the practice evidences and legal belief evidences, what would be the way to authenticate and dissociate them? Verbal acts

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39 Dinstein 2003, at 277.

40 Yearbook of the International Law Commission, 1950, Vol. II, Documents of the Second Session Including the Report of the Commission of the General Assembly, A/CN.4/SER.A/1950/Add.1, at 368–372.

41 *Restatement (Third) Foreign Relations Law of the United States, Vol. I* (St. Paul, MN: American Law Institute Publishers, 1986), para. 102, commentary (b).

42 Seyvanizad 2017, at 119.

are being considered as the most important evidence for proving the existence of legal belief. The result which is achieved in this case, according to some lawyers, will be an epistemological way which causes one of the components of the creator of the customary international law rule look redundant. Viewing more meticulously, the solving the problem does not seem to be difficult. Although apparently and at first, considering verbal acts as evidences for both creating practice and evidences for creating legal belief of the States can lead to the fomenting of some ambiguities, these problems can appear where the States do not have any verbal act about an issue. In the recent case – beside the material component – also the mental component is extracted on the basis of the wide and convincing practice of the States and not through understanding of the preconceived notions. This has been explicitly confirmed in the judgements of the Court Branch in 1984 (Gulf of Maine case).[43] Thus, necessarily, insisting on the dissociation between the sources of the evidences of custom components is not logical. As the verbal acts can show the States' practices and also the legal beliefs, physical acts can also contain such situations but in the former case, we face a different situation. In this regard some lawyers, in addition to acknowledging that verbal acts of the States can be cited as a form of practice, they believe that the contents of such actions will also show the mental elements or their legal beliefs. In their opinion, our classification of a special verbal act as an example of a mental element or a material element depends on the situation. However, in some situations it is not possible to consider a special verbal act as a material element or legal belief of States, because it might happen that in an issue – like force – in which we face a massive amount of verbal actions. Thus, in such cases, it is necessary to consider the dual elements at the heart of the action and in mixing with each other. It's feasible in this way that only taking actions for issuing a verbal act including a statement release, issuing a diplomatic announcement, participation in voting for issuing a resolution in the framework of the international organizations, participation in negotiations concerning the drafting a treaty or international conventions and taking actions for its ratification are recognized as the material element and the content of the mentioned instruments are recognized as the mental element of States legal belief. Within status above that in some cases distinguishing words as a practice from the words as a legal belief is difficult, in hypothesis of custom-building process of nuclear fatwa by verbal confirmation of international authorities, verbal statements are both practice-maker and indicative of their legal belief.[44]

### *2.3. Refusal or Omission*

Although the material element or practice implies the States' actions (both physical and verbal), it is possible that under especial situations, refusing to take action (refusal) will be considered as a kind of the State's practice in the process of

[43] *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 26, para. 111.

[44] Seyvanizad 2017, at 98.

the forming legal international customary rules. For example, refusing to prosecute an accused or suspect foreigner diplomat for committing the crime in order to create the customary rules related to the diplomatic immunities. The majority of the authors and commentators have more or less accepted the role of refusal in the process of making practices. Professor Wolfke believes that "there is no basis for excluding refusal as a kind of process which leads to the formation of the international custom. Everything depends on the situation and occasion."[45] Professor Akehurst also states, that the State's practice can contain refusal and silence. The viewpoints of other lawyers such as Sorensen, Tunkin, Bernhardt, Danilenko, and Kunz in relation to the role of refusal are the same. Also Professor Mendelson believes that refusal can be paid attention to as the material component of custom or practice, but we should consider the situation and a degree of caution. Like other lawyers such as Wolfke and Akehurst, he poses popular Lotus case as the basis of his analysis. It appears that the best understanding of the role and place of the refusal in the process of making practices which lead to the formation of customary rules, have been done in the framework of this idea. In this case, the Permanent Court of International Justice did not accept the refusal of the States (except the flag State) from the prosecuting of the accidents on high seas as an evidence for existing a customary legal international rule which bans the States from such actions. But the reason for this policy of the Court was that the refusals of the States were ambiguous; this can mean that there is no problem in situations that refusals of the States as a government practice contain no ambiguity. In this case, by citing the lack of prosecution from the non-flag States about the claims related to the collision on the high seas, the French government was a pretender of a kind of duty for such States. The Permanent Court of International Justice denies this reasoning of the French government not because of the fact that refusals of the States naturally do not have the characteristic to consider this as a "practice," but because this refusal seemed ambiguous in such situation and it was unlikely that this was as a result of aware commitment. Mendelson believes that in this case, there could be other reasons for refusal which basically have nothing to do with international law. For example, the lack of authority or jurisdiction by virtue of domestic law (most of the criminal rules are constrained in the territory), or lack of interest and believe in the fact that the flag State is in a better situation for prosecution and punishment of the crime. In this framework, there is another similar practice in the ICJ judgement about the legality of the threat or using nuclear weapons in 1996 when the Court denies this reasoning: Since the States that have nuclear weapons have prevented from using them from 1945, so they have accepted the commitment of not using them.[46] Although here the Court denies the possibility of the emergence of a rule on the basis of the States' refusal; this does not mean that the Court disagrees with the acceptance of refusal as a way of the State's practice. The reason is that the political situation (prevention) is responsible for

[45] Wolfke 1993, at 61.

[46] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, para. 67.

not using the weapons in the mentioned period. In other words, if the situation does not contain any ambiguity, considering refusal as a kind of the State's practice would be possible; if the refusal of the States which have nuclear weapons from using this kind of weapons clearly showed the States' legal judgements, the Court could well extract a customary rule about this issue. In relation to recent expression, which is an important point to be considered, as non-realization of an act can include an omission, non-realization of a verbal act also can include a legal refusal. Therefore, with regard to not hearing any condemnation against nuclear fatwa and its derived legal regime by internationally official authorities, the existence of custom-building process even with refusal mechanism by non-active States can be found out.[47]

### *2.4. Characteristics of the Practice*

Which characteristics should the practice or material component of custom have? Under which quality are the States' actions recognized as the international practice? Art. 38(1)(b) of the Statute of the ICJ only considers the generality of the practice. Nevertheless, investigating of the lawyers' ideas about the international juridical practice implies other traits and qualities which the practice that lead to the formation of a customary rule should also contain them. We will discuss this issue in detail in this section.

#### *2.4.1. The Generality of Practice and the Limits of This Generality*

As previously mentioned especially in citing Art. 38(1)(b) of the Statute of the ICJ, the international practice which leads to the formation of the customary law should be "general." But this generality does not mean the participation of all States in the world in the process of the practice-building, because in this way we should wait for years to create a customary law to come true that is so exceptional and far away from expectation. With the generality of the practice, it means that it implies "wideness" and "similarity" which are the bases for the formation of the rule and all of the States are required to comply with them, unless it is in the framework of "Persistent Objector."[48] The general practices of the States contain both the sequential and parallel actions which are a result of the practices of cognizable organizations in a period. In most cases, these actions can be accomplished independently; however, the consistency between the States should not be disregarded. Now we should discuss about this issue: How many States should participate in this practice? There is no specific criterion in this regard and naturally, like the other issues about the custom, it is difficult to exactly pose a rule about the number of the States which should participate in the practice which leads to the formation of the customary law. This participation not only contains the States actions but also contains the reactions

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47 Seyvanizad 2017, at 128.

48 *See* Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 Recueil des Cours: Collected Courses of the Hague Academy of International Law 285 (2006).

of other States whose interests are affected.[49] The majority of the customary rules which have been done by the international juridical authorities were based on the wide participation of the States. But it is also possible that the general practices of the States be the result of the actions of a few countries. And it is also possible that the other States have the "once in each direction" participation.[50] But it has been said that if a State or a group of States do not protest against the action of another group in the case that they are objector to, their silence means that they have accepted such actions.[51] From the standpoint of the International Law Association committee statement about the principles governing the formation of customary international law, the States' practices should be wide in order to create a general rule of customary international law, so as was stated in the court's practice, and not necessarily universal,[52] also it is not necessary for the specific governmental requirements to customary international law, it will be proven that the mentioned State has participated in the practice actively or deliberately has agreed with that.[53] And the international judicial authorities have never denied this State from the commitment for the reason that the State has not participated actively in the practice which leads to the formation of general rule of customary international law claims.[54] As it was considered, the alliance of all States in custom-building process of something is not necessary, rather only by positive alliance of some States and even by their silence possibility of custom-building process is possible, so the widespread support of several States from the legal regime of nuclear fatwa has provided enough quantity in order to form a related international customary rule.

*2.4.2. Duration*

How much time is necessary for a customary law to come into emergence? About this, we should state that there is no specific criterion. Maybe in this framework, the time needed for the time passing for creating a customary law; the wording of the ICJ in the North Sea Continental Shelf Cases will be the best criterion for an analyzer. Although passing a short time does not necessarily or in itself prevent the formation of the customary rule of international law, on the basis of what was basically a convention rule but the necessary condition in this short period is that the practices of the States, especially those States whose interest will have been affected especially, regarding the

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49 Michael Akehurst, *Custom as a Source of International Law 1974–75*, 47(1) British Yearbook of International Law 16 (1976).

50 Dinstein 2006, at 283.

51 *Id.*

52 Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 14(1).

53 *Id.*

54 *Id.*

citation of the regulation, be wide and really consistent. In addition to this, the practice should be made so that it makes possible the recognition of the fact that a legal rule or a legal necessity has been regarded.[55] The needed scale of time continuity in order to create an international customary rule depends on various related factors. For example, if an issue is stated about which no other rule was accepted, establishing the rules concerning the issue will take shorter time than the issue for which a customary law exists and it should be adjusted for the establishment of the new rule. Nowadays, in parallel to the development of international relations, the importance of time is reduced. In assessing the behavior of a State, time is of low importance and its situation in each case depends on the other factors related to that activity. In the past and in the Roman law, basically custom was considered as a product of a long practice, also in common law in order to convert the practice to law, that practice should have a long history insofar as nobody can remember its root time. In the international level, most of the legal rules have a long history. But this does not mean that the formation of the new rules also needs such history. At present, the creations of the customary rules are provided in a short time and faster than the past. For example, the rules governing the law of the sea were first announced by President Truman in 1945.[56] In 1951, in the judgment of the Abu Dhabi Lord Asquith the dispute case of Petroleum Development (Trucial. Coast) Ltd. and the Sheikh of Abu Dhabi, he ruled that the mentioned doctrine with specific line yet not appear in the international stature of a rule of law.[57] But over the next years and until the 1958 Geneva Conference, more States claimed jurisdiction over the continental shelf. At the time, the Conference accepted that the coastal States should have special rules over their continental shelf. And thus the Convention of 1958 recognized such rights for the coastal States. Therefore, in connection with nuclear fatwa – that in form has structural-legal affinity with Truman declaration – with regard to passage of more than a decade from its issuance, it seems that the process of its custom-building has entered a new phase.

*2.4.3. Integrity and Uniformity of Practices*

The practice should be virtually uniform in order to participate in the process of making the principles of international law.[58] It means that the different samples

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55 *The North Sea Continental Shelf Cases (Germany v. Denmark and the Netherlands)*, I.C.J. Reports 1969, at 43.

56 In this year, President of the United States posed the claim of jurisdiction and control over the continental shelf: "The Government of the United States considers the natural resources of the continental shelf waters as then possessions of the Unites States and under its jurisdiction and control." What mentioned here was a clear statement of the idea of belonging the continental shelf to the coastal State. A unilateral claim which gained support of the other States which had important interests in the area of the continental shelf and finally it converted into a customary rule of international law. The completion of this process lasted for several years.

57 *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, (1951) 18 I.L.R. 144, at 155.

58 *The North Sea Continental Shelf Cases*, *supra* note 55, para. 43.

of the practice should necessarily be similar and consistent both internally and in general.[59] That the practice should be internally consistent means that the behavior of a participated State in the process of custom-building about a special issue should be consistent in different levels. By consistency in general, it means that different States should not have different practices about a special issue.[60] In the Nicaragua case, the Court did not find an opportunity to consider come points in relation to the present issue. According to the Court, when considering customary international law related to the principle of banning on the resort to the force and also the principle of prevention from intervening of the States in each other's internal affairs, this international juridical institution does not expect that the States' practice in obeying the mentioned principles to be in a high rate so that they should prevent intervention in each other's affairs by resorting to force in a consistent way. The Court believes that for the formation of a customary law, it is not necessary that the related practice be consistent with that rule. In order to establish the existence of such a rule, it will be enough that the States' behaviors be generally consistent with that and the examples of the practice which are inconsistent and incompatible with the rule should be treated as a violation of that rule and not the signs indicating the recognition of a new rule.[61] As was considered, no certainty has been prescribed based on the complete implementation of a same practice by international law so that the practice of States in order to consolidate legal regime of nuclear fatwa, mostly in verbal form, includes from direct hint on fatwa to confirmation of Iran's peaceful nuclear policies.

2.4.3.1. The Practice of the Beneficiary States

The wide and consistent practice of the States should be represented in order to form a customary law. The ICJ, in the issues related to the continental shelf of the North Sea, has emphasized on the "the practices of the States whose benefits are affected in a special way" in the process of practice-building.[62] This suggests that the number of the States in comparison to the situation and the States which are related to the issue is of lower importance because their benefits are in relation with the mentioned rule. For a claimed rule to legitimate, a proper reaction from the states and the beneficiary States is needed. Thus for example, we can hint to Britain's contribution in the formation of the law of the sea in the 19th century and the role of the United States and the former Soviet Union in the development of the law beyond the atmosphere. Before a claimed rule can find its way in the area of the customary international law, it is possible that the participation of some States is more necessary. What is meant by this, is the realization

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59 Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 13.

60 *Id.*

61 *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. the United States of America)*, 1986 I.C.J. 14, paras. 183–186.

62 *The North Sea Continental Shelf Cases*, *supra* note 55, para. 74.

of an affirmative practice of the nuclear States in custom-building process of the legal regime of nuclear fatwa, i.e. non (nuclear, chemical & microbial) States basically play no role in utilization or non-utilization of WMD to want to be effective in respect to such custom; however, they can take an effective step by their affirmative acts. In this respect, the remarkable welcome of powerful nuclear States like: China, Russia, USA, India and Pakistan from issuance of nuclear fatwa has accelerated the formation process of a new custom derived from the legal regime of fatwa.

### 3. *Opinio Juris*

As previously mentioned and in the definition, one of the component elements of custom is the immaterial element which reflects the legal belief of the States in following of a practice. Now the discovery of this legal belief can be obtained through different ways which are discussed here.[63] As the ICJ states in the issues related to the continental shelf of the North Sea, in the formation of the customary rules, merely the existence of a "great" and "much unified" practice is not enough. Also the mentioned practice should be made in a way that it implies the recognition of legal rules or obligations. In this regard, the Court explains that "two conditions should be met": first the existence of "an established practice" which contains the mentioned conditions, and the other "belief in the fact that such practice is obligatory because of the existence of a legal law."[64] Thus, the objective element of custom-practice, as was mentioned in the previous part, should accompany with a "Subjective Element" which lies in the concept of the "legal beliefs derived from necessities."[65] The Latin equivalent which is usually used as an abbreviation: "*opinio juris*," is "the legal beliefs of the States" or in others' view point "legal firm judgements of the States." Such a concept dissociates the Wheat from the practice or Chaff.[66] Thus the aforementioned practice should be drawn in the form of the following equation. The general practice of the States + their legal belief = custom = international law; so the existence of both objective and subjective elements of custom – meaning the general practice and legal belief – is necessary and unavoidable in the process of making legal rules. The first element defines what has occurred in the world and the second element prescribes the entering of the existing practice to the legal relations era (right and duty). Also it should be noted that in a way

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63 *Opinio juris* issue is seriously debatable in the customary law. According to some analyzers, the exact defining the psychological element in the process of custom construction, possibly has created more academic debates and discussions in comparison to the whole claims based on the custom rules. Hugh W.A. Thirlway, *International Customary Law and Codification* 47 (Leiden: A.W. Sijthoff, 1972). This expression actually means that the current issue in the world, rather than providing a challenge in the legal relations, paved the way for a wide debate in academic areas. Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. Part III (comment 2).

64 *The North Sea Continental Shelf Cases*, *supra* note 55, para. 44.

65 *Opinio juris sive necessitatis*.

66 Dinstein 2006, at 293.

that practice which leads to the formation of the customary rule should be general, the legal belief needed in this process should also have the necessary generality. In other words, the legal belief should also be the product of belief or shared attitude of the States of the world or the international community as a whole. And this is different from the individual legal belief of the States.

Accordingly what is certain is that the legal belief of States to the inhumanity of consequences resulting from utilization of WMD, is a universal belief, hence the formation of a custom based on the legal regime of nuclear fatwa – that has prescribed the certain inhibition of WMD – from this view, is completely obvious and undeniable. Basically the States' behavior lies in their relation to each other in different forms. Some of the behaviors may accompany a legal necessity and some others do not. If it is supposed that some behaviors become a custom, the condition is that what is legally necessary (what is necessary in accompany with the legal belief) should be separated from what is not necessary. Also there are some cases in which the behavior, or in other words the practice which should be considered in the process of making the customary rules, is ambiguous. Also in these cases the legal beliefs of the Sates have gained attention as a decisive concept, especially from the ICJ, in order to explain the issue why the practices of the mentioned States were not regarded in the process of making a custom. A behavior that does not clearly have the ability to refer to an existing or potential legal treaty or in other words does not fit in the framework of international legal relations, should not be paid attention in making or defining existence of a general customary rule – one of these cases in the ambiguous refusals. As was mentioned in the previous sections, the actions which are based on the refusal have the capability that in a state of necessary conditions, participate like the positive actions in the process of making rules. One of these conditions is the necessary clearance for recognition of the action. One of these conditions is crystallization for the recognition of the act. But even if this comes true, theoretically and practically in most of the cases the refusals are ambiguous. And what can make these ambiguities clear are the legal beliefs of the States.

### *3.1. The Consent Theory of the Voluntarist*

It has been considered from the Grotius time that whatever is explicitly in consent of the States is treaty and whatever is done implicitly is customary law and this is rooted in positivism. The advocates of the voluntarist theory of custom generally put their establishment on the basis that since the States have government in the international relations area, they are not required to the obligations without their consent. In their idea, custom is regarded as a kind of implied treaty which the States have to follow if they have created that. Tunkin – one of the advocates of this theory – believes that the basis of the customary rules is the consistency of voluntarism of countries or other subjects of international law. Countries have the same right in the process of making international law rules and so the majority of them cannot make the rules which are necessary for the small numbers of countries to follow. He

considers accepting a view point other than this, contradictory with the principal rules of international law. In law – although not in the world – the States have the same value. It is right that in reality this tendency of the powerful States to determine the actual influence on the process of the formation of international law legally; the majority of the States cannot create rules for the others and consider them obligatory for them to follow. Tunkin continues that this is of great importance that the situation is different, especially in the current international law system whose duty is to adjust the relations between the States belonging to different social system. Only a rule has the capability to be converted into general an international law rule which has been recognized in all of the legal systems by the States.[67] But this theory has a wide range of objections. In this regard Kelsen believes that "the customary law is necessary to obey for the countries which have not participated in the customary law and the idea that this is just necessary to obey for the countries which have recognized the laws, is on the basis of an international norm."[68] In fact, if this theory is put into practice in a flexible and permanent way, its practical consequences will be out of mind. Among the implied consent theorists, Professor Strupp maintains an interesting view. At first he believes that "agreement" is the only possible source in international law, if the States are equal, and if there is not a great organization and no top authority to impose a rule on the States, accordingly we can conclude that international law cannot exist without consent and consistent voluntarists of the States. Strupp considers custom as an implied consent that implied satisfaction and this is the interesting point of his view, and a State is necessary to obey the other States which have admitted the claimed rule. It seems this theory, which is based on manner of presentation of a suggestion to apply a regulation, has somewhat theoretic affinity in road of consolidation of the legal regime derived from nuclear fatwa, because the States that agreed with this regime, which indicates their implied satisfaction, make them committed to non (utilization, proliferation and stockpiling) of WMD.

### *3.2. Legal Beliefs Derived from the Necessities*

Literally this expression means a belief or legal belief derived from the necessities. The Latin equivalent of this shows that it has no roots in the Roman law or in classical writings. It appears that the first person who has used this expression completely, is Genny in 1389,[69] and this is in the domestic law framework, although in Guggenheim's idea, some parts of this idea or other ideas similar to that are found in the written history of Germany in the late 18th century. In the current discussion, generally the expression *opinio juris sive necessitatis* is interpreted as "belief in the legal nature and necessary related act (practice), or belief in its necessity." In other words, a State

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67 Raphael M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12(3) Israel Law Review (1977).

68 Hans Kelsen, *Principles of International Law* 44–45 (New York: Rinehart & Company, Inc., 1967).

69 D'Amato 1971, at 49.

which makes a practice or procedure believes that it does a kind of legal obligatory or it accepts a legal right that this obligation and right is also the manifestation of an objective rule and is based on the social life requirements and international life necessities. Accordingly, Kelsen believes that the customary law is necessary for the States which have not participated in the creation of customary rule – including new and also the active States – and this idea that international law is just necessary for the countries which have recognized its law – as was stated by voluntarists– is on the basis of a norm of international law. Based on this school, the hypothesis of formation of custom emanating from legal regime of nuclear fatwa is not unavailable, because based on this school, existence of a necessity related to international life necessities, is a fundamental term in determination of States legal belief in adherence to obeying a practice; with such an explanation, is there any necessity in dreams of international law to be more important than the maintenance of international peace and security? Consequently, recognizing the element of necessity in explaining the nature of custom-building process of legal regime of fatwa is decisive. It is needed to explain that in the international system, some of the rules have a position that the international community do not have doubt in considering them as a part of general international law corpus and so juridical institutes did not conduct a research from the view point of the recognition of the material and immaterial elements of it. For example, the ICJ by using the expressions such as "important principles of international law,""the fundamental principles of international law,""a part of modern international law,""the approved and recognized rules of international law," and so on, has considered these rules certain and has not accepted a special trend for proving. The Permanent International Court of Justice also had the same situation. That the Court has taken action to the recognition of the rule according to the procedure that it has defined in its judicial practice and we will investigate as a part of international law, does not mean that the court was ignorant of the recognition of the component element of custom, but these rules have been refrained from more research because of the popularity and the certainty of these rules. In other words, "certain practice" and "certain belief" are the existing conditions of a customary rule that the court imagines in relation to some rules from the view point of the mentioned characteristics and then starts to recognize the rule. Also the principles such as the supremacy of international law on domestic law[70] and the obligatory of unilateral action,[71] which undoubtedly are among the accepted principles and certain principles of general international law in the judicial international practice, have been recognized.

On this basis and with regards to the advent of some fundamental rules such as inhibition of genocide, crime against humanity and war crimes, which have been embodied in the legal regime of nuclear fatwa, recognizing the *opinio juris* in practice of agreed States is not necessary.

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[70] P.C.I.J., Series A, 1928, No. 9 & P.C.I.J., Series A, 1926, No. 7, at 31.

[71] *Nuclear Tests Case*, *supra* note 28, *New Zealand v. France*, para. 45, and *Australia v. France*, para. 42.

### *3.3. Theoretical Fundamentals*

In order to define the issue and explain it completely, the following discussion is needed: first the discussions about the basis of international law which should be submitted that natural law doctrine is of great importance from the view point of theoretical bases. Nature, wisdom, justice, morality and divine rights are all the concepts which are evolved from natural law concepts. From the view point of the advocates of natural law doctrine, it is understood that the basis of the laws – general and international law – specifically are put in the metaphysics and it is emphasized that there are general principles and rules which govern the individuals and States, and the States have to obey them. In other words, principles and rules are beyond the will. Thomas Hobbes, a British lawyer and philosopher, only considers natural law as the basis of international law. But from his viewpoint, the most important principle of natural law is the right of self-preservation. In the framework of natural law we are faced with a collective of primordial, eternal and immutable rights which does not need the elapse of the time and includes all the humans from every race and sex. Therefore, no statuary and contractual rule can deprive them of a human. From the viewpoint of those who believe in the common humanistic nature, the inspired rules from the nature of human are so basic that the final aim of a regulation is the rights which are based upon the general awareness and pursuit of human which are the proper finale for the human. On this basis, the legal regulation which is contained of natural law principles is beyond the desire of individuals. This point must be mentioned that the teachings of natural law doctrine, especially at the beginning of the 19$^{th}$ century, were weakened; however, this fact must not be considered as the complete disappearance of principle and beliefs of the natural law. In this regard, some have used the expression of the hibernation. Although natural law lost its position as an inclusive basis of international law for a while, as we will explain later, form the late 19$^{th}$ century we see reviving its ideas and thoughts in the fundamental field of international law. Generally, the basic principles of the law are as old as the State. In the framework of this school unlike natural laws which imagined the legal rules as fixed and eternal and know the State as the positive law of these rules, its advocates know the international law rules as the product of the States' will. In this regard, the system which is meant by lawyers is a logically consistent system which creates beyond a deductive pure process all the rules required for making decisions about the existing and possible issues in the system. Likewise, unlike natural law attitude in which belief in metaphysical basis was of great validity and merely by induction, the nature of them can be achieved; the positive law can be achieved by induction and without resorting to the principals of metaphysical concepts. Thus "real law,""ideal law,""law at the same level with reality,""law at the same level of value" are distinct from each other. Such an attitude does not necessarily contradict with the idea which considers "law" as a result of divine will and the nature of objects or humans. However, based on the definition, the laws which are not made of will, are not "law" on their own and it means that they should enter into the positive law to become accessible. In other words, laws have to

be made. Often "positive law" and "natural law" are put against each other. Although the positive law doctrine has more consistency with the international system because of the consideration of consent and the States' will as the basis of the formation of rules, it could not and also it cannot be responsible for the issues and requirements of the current international community. The development of human rights and other humanistic considerations, especially from the early 20th century, showed the reviving of the principles and natural law ideas in the international law area. Specifically, the ratification and formulation of the Hague Conventions of 1899 and 1907, the adoption of the UN Charter in 1945, that its introduction begins with "we the people of the United States" which indicates human dignity and fundamental human rights are among the aims and desires of the United Nations. Issuing the Universal Declaration of Human Rights in 1948, ratification of the International Covenant on Civil and Political Rights in 1966, approval of the four Geneva Conventions in 1949, confirmation of the Additional Protocols in 1977, the real manifestation of the humanistic values in the form of valuing an individual in international law by predicting individual complaints in international juridical institutions, all symbolize paying attention to the principles of natural law in international level. Special attention of the ICJ is to humanistic aims and desires, drafting and ratification of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 and the ratification of several human right documents and also the dimensions of the permanent and temporary inter States criminal courts in order to act against the serious and systematic violations of humanistic values. In this framework we can name the establishment of the Nuremberg and Tokyo criminal tribunals, International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Criminal Court in 2002. It should be noted that not paying attention to the power and the role of the accused official during the prosecution and punishment is another great trait of the above courts. The establishment of several judicial and quasi-judicial institutions, especially in the area, all shows the importance of the principles and basis of natural laws in the international level. Nowadays, human right is another saying of the natural law. It must be noted that the existence and the validity of the human right is not because of the States' will. It appears that the current system is under the influence of some transitions such as development of the humanistic concept and initial humanistic considerations. In some fields we can adjust the role of States' will and its direct influence in the positive law. In other words, it is the replacement of the bases and judgements of natural law instead of the States' will in the process of creating international positive law rules. This issue has been discussed in the beginning of this discussion. As highlighted above, the ratification of the Martens clause which can be a criterion for the acceptance of the mentioned transition and the recognition of Art. 3 common to all four Geneva Conventions which are the reflection of this clause was on this basis and in this framework of the ICJ in Nicaragua case.

In addition, the International Criminal Tribunal for the Former Yugoslavia has explicitly announced that, since in the current time the imagination of a customary law creation with relying on the consistent and adjusted States (the material element of

custom) is nearly impossible. Due to the Martens clause, the principles of international humanitarian law can emerge as a citation and resort to humanistic clauses (*opinio juris*).[72] And in this regard, Professor Meron has also acknowledged that the Martens clause has strengthened an attitude on the basis of the process of the formation of customary international law, which is at first as the basis of the State practice. Also Professor's Cassese's attitude toward this clause was the same. What is Martens clause? This clause was first stated in order to solve the problem among the members of the Hague Peace Conference on the position of the resistance movements in the occupied territories. The States thinking that the inhabitants of the occupied territories who have weapons should be regarded as legitimate combatants, could not gain the majority vote for their proposal. And because of this, the regulations related to the position of the combatants in Arts. 1 and 2 of the Hague Regulations did not put the resistant forces' combatants among the list of the combatants. Most of the States considered the Martens clause as a suggestion; on the basis that Arts. 1 and 2 it should not be treated as the last sayings about the combatant's legal situation and the issue whether the combatants of the resistance force have the same situation or not should not be merely determined through the mentioning of omitting them. But we should solve this by this principle "in cases which are not included in this treaty or other international agreements, the military and non-militaries should remain under the support and authority of the international law principles which are a result of certain practices and humanity principles."

### *3.4. The Procedure of the International "Judicial Practice"*

From the conceptual and general view point, it was previously mentioned in detail about the modern custom and the process of its recognition in the international judicial practice. Undoubtedly, nowadays, the dominant procedure in the process of the recognition of the customary rules related to humanistic considerations is affected by the transitions which result from the development of the related concepts. It is transited from the initial recognition to the central discovery of "legal belief." If we put apart the theoretical basis of this transition, it should be noted that it is necessary to investigate the procedures of some valid international judicial organizations. It is obvious that just a collection of the judicial ideas is enough to introduce the procedure.

#### *3.4.1. International Court of Justice*

As previously mentioned, the recognition of Art. 3, common to all four Geneva Conventions in 1949 by the ICJ in the Nicaragua case, was a turning point in the new international judicial practice in the recognition process of customary international law. In the case of armed conflict, not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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[72] *Prosecutor v. Kupreskic et al.* (Trial Judgement), IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), January 14, 2000, para. 527.

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and carrying out executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

As it was considered, international law derived from voluntarism has never fulfilled its goal in the maintenance of international peace and security, because based on its contractual approach, it has made imbalanced world's legal system and consequently the legal mechanisms have lost their capability in realization of justice. For example, the formation of the Non-Proliferation Treaty created to stop production and proliferation of nuclear weapons based on the principles of voluntarism, finally led to the production of last generation of atomic weapons for nuclear weapon States and also production of first generation of atomic weapons for non-nuclear States. Moreover, numbers of nuclear threats increased and in my opinion, more than anything else it is rooted in the wrong fundamentals governing such treaty – which will be discussed in detail within the next section. In the meantime, the legal regime of nuclear fatwa appears and with a superior status and in position of total defending the human dignity, bans any kind of production, proliferation and stockpiling of nuclear weapons and has this potential to be recognized as an international customary rule, as the harbinger of sustainable peace based on the just processes.

Nuclear fatwa has the same direction with natural law, and in fact is not the creator of any added right to human nature and common conscience of humanity,

rather is a confirm for fundamentals of natural law, accordingly has been welcomed internationally. In a more general view, this discussion whether nuclear fatwa can create a customary rule or not, discloses a historical battle between the advocates of positivism and natural law; whether it is possible to legislate a rule upper than the general nature and human, or legislation of rules merely has reflexive aspect and reflects the constant legal system of world? The bases of many problems are originated from this fact that when we emphasize on the principle of will sovereignty, on the one hand that is the amplifier of international law legislation is remarkable but on the other hand that can make a fertile ground for swerving from realization of natural law, i.e. unlike humanitarian principles and common conscience of humanity; only because of a will, is really worrying. Therefore, the analysis of nuclear fatwa notably clarifies the scope of conflicts in international law and various doctrines, and also enlightens their actual effects. The controversy is that international law is not formable only based on propensities, rather it exists spontaneously relying on humanitarian principles and common conscience of humanity and it needs to be only discovered and recognized, like the rule of gravity that itself was not the creator of gravity but its discoverer. In this phase, the battle between positivists and their opponents is boosted. The first group believes that the axis of values system is will, whereas the second group believes that the values system exists and is independent from the will. For example, if a value is right, no will can take the legitimacy of that right away but the classic system of the formation of international custom has built its basis based on practice emanating from State will, consequently if a will makes a consensus around the falsehood, naturally is formed an untruth custom that among the naturalist is inherently false, because it is in conflict with determined legal system. According to reflexism, nuclear fatwa has such an aspect, i.e. this decree and regulation is the discoverer of common humanitarian principles and noble human values; it does not create or negate a right spontaneously. According to reflexism, "will" cannot affect the truth, years of years the universal will believed that solar system is earth-based and executed whoever disbelieved it, whereas the truth was the other thing and was never affected by the collective will. When there is no will for acceptance or rejection of a truth or value, it is not effective in its legitimacy and existence. For example, imagine a specialist surgeon whose abilities are undeniable but people do not see him for treatment, in fact there is no any collective will on his specialty; now, can this lack void his specialty as a surgeon? The response is absolutely negative; therefore, a will cannot affect the truth. The other fundamental question here is that, has the current international law system that more than anything else has been built based on Voluntarism – and State will plays a major role in its realization – reached his ultimate goals or not? What seems to be correct is that, those sorts of wills are important that are consistent with truth and at least are not in contrast with human and moral system and heritage of common conscience of humanity. Hence, the ideal system of international law is a system that accepts natural law perfectly and positivism and will-based values system conditionally.

## 4. Comparative Study of Fatwa *Sui Generis* with NPT and the Advisory Opinion of the International Court of Justice

### *4.1. Generalities*

WMD's restraining policies and demobilization fundamentals are expressed within the juridical body of the Non-Proliferation Treaty (NPT). The NPT which is mostly the output of plethora mainly concerns the atomic weapon units, that is, it concerns the jeopardy of atomic weapons multiplication, plus scanning to preserve their concession on the acquisition of atomic weapons. After great amount of time and hard discussions, the agreement consisted of a preface and 11 items, was formed and ratified in 1968, and was made operational in 1970. The NPT has been derived from a deal between two insisting aims, non-multiplication of atomic weapons, on one hand, and the utilization of atomic energy for irenic aims, on the other. The covenant is based upon three columns (concepts, criteria): non-multiplication of atomic weapons; the certain right of governments to atomic energy for irenic aims; and eventually, atomic weapons disarmament. We would attribute to these as universal fundamentals on atomic weapons non reproduction and disarmament. In an obvious biased way, the NPT has separated the members into atomic-armed and non-atomic-armed members (states), with distinct rights and liabilities. By particular tools and approaches, non-atomic-armed states are deprived from obtaining the weapons. On the opposite side, however, no particular approaches or designs are imagined for atomic weapons disarmament. Arts. I and II are related to the atomic non-reproduction maxim. Non-atomic-armed states promise to eschew from obtaining atomic weapons, and atomic-armed states promise not to submit the armaments to others. Art. III refers to protections approaches to confirm conformity with non-distance of atomic activities from irenic utilizations to military aims. Every non-atomic-armed state member of the Treaty promises to accept protections, as declared in an agreement to be discussed and finalized with the International Atomic Energy Agency (IAEA) according to the bylaw of the IAEA and the Agency's protection system, for the monopolized aim of confirmation of the completion of its commitments granted under this covenant with regard to eschewing distance of atomic energy from irenic utilizations to atomic armaments or other atomic eruptive tools. Arts. III, IV and V are about "the unbreakable right of all the members to the Treaty to expand research, production and use of atomic energy for peaceful aims without discrimination." Disarmament of atomic armaments maxim is encompassed in Art. VI of the NPT. Every member of the NPT promises to follow talks in good faith on drastic acts regarding to cease of the atomic arms match at an early date and to atomic disarmament, and on an agreement on comprehensive and perfect disarmament under firm and drastic international inspection. The Covenant considers the feasibility of receding from it under specific conditions. Every member shall, in operating its internal governance, have the right to recede from the Treaty if it decides that unforeseen occasions, concerned to the crux of this agreement, have threatened the topmost profits of its country. It must present report of such recede

to all other member states and to the United Nations Security Council three months in advance. This kind of notification shall contain a proclamation of the unforeseen events. It is considered as having threatened its topmost profits. The provision also handles the continuity of the Treaty. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods.

***4.2. Compatibility of the Edict's Legal Regime with NPT Master Keys***

Although, the edict's juridical commitment is of a one-sided personality, and that of the treaty is a universal one, there are significant juridical likenesses and diversities between the two. It is realized that: Although sometimes compliment, one-sided gumptions have restrictions. Some have not been confirmed, are not included in any limpidity or reporting necessities, are easily revocable, or are not lawfully binding. Seceding abolished armaments while developing substitutions cannot be observed as a performance of an obligation to disarm. Like the NPT, although no particular confirmation workmanship of its own is realized in the fatwa, an obvious reference to Iran having placed "the overall domain of its atomic measures under IAEA provisions and the ad joint protocol in addition to commitment optional limpidity measures" has formally been made in connection with the fatwa. Also, as discussed in the previous part, the counter-WMD obligation made in the edict is not revocable and is lawfully mandatory. Conversely, Art. X of the NPT permits for returning the obligation, that is, a state's removal from the Treaty. Eventually, with respect to expanding substitutions, it is significant to perceive that, while the Treaty prohibits a special kind of weapon, atomic armament, the edict's ban covers all kinds of WMD, even those that could be concocted and perfected in the future. Therefore, by some means in contrast to the recent WMD Commission's offer, the decree's one-sided status has not made it more restricted than the NPT, which is a many-sided cosmopolitan covenant. Generally, both the edict and the NPT have juridical indications on Iran, banning the posterior from the obtaining, generation, storing, and utilization of atomic armament. However, the decree, covering all kinds of WMD, containing atomic, microbial, biological, and unknown weapons, and any possible weapons or tools of warfare which are unfair in their influence, beyond the limitations set forth by the NPT, which merely is about atomic armaments. Based on the fatwa, WMD are religiously taboo and sinful, and from the sovereignty perspective, banned and unlawful. Therefore, the juridical ban declared by the edict is severely originated from the Islamic beliefs and moral principles of the Iranian nation. Thus, Iran's obligation created by the decree is much more than a State's legal commitment in respect of a cosmopolitan consensus. Iran's profound divine and gnomic obligation by the fatwa adds to the strength and protracted peculiarity of the assumption made by the NPT. Specially, NPT items one and two are about the atomic disarmament maxim. Non-atomic-armed States promise to eschew from obtaining atomic armaments, and atomic-armed States pledge not to send the weapons to others. The decree limits Iran in ways no less limiting than the NPT. For example, NPT

refers to qualifications such as "non-acceptance of transfer,""explosive devices,""not to seek or receive any assistance in the manufacture of nuclear weapons." However, the edict does not employ these terms, it obviously and firmly prohibits atomic armaments, cost-effectively containing the worries set in Art. II. Art. III of the NPT refers to protection approaches to confirm accordance with non-redirection of atomic activities from irenic utilization to military aims. Likewise, although no special confirmation workmanship of its own is encompassed in the fatwa, an apparent reference to IRI having placed "the total domain of its atomic program under IAEA provisions and the additional protocol in addition to pledge optional limpidity acts" has formally been made in connection with the edict. In order to the acquisition of agreement by each non-atomic armed State with the IAEA, the Additional Protocol is an appendage to any available general protection agreement between a government and IAEA. Thus, in addition to the IAEA provisions set in the NPT, the edict is also aware of the Additional Protocol, which postulated, among other cases, a State's further juridical figures for an extremely more impressive IAEA investigation of any dubious atomic acts. Atopic of meaningful, set in Arts. III, IV and V of the NPT, about "the unbreakable right of all the members to the Treaty to expand research, production, and use of atomic energy for peaceful aims without discrimination." As related to the demeanor of the protections (safeguards), Art. III(3) of the NPT particularly prescribes that they "shall be implemented in a manner… to avoid hampering the economic or technological development of the Parties or international co-operation in the field of peaceful nuclear activities." Essentially with the similar regards, the subject is also of momentous to the edict. Although, in this field, the central matter of the State's internal self-government is much more clearly referred to by the edict. Since the NPT's formation, there has been an interchange between the right to irenic utilization and the disarmament obligations. The decree, however, there has never been any implications, whatsoever, of provisionality between the WMD-prohibition and the right to irenic atomic program. While the edict has one-sidedly and categorically prohibited WMD, in the NPT no special approaches or methods are considered for atomic disarmament. Worse than that is the NPT wordage on the topic, splicing discussions on atomic disarmament with the "cease of the atomic arms match at an early date," on one hand, and "a treaty on comprehensive and total disarmament," on the other hand, rendition the atomic demobilization as an implausible dream. Thus, in this context, also, the edict perches at a superior moral and juridical ground than the NPT. The Treaty ordains the right to members to bow out from it "if it decides that extraordinary events, related to the subject matter of this Treaty, have imperiled the supreme interests of its country." In obvious divergence to the NPT, based on the edict, irrespective of all States, containing topmost State interests of Iran being in danger, there is no bowing out from the WMD-prohibition. Eventually, about the NPT's longevity sequent a consensus established in the Treaty Conference in 1995, it was determined that the NPT will continue in force for unspecified period of time. However, regarding the compromise, containing obligation to atomic disarmament, incumbency for the globalization of the Treaty,

and realization of an atomic armament free-zone in the Western Asia, is not being esteemed by atomic-armed members, the undetermined continuity of the NPT is more and more in danger. In contrast, the fatwa's survival, not being subject to multi-sided compromises or conditions, but instead, formed on the basis of profound divine beliefs and moral courses, is eternal.

### 5. The Superiority of Fatwa to the System of Treaties

Can Supreme Leader's fatwa be a performance bond in non-(production, use and stockpiling) of WMD for Iran or not? If this fatwa has a performance bond, is its credibility stronger or weaker than NPT?

Based on the applicable Islamic rules in Iran, when *Valliye Faqih* issues a fatwa that enjoys the primary State order status, obeying it is indispensable for all. Therefore, the performance bond of fatwa is undeniable but whether which one has a stronger performance bond, some points must be posed here.

1. Based on this Quranic principle that states: "O people who have believed (in God) fulfill your obligations." Treaties and all agreements are binding for Muslims. And Islamic States, by signing a treaty, in addition to the legal and moral commitment, are committed also religiously. Hence the commitment evolved from fatwa is inviolable.

2. In spite of the first point, the contracts and treaties are a kind of agreement and a result of the commitment between human and human, but fatwa is the commitment of human in front of God, that is naturally more important for Muslims.

3. The components of a treaty are composed of human will that is formed after negotiations by full-power representatives, and finally is ratified in a specific form. In Iran, for instance, the international treaties must be ratified by the parliament[73] and then will be recognized as an applicable rule. But the components of fatwa is not composed of human will and derived from the God will which has been extracted from the sources such as: Quran, Narrations, Consensus and Reason. Therefore, base of fatwa is divine and base of a treaty is man-made.

4. Treaties are reservable. "Reservation" is a well-known principle in realm of international law of treaties. According to this principle, at the acceptance time of a treaty, States have the right of reservation, i.e. in case of conflict between an article of treaty with domestic law, domestic law will have superiority. But there is no such a thing under the legal regime of fatwa. Nobody has the right of reservation in religious affairs and cannot exclude himself from the inclusion circle of fatwa.

5. International treaties are revocable, and based on expediency, some contents of a treaty may be breached, but fatwa does not have such a nature. When something has been religiously prohibited, that prohibition is not changeable, even because of expediency. For example, production of WMD, because of the expediency of

[73] The principle 77 of the Constitution of the Islamic Republic of Iran.

preemption in defending the country borders, is not justifiable under the fatwa regime. It must be emphasized that the aforementioned fatwa, based on the obvious decisive Islamic reasons, i.e. of WMD with the Islamic principle of retaliation set forth in some Quranic verses, is not revocable.

6. International treaties have duration and are terminable. For example, in early Islam in case of "*Hodaibiyyeh*"[74] conciliation, we know that the treaty between Prophet and atheists was concluded for ten years (however, this treaty was breached by atheists before ten years). International treaties also can be concluded with specific duration, but fatwa does not obey this practice, and its content is permanently feasible. Therefore, that is a misconception if we believe that it is possible to issue a fatwa in prohibition of WMD just for five or ten years.

7. One of the legal issues that has always been the fundamental component of the legal regulations is the performance bond of a rule and prosecuting judicial authority in case of its breach. Under international treaty system, in case of treaty breach by a State member party, it will be charged to something that has been previously agreed and specified in the body of treaty. But according to nuclear fatwa issued by *Valliye Faqih*, in case of its breach by any person, in addition to being a public crime before the law, as well it is a major sin before God. Consequently, the performance bond of fatwa is stronger than a treaty, because it enjoys both binding religious and legal aspects.

8. Some treaties mostly create rights. For example, the State member of the NPT has the right to have peaceful nuclear technology. The right is basically dispensable, whereas the fatwa, along with the right, creates obligations, and obligation is not dispensable at least by the promiser. Therefore, any conclusion of an agreement or contract obligates IRI to certain commitments. But that is logical and predictable for the States that breached their commitments repeatedly to be worrier of causing it by others and subsequently underestimate the performance bond that has been determined by themselves and as well the United Nation's mechanisms. Nevertheless, after the historical issuance of the nuclear fatwa, IRI rationally presented a serious and inviolable performance bond to the world.

## 6. The Legality of Threat or Use of Nuclear Weapons

Perhaps when the project of asking ICJ in 1992 was posed, no one imagined that the end of this goes contrary to the general belief. Apparently, the benevolent thoughts and peaceful motives made by the presenters of this project – non-governmental[75] organization – was the harbinger of the formation of a movement that, with cooperation of States, was about to lead into a good result in the world.

[74] The temporary (10 years) ceasefire agreement between Muslims and Atheists.

[75] Including the International Peace Bureau in Geneva, International Physicians for the Prevention of Nuclear War, International Association of Lawyers against Nuclear Arms, Greenpeace and so on.

But the court's opinion was not in this regard. If there was a little doubt about the non-strength of theories relating to the legality of use, or the threat of nuclear weapons, from 1996 onwards, not only such doubts have been increased, but also they have been legally consolidated and cited to the ICJ related deduction. Hence, some cynical perceptions from the backstage of NGOs pressure, in order to refer this question to the ICJ, do not seem to be unfounded. Before the issuance of the ICJ Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons in 1996, almost all international lawyers unanimously believed that the use and threat of nuclear weapons is illegal. But after the issuance of this opinion, the aforementioned general consensus was eliminated and this matter was finally considered in favor of the nuclear powers. On December 14, 1994, the United Nations Secretary-General formally sent the decision of the General Assembly on requesting for the advisory opinion of this judicial organ. In the framework of this request, the General Assembly, with the consideration of States commitment in connection with refraining from the threat or the use of force against the territorial integrity or political independence of each other, and also with recalling its resolutions 1653 of November 24, 1961, 33/71 B of December 14, 1981, 34/83 G of December 11, 1979, 35/152 D of December 12, 1980 and 36/92 I of December 9, 1981, in which the use of nuclear arms had been recognized as the breach of the UN Charter and crime against humanity, required ICJ for its opinion whether the threat or use of nuclear weapons in all circumstances before international law is valid or not.[76] Subsequent to this request, the ICJ began several processes of proceedings, and finally on July 8, 1996 issued its advisory opinion. Generally, the ICJ Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons is investigable from the various aspects such as international humanitarian law and analysis of principles like distinction between civilians and combatants, non-imposing unnecessary pain and suffering, international human rights including some provisions of the International Covenant on Civil and Political Rights and the Convention on the Prevention and Punishment of the Crime of Genocide, and also the law of the use of force in light of the UN Charter. Furthermore, the implied emphasis of the ICJ to the priority of States sovereignty in all circumstances, which was the main basis and the most controversial part of this opinion, needs to be meticulously examined. In this regard, the ICJ at first and before entering the above entries, pays attention to the field of the law of use of force. According to the Court, provisions of Charter related to the threat or use of force in the framework of Arts. 2 (part 2), 51, 42 enjoy the capability of general application in any conflicts regardless of the type of used armaments; hence, it warrants neither the permission nor prohibition of any type of weapons including nuclear weapon.[77] Then the Court considers the twofold conditions of "necessity" and "proportionality" in self-defense as the unavoidable principles, regardless of the use of any type of

[76] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 46, paras. 1–9.

[77] *Id*., para. 39.

tools and war weapons. And in connection with Art. 2, part 4 declares: only having nuclear armaments will not make an illegal threat in use of force contrary to these provisions, unless the resort to force is against the territorial integrity or political independence of States, or in contrast with the purposes of the United Nations.[78] Therefore, the Court cannot find a clear response to the legality of resort to nuclear weapons, however this is not considered illegal only by having such weapons. But out of this framework, is there any specific rule under international law relating to inherent legality or illegality of resorting to nuclear weapons? In this phase, the Court investigates a respond to the above question in the field of general international law. The Court, at first, through hinting to this fact that there is not any specific rule prescribing the threat or use of nuclear weapons or any other type of weapon in all or certain circumstances, specifically in the application of self-defense under international law, emphasizes nevertheless there is not any principle or regulation depending on the legality of the threat or use of nuclear weapons, or any other weapon on a specific authorization under international law.

According to the Court, State practice shows that the illegitimacy of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is created[79] in terms of prohibition.[80] The Court, before looking for a specific prohibition in connection with resorting on nuclear weapons in States practice, also considered whether such a prohibition can be found under the international contractual law or not. In this regard, the Court states that the certain provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the Geneva Protocol of 1925 that has been cited by some States do not prohibit resorting to weapons of mass destruction.[81] According to the Court, the consensus built concerning WMD lies in their illegality through some specific instruments. But the Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction and observes in this way that although in the last two decades many negotiations have been conducted regarding nuclear weapons, they have not resulted in a treaty of general prohibition of the same kind for bacteriological and chemical weapons. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing nuclear weapons, without specifically addressing their threat

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78 *Legality of the Threat or Use of Nuclear Weapons, supra* note 46, para. 39.

79 *Id*., para. 52.

80 It seems that the core of all controversial issues resulted from the Court opinion is formed here. A legitimate point that has been inspired by the State-oriented views of ICJ opinion in the Lotus case is accepted. The point that had been referred by some States, i.e. "what is not prohibited under international law is permitted." It means, the clear prohibition will illegalize some weapons. This type of reasoning by the Court – that based on a change in General Assembly question – from "prescription" to "prohibition" posed, is really dangerous as it may legitimize use of any new weapon in case of non-clear customary or contractual prohibition.

81 *Id.*

or use, certainly point to an increasing concern in the international community with these weapons. The ICJ finally concludes that these treaties could therefore be seen as the landscape of the future general prohibition on use of such weapons, but the mentioned treaties per se do not constitute the world prohibition on WMD – specifically as the subject of international law. Therefore, it seems that international law has encountered a contradictory situation, on the one hand is maintenance claimant of international peace, and on the other it does not prescribe any certainty on prohibition of the most destructive weapon of the world. Obviously, getting away from the fundamentals of natural law that was once the basis of international law and also assimilated into the legal system originated from voluntarism, will be absolutely along with such contradictions. On the contrary, the legal regime of fatwa, because of the origination from the progressive moral principles, and also the dictation of the common conscience, manifested its certainty on illegality of weapons of mass destruction, and did not let this certainty be affected by any condition.

## Conclusion

One of the most significant outputs of nuclear fatwa was the formation of a fertile ground for constructing a new international custom concerning international law of WMD. As mentioned, application of all subcategories of customary international law with elements of nuclear fatwa *sui generis* is legally feasible. Support of nuclear weapon states such as Russia, India, Pakistan, China, North Korea and the USA for nuclear fatwa, largely paved the way of its globalization. All statements, reactions and even behaviors of international officials done in public including body language, have legal meaning and bring the international responsibility for their doers. Therefore, all the States – especially nuclear weapon States – that made a meaningful political connection with Iran during the so-called Iran phobia age are truly remarkable under international law. During the aforementioned period, many States in spite of the baseless all-sided pressure against Iranian nation, instead of closing their tie with Iran, all confirmed its anti-arm approach derived from the nuclear fatwa and reconsolidated their bilateral relationships with Iran. This would not have happened unless they believed in Iran's peaceful approach in its nuclear activities, and what could be more important than the nuclear fatwa indicating this practice? Expressing universal desires to the nuclear fatwa doubled the significance of this act, because this act enjoys some aspects which distinguish it from the other acts with the same functions. For instance, the NPT is a treaty only about nuclear weapons, whereas fatwa includes all possible sorts of WMD, also NPT only focuses on non-proliferation, whereas the fatwa covers and prohibits all functions of nuclear weapon including destruction, policy of prevention and test. Hence, the opportunity of globalizing such a different document enjoying such capacities is being operationalized by several States. The nature of nuclear fatwa can be regarded as the demonstration of Iran's commitment to international acts concerning the proscribing of WMD and

the obligations derived from them. Since the early 20th century, Iran has manifested its propensity to almost all approaches which condemn the use of nuclear, microbial and unconventional weapons including the Hague Conventions, the 1899 Hague Declaration (IV, 2) (concerning Asphyxiating Gases), the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, the 1972 Biological and Toxin Weapons Convention, and the 1993 Chemical Weapons Convention. Iran was one of the first States in the Western Asia that commenced its amicable nuclear activities in 1957. It signed the NPT in 1968 and ratified it in 1970. It also underwrote safeguard instrument with IAEA in 1973 and lengthened it for infinite time. At the same time, some countries in the vicinity of Iran like Israel, denied joining the NPT. IRI has joined to the international act for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) in 1929. Having around 50 000 chemical armaments immolations from Iran-Iraq conflicts, Iran is the principle victim of chemical armaments. Almost 20 years after Iran-Iraq armed conflict (1980–1988), the wounded still have to tolerate the sores created by chemical weapons. While Saddam used poisonous biological gases in battle fields and even in residential, IRI being a Member State of the Geneva Protocol of 1925 and loyal to Islamic tenets and humanistic values, eschewed from retaliation in kind. At the time of battle between Iran and Iraq, the supreme leadership, grand Ayatollah Khomeini, numerously stated that it did not retaliate in kind against Saddam's chemically attacks because of the absolute forbiddance on utilizing poison in Islam. Within Paris Conference in 1989, Iran opposed to, and blamed the global village for being isolated in front of Iraq's use of unconventional armaments and convinced international community to finalize the Chemical Weapons Convention (CWC). As the Member States of Disarmament pillar, IRI did its best in negotiation process for the finalization of the agreement and the realization of a structure for the forbiddance of Chemical armaments and underwrote the CWC on January 13, 1993, the first day that it was open for signature, and ratified the Convention on November 3, 1997, as the 82nd Member State.

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# COMMENTS

## INTERNATIONAL SPACE LAW

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*It is well known that the modern day technologies that drive our global society are highly dependent on the use of outer space. For example, daily activities such as sending emails, making phone calls and carrying out bank transactions cannot be done unless satellite technologies are involved. When you catch a plane, the air traffic control is dependent on GPS. Even natural disaster management is dependent on satellite imaging.*

*Taking into account the importance of this, it becomes increasingly necessary to be knowledgeable in the field of international law as it is the only sphere of law that reaches beyond the physical boundaries of the Earth, goes deep into space and provides protection for today's society.*

*With new steps being taken to exploit further the potentials of outer space, and with increasing talk of new space missions and new discoveries, current international space law is being placed under scrutiny, for it should be remembered that the major international legal documents in this field were adopted in the middle of the 20th century, and thus there are fears that the law may have become obsolete, irrelevant in the face of new challenges in the use of outer space.*

*This paper delivers an analysis of existing international space law and attempts to raise several crucial issues pertinent in the area.*

*Keywords: international space law; space activities liability; commercialization of space.*

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## 1. Basic Principles of International Space Law

In accordance with the basic principles of international civil law, liability is based in the first place on the laws of the country on whose territory the damage occurs (*lex loci delicti*). But where the setting extends beyond geographical boundaries and encompasses the realm of outer space, such as when a man-made space object that causes damage in one country originated in another country, litigation may turn out to be extremely laborious. This is because civil law claims may be very difficult to assert for a variety of reasons, e.g. limits of indemnity, problems with regard to the burden of proof, inequality in terms of the strength of the parties involved, and the difficulty of getting court decisions executed. Because of these shortcomings, special rules on liability were established by the United Nations.[1]

But the road to establishing an international regime was quite long. In the late 1950s, an academic debate began as to liability for third-party damage caused by space activities. In 1962, U.S. delegates raised the need for a liability regime before the Legal sub-committee of the UN Outer Space Committee. This was done in response to an event of September 5, 1962, when a 3-kilogram metal object fell from the sky and landed on a street in Manitowoc, Wisconsin, and the United States believed it to be from Sputnik 4, launched into space by the Russians in 1960. Unfortunately, the Soviet Union showed little interest in preparing a draft instrument, as they considered that liability would arise in accordance with international law.

The principle that the state bears international responsibility for national activities in outer space and that each state which launches or procures the launching of an object into space is internationally liable for damage sustained on the Earth, in airspace or in outer space, was set out in special international documents that initiated the origin of international space law.

Space law can be described as the body of law applicable to and governing space-related activities. The term "space law" is most often associated with the rules,

[1] Piotr Manikowski, *Examples of Space Damages in the Light of International Space Law*, 1(1) The Poznań University of Economics Review (2006) (Apr. 4, 2017), also available at http://www.ebr.edu.pl/pub/2006_1_54.pdf.

principles and standards of international law appearing in five international treaties and five sets of principles governing outer space which have been elaborated under the auspices of the United Nations. However, space law also includes international agreements, treaties, conventions, rules and regulations of international organizations as well as national laws, rules and regulations, executive and administrative orders, and judicial decisions.

Since the end of the 20th century, there have been major changes in activities related to the development and study of outer space. The level of commercial use of space has increased significantly, in particular the establishment of satellite communications, launch services and remote data collection.[2] Private entities are being set up quickly, and they are able to conduct space activities effectively and make a substantial contribution to the development of the space industry.

Amid this activity, it is worth recalling that Art. 38 of the Statute of the International Court of Justice (ICJ) regards "the general principles of law recognized by civilized nations"[3] as one of the applicable sources accepted as law. Thus it not surprising that the general principles of international space law play a huge and growing role. They are becoming even more crucial, considering that talk of new explorations (and, sometimes, appropriation) of a number of different celestial bodies, such as the moon and Mars, abounds.

There are many principles of international space law. In our view, three of them are of key importance: transparency, cooperation and reciprocity.

*Transparency* can be summarized as "a clean window that you can look through."[4] In 1998, the UN General Assembly considered that Member States should pay more attention to the critical problem of collisions of space objects[5] and stressed the important role of international cooperation for the exploration and use of outer space for peaceful purposes.

The concept of transparency and confidence-building measures (TCBMs) relating to issues concerning outer space was adopted by the UN, for the first time, via Resolution 60/66,[6] titled Transparency and Confidence-Building Measures in Outer Space Activities.[7] Specifically, transparency and confidence-building measures can

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2 Fausto Pocar, *An Introduction to the PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities*, 38 Journal of Space Law 171, 174 (2012) (Apr. 5, 2017), also available at http://www.spacelaw.olemiss.edu/jsl/pdfs/supplements/pocar.pdf.

3 Statute of the International Court of Justice, 33 U.N.T.S. 993, Art. 38, para. 1(c).

4 Ulrich K. Preuß, *Transparency in International Law*, 12(3) International Journal of Constitutional Law 820, 822 (2014).

5 G.A. Res. 52/56, U.N. GAOR 52th Sess., at 6, U.N. Doc A/RES/52/56 (1998).

6 G.A. Res. 60/66, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/66 (2005).

7 Jana Robinson & Vladimir Silhan, *Securing Outer Space: A Major Global Challenge*, 4 Science for Population Protection 9 (2012).

actually serve to enable states to better plan their actions without running afoul of existing international law.[8]

Moreover, the UN General Assembly adopted several precise resolutions concerning transparency and confidence-building measures in outer space activities[9] calling for implementing transparency through relevant national mechanisms.

Thus TCBMs provide a basis for predicting the actions of others and actually allow states to plan their own actions in accordance with relevant technical rules and guidelines such as, for example, the Space Debris Mitigation Guidelines.[10]

Therefore, the principle of transparency is *conditio sine qua non* for a realistic means of generating a more accountable, peaceful and legitimate form of international relations that encompasses outer space.[11]

As for the principle of *cooperation*, it remains the key to sustainable activity in outer space.[12] International cooperation in the exploration and use of space for peaceful purposes needs to be conducted in accordance with the provisions of international law, including the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies[13] (Outer Space Treaty), and all states should contribute to promoting and fostering international cooperation.[14]

The UN Charter establishes general rules for Member States aimed at achieving international cooperation in solving international problems in various spheres (Art. 1). Art. III of the Outer Space Treaty applies both international law and the optimum order system of the UN Charter to space activities.[15]

The preamble to the Outer Space Treaty recalls one of the basic principles in international law and urges the state parties "to contribute to broad international co-operation" in different aspects of the exploration and use of outer space.

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8 Robert A. Friedman, *International Law in the Context of Outer Space Activities*, 3rd ASEAN Regional Forum (ARF) Workshop on Space Security, Beijing, China, November 30, 2015, at 3–4.

9 G.A. Res. 68/50, U.N. GAOR, 68th Sess., U.N. Doc. A/RES/68/50 (2013); G.A. Res. 69/38, U.N. GAOR, 69th Sess., U.N. Doc. A/RES/69/38 (2014); G.A. Res. 70/53, U.N. GAOR, 70th Sess., U.N. Doc. A/RES/70/53 (2015).

10 Report of the UN Committee on the Peaceful Uses of Outer Space, 53rd Sess., at 15, U.N. Doc. A/65/20 (2010).

11 Daniel R. McCarthy & Matthew Fluck, *The Concept of Transparency in International Relations: Towards a Critical Approach*, 23(2) European Journal of International Relations 416 (2017).

12 Nicholas D. Welly, *Enlightened State-Interest – A Legal Framework for Protecting the "Common Interest of All Mankind" from Hardinian Tragedy*, 36 Journal of Space Law 273 (2010).

13 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, entered into force on October 10, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

14 Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, adopted on December 13, 1996, U.N. GAOR 51st Sess., U.N. Doc A/RES/51/122 (2015).

15 Rex Zedalis & Catherine Wade, *Anti-Satellite Weapons and the Outer Space Treaty of 1967*, 8 California Western International Law Journal 454, 457 (1978).

Even more, states have the duty to cooperate with one another in accordance with the UN Charter.[16] The abovementioned principle refers to all types of cooperation, including governmental and non-governmental, commercial and noncommercial, global as well as regional.[17]

The rule *pacta sunt servanda*, established by the 1969 Vienna Convention on the Law of Treaties[18] (Art. 26), was of prime importance and a secure foundation for peaceful international relations.[19] A substantive idea of *pacta sunt servanda* is that if any treaty is in force for the State Party, it is obligatory and must be carried out in good faith (*bona fides*).

Even the International Law Commission identified a *staccato statement*[20] in order to stress the essential importance of *pacta sunt servanda*. The provision is forcefully yet elegantly drafted, containing no exceptions or conditions which could lead to debate calling into question its validity.[21]

The Group of Governmental Experts on TCBMs in Outer Space Activities encourages states to consider using existing consultative mechanisms, for example, those provided for in Art. IX of the Outer Space Treaty.[22]

Under Art. IX of the Outer Space Treaty, a State Party has the obligation to undertake appropriate international consultations if its planned activity in outer space can potentially cause harm to activities of other State Parties in the peaceful exploration of space before it proceeds with any such activity.

*Reciprocity*, as another major principle of international space law, is important enough to be considered a meta-rule of the system of international law – an essential element in its functioning.[23]

The principle of reciprocity contains the idea that each party has rights and duties[24] and can resolve many issues under international law.

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16 G.A. Res. 25/2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/25/2625 (1970).

17 Sergio Marchisio, *Article IX* in *Cologne Commentary on Space Law, Vol. I: Outer Space Treaty* 172 (S. Hobe et al. (eds.), Cologne: Carl Heymans, 2009).

18 Vienna Convention on the Law of Treaties (VCLT), entered into force on May 23, 1969, UN Doc A/Conf.39/27; 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969); 63 AJIL 875.

19 Report of the Committee of the Whole, United Nations Conference on the Law of Treaties on the work of its 1st Sess., 29th meeting of the Committee of the Whole, at 157, U.N. Doc. A/CONF.39/14.

20 *Revision of Part II of the Draft Articles in the Light of the Comments of Governments* in *Yearbook of International Law Commission. Vol. II* 60 (New York: United Nations, 1966).

21 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 368 (Leiden and Boston: Martinus Nijhoff Publishers, 2009).

22 Report of the Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space Activities, U.N. GAOR 68th Sess., at 20, U.N. Doc A/68/189, (2013).

23 Francesco Paris & Nita Ghei, *The Role of Reciprocity in International Law*, 36(1) Cornell International Law Journal 93, 94 (2003).

24 Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25(2) American Sociological Review 161, 169 (1960).

Art. IX of the Outer Space Treaty formulates the principle of reciprocity or mutual assistance and provisions about the need for international consultations in case of potentially harmful interference in outer space.

Having commented on the above-said principles, it is important to underline their crucial role when a state engages in the exploration of celestial bodies. More so, when several countries are involved in this process.

### 2. Issue of Responsibility in Space

Governmental bodies frequently enter into agreements with private entrepreneurs that ensure the efficient use of resources of both partners and facilitate commercial activities with high potential for economic growth. For instance, the USA supports the development of commercial space projects in the fields of transportation and manned space activities in the framework of National Aeronautics and Space Administration (NASA) competence.[25]

The commercialization process flowing in this area was not taken into account during the drafting and adoption of major international treaties on outer space activities. In this regard, a number of issues concerning the regulation of commercial companies remain open, in practice there are gaps in the law. According to the existing regime, the state is responsible for the activities of legal persons in their territories, but it does not clarify matters where the launch of a space object occurs from the neutral waters of the ocean.

At this moment, the question of the responsibilities of commercial companies under international space law is acute and requires immediate resolution. Scientists worldwide also support this point of view. Professor Frans G. von der Dunk considers private-sector participation has become a permanent and particular feature of the present level of the development of commercial opportunities in outer space. At the same time, based on historical practice, private enterprises are not mentioned in international treaties. Relatively recently, legal entities were granted independent legal status in the framework of the International Telecommunication Union, along with its decisive role in the coordination of orbital points, the orbits and frequencies for satellite communications operators. The state is obligated to apply international space law norms to those kinds of organizations, in accordance with Art. 6 of the Outer Space Treaty.[26] Therefore, the issue of rights, obligations and responsibilities of private enterprises remains valid.

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[25] NASA: Introduction – Commercializing Space (Apr. 6, 2017), available at www.nasa.gov/externalflash/commercializingspace/.

[26] Frans G. von der Dunk, *Space for Dispute Settlement Mechanisms – Dispute Resolution Mechanisms for Space? A Few Legal Considerations*, at 444–448 (Apr. 4, 2017), available at http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1037&context=spacelaw.

It is worth noting that during the adoption of the Outer Space Treaty the USA and the Soviet Union took opposite positions in reference to the possibility of private enterprise activity in space. Striking a happy medium, the countries should have included in the Treaty fundamental principles of international law, which envision international responsibility for national activities in outer space regardless of whether they are carried out by governmental bodies or non-governmental entities. In this way, an international treaty does not regard legal entities as the subjects of international space law and the organization's responsibility for the activities rests solely with the state while not denying the possible participation of the private sector in space.

Legal disputes encompassed by international space law between a state and a private enterprise are resolved exclusively at the national level. When a dispute arises between two private companies, the question remains treatment in compliance with international standards; however, those kinds of disputes should be resolved in accordance with national legislation and in national courts.

To cite an instance, the legal dispute between the legal entities Martin Marietta and Intelsat could be mentioned. In August 1987, Intelsat concluded a contract with Martin Marietta to launch two of Intelsat's satellites. The launch of the first satellite was unsuccessful, it failed to establish in a particular orbit. Martin Marietta filed a lawsuit in order to get the declared decision to release them from liability. Intelsat put forward a counterclaim, citing a breach of contract, grievous dereliction of duty and misrepresentation by Martin Marietta.

In the reasoning in the decision of the court, the circumstances did not require the imposition of a specific obligation to take special care in excess of the contract; therefore, a misrepresentation was excluded. When considering the case, it was noted that the state policy of the country requires a person's understanding that if they appeal to a licensed space launch service, they so rely at their own risk.[27]

Most space law experts in the field of public international law consider that this branch of law presumes two forms of liability. As a rule, the literature on international law includes such kinds of international legal responsibility as political responsibility and financial liability.

Political responsibility brings about the result of a breach of any international legal obligation – the international law principle, contractual rules that protect the interests of the other state. Political responsibility arises even if the offense did not result in property damage or other obvious negative consequences. The tort is the basis for raising the international responsibility question of the directly affected state(s).[28]

In this regard, it is evident that legal entities could not be politically responsible. However, we assume that in the future commercial companies may also violate

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[27] *Martin Marietta Corp. v. Intelsat*, 763 F. Supp. 1327 (D. Md. 1991) (Apr. 9, 2017), available at http://law.justia.com/cases/federal/district-courts/FSupp/763/1327/1586244/.

[28] Малков С.П. Международное космическое право: Учебное пособие [Sergey P. Malkov, *International Space Law: Textbook*] 344 (St. Petersburg: SUAI, 2002).

the norms of international space law. For example, if an enterprise inserts into orbit around the Earth any objects carrying nuclear weapons or any other sorts of weapons of mass destruction. In our opinion, in this case the state should act as a representative of the non-governmental entity and then hold them accountable, but in accordance with its domestic law.

At the same time, if the government ignores violations of international space law committed by a legal entity on its territory, it is advisable to provide and apply the political responsibility for the state by means of implementing a satisfaction or a limitation of sovereignty.

The 1972 Convention on International Liability for Damage Caused by Space Objects (Liability Convention)[29] identifies two types of financial liability: absolute responsibility and liability depending on fault.

In respect of the first type of responsibility, a state bears absolute liability for damage caused by its space object on the surface of the Earth or to an aircraft in flight. The established strict liability principle seems to be reasonable, as there is always a risk of people's death and property or environmental damage, etc. In this regard, it is obvious that no space activity operator could guarantee damage compensation entirely on its own; therefore, public relations in this sphere are raised at the international level.

In order to resolve such disputes, the Claims Commission has been established based on the Liability Convention. In its structure and name, the Claims Commission is similar to the interstate Claims Commission, set up from time to time, in the capacity of the arbitration courts. The aim of the establishment of a Claims Commission was to adjudicate on disputes and (or) on damage claims in the postwar period.

Nevertheless, the demand for the existence of the Claims Commission based on the Liability Convention is controversial due to the fact that the Commission's decisions are not binding as long as both parties agree to it. For the more than forty-year history of the Liability Convention, the Claims Commission has not adjudicated any disputes.[30]

We believe that states need to develop domestic legal acts that establish the procedure for making recourse to state requirements for private enterprises that caused actual damage. This approach is justified by the principle of doing business at your own risk. It seems appropriate to allow states to reduce their financial risk in the event of damage caused by a company in terms of private-sector development.

In practice, space disputes are resolved on the basis of domestic legislation most successfully. For example, in 1993 a decision on pecuniary compensation was issued in favor of the Hughes Corporation in *Hughes Communications Galaxy, Inc., v. the United States*. On December 5, 1985, Hughes concluded an agreement with the

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[29] Convention on International Liability for Damage Caused by Space Objects, entered into force on October 9, 1973, 24 U.S.T. 2389, 961 U.N.T.S. 187.

[30] Henry R. Hertzfeld, *A Roadmap for a Sustainable Space Legal Regime*, at 7 (Apr. 9, 2017), available at https://www.gwu.edu/~spi/assets/docs/Hertzfeld-IISL%20Paper-Revision%2011-30-2012.pdf.

U.S. government in the form of the National Aeronautics and Space Administration. NASA had agreed to launch ten Hughes commercial satellites under its programs. However, on October 30, 1986, NASA informed Hughes that it could not provide the launch of the satellites, in accordance with the President's announcement earlier that year ending commercial satellite launches by NASA on space shuttles following the Challenger explosion.[31]

The recourse claim procedure is already provided in the legislation of some countries. According to Art. 15 of Belgium's law "On the Launch and Control of Space Objects," the state has a right to commence a counterclaim against an operator; a value of the matter in controversy is limited in the extent of compensation based on this Article. However, if the operator violated the conditions of the permit, he must compensate the damage in full.[32]

The second type of responsibility is contained in Art. III of the Liability Convention:

> In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.[33]

We tend to think that in the context of the commercialization of space activities this norm should be changed – the liability should be laid on the persons who own a space object as a source of increased danger in the framework of civil proceedings. Notably, this approach is used in international nuclear law where the nuclear installation operator bears responsibility for damage resulting from a nuclear incident at the installation.

Moreover, it is also expedient to provide for the possibility of insurance of legal entities that carry out these kinds of activities. The compensation limits for the damage should also be foreseen, as it could be a significant sum of money. Similar limits are provided for in the legislation of a number of countries such as Austria, Belgium, Brazil, the Netherlands, the USA, France and Japan. Particularly, in the Netherlands a legal norm establishes that the requirement applies to a guilty person in full. Nevertheless, if the offender is a licensee, the amount of a counter indemnity cannot exceed the maximum amount of its insurance coverage.

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31 *Hughes Communications Galaxy, Inc., v. the United States*, 998 F.2d 953 (Fed. Cir. 1993).

32 Loi relative aux activités de lancement, d'opération de vol ou de guidage d'objets spatiaux, F. 2005-3027, 17 Septembre 2005, Le Moniteur Belge, 2e éd., Mercredi 16 Novembre 2005 (Apr. 10, 2017), available at http://download.esa.int/docs/ECSL/Belgium3.pdf.

33 Art. III of the Liability Convention.

International experience shows that neither air nor space law regulates the insurance at the international level. Space insurance has been available to private enterprises for several years. Especially, it applies to satellites. The insurance reduces the financial risks, thereby attracting new sources of funding for space activities.[34]

Another point worth mentioning when discussing the second type of responsibility in space is that there is no standardized notion of what international fault is (which, in our view, seems ambiguous).

There is the elimination of the principle of absolute liability in the case of damage caused on Earth by a space object of one state to the property of another state. In the case where the damage was caused not on the surface of the Earth, the liability is based on the principle of fault.

Thus, absolute liability is defined owing to the place of damage, where damage is caused on the surface of the Earth or to aircraft in flight. If the damage was caused in outer space, the launching state is liable only in the case where the damage is caused due to the fault of the state. For example, in a 2009 satellite collision (Iridium 33, owned by Iridium Communications, Inc. (USA) and Cosmos 2251, owned by the Russian Space Forces) international responsibility did not take place, because there was no fault of either party. The Iridium/Cosmos collision was settled by the respective countries outside of the Liability Convention.[35]

Some researchers believe that fault is a negligent or intentional failure to act reasonably or according to law or duty.[36]

Due diligence demands to be aware of the risk of harm and to be ready to undertake measures for the prevention of collision.[37] Violation of the due diligence principle indicates guilt.[38]

The damage could be connected to the initial act only by an unforeseen chain of exceptional circumstances which has occurred because of a combination of causes alien to the author's will and not foreseeable on his part.[39]

Negligence also should be taken into account when determining fault. Negligence is a failure to use reasonable care that results in harm to another party: defined differently, when a party "knew or should have known that its actions would induce

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[34] Isabella H.P. Diederiks-Verschoor & Vladimír Kopal, *An Introduction to Space Law* 113 (3rd ed., Alphen aan den Rijn: Kluwer Law International, 2008).

[35] Ram Jakhu, *Iridium-Cosmos Collision and Its Implications for Space Operations* in *Yearbook on Space Policy: 2008/2009* 259 (K.-U. Schrogl et al. (eds.), Wien and New York: Springer, 2010).

[36] Jonathan Wallace & Susan Ellis Wild, *Webster's New World Law Dictionary* 141 (Hoboken, NJ: Wiley, 2010).

[37] Martha Mejia-Kaiser, *Collision Course: 2009 Iridium Cosmos Crash*, Published in the Proceedings of the Fifty-Second Colloquium on the Law of Outer Space (2009), at 274.

[38] Xue Hanquin, *Transboundary Damage in International Law* 296 (Cambridge: Cambridge University Press, 2003).

[39] *Naulilaa Case Decision (Portugal v. Germany)*, July 31, 1928, II UN RIAA 1031.

actual infringement."[40] There is widespread recognition that negligence on the part of the claimant is an acceptable exoneration.[41]

The fault referred to in Art. III of the Liability Convention could arise in the shape of two major forms: objective fault and subjective fault. Objective fault refers to the failure to adhere to an international obligation or breach of an obligation imposed by law;[42] whereas subjective fault refers to the intent or negligence to cause damage.[43] The majority of writers and the decisions of international tribunals support the objective theory of responsibility. This theory consists of the idea that responsibility is the result of the breach of an international obligation (responsibility without fault). This means that the breach of the duty by result alone leads to responsibility.[44]

Alongside the various theories of responsibility for a wrongful act, there is also the regime of liability without a wrongful act. Here, the causal link between the activity and the damage done leads to the obligation to pay compensation, or liability, even though the damage occurred from a lawful activity.[45] Examples of such activities are the transportation of oil, the production of nuclear energy and operations in outer space.[46]

Most treaties containing rules on liability concern civil liability, meaning that the operator or owner of a certain activity is obliged to pay compensation for damage resulting from the activity. The liability regarding an accident is restricted to an insurable sum of money and the national courts are the forum for proceedings. The point is that victims should be appropriately compensated and the status quo ante be restored.[47]

*In nuce*, Art. XII of the Liability Convention provides that the compensation which the launching state will be liable to pay for damage will be determined in accordance with international law and the principles of justice and equity, in order to restore the condition that existed prior to the damage.

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40 *Commil USA, LLC v. Cisco Systems, Inc.*, 135 S. Ct. 1920 (No. 13-896) 4 (2015).

41 Stanley Mazaroff, *Exonerations from Liability for Damage Caused by Space Activities*, 54(1) Cornell Law Review 71, 81 (1968).

42 Lesley J. Smith & Armel Kerrest, *Article VII* in *Cologne Commentary on Space Law, Vol. I: Outer Space Treaty* 141 (S. Hobe et al. (eds.), Cologne: Carl Heymans, 2009).

43 Frans G. von der Dunk, *Liability Versus Responsibility in Space Law: Misconception or Misconstruction?*, Published in the Proceedings of the Thirty-Fourth Colloquium on the Law of Outer Space (1992), at 363, 364.

44 Maria Flemme, *Due Diligence in International Law*, Master Thesis, Faculty of Law, University of Lund (Spring 2004).

45 *Id.* at 10.

46 Göran Lysén, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles* 135–137 (Gothenburg, Sweden: Iustus Förlag, 1997).

47 Flemme 2004, at 11.

Having said this, it is important to realize that finding guilt in cases regulated by space law is difficult. Apart from the absence of a notion of fault some other issues must be taken into consideration. For example, the damage (and, subsequently, responsibility) may be caused by unforeseen space events (ejections of solar wind, communications problems between installations on Earth and the space object, etc.). This shows how crucial it really is to finally formalize a definition of guilt and aspects of its application in space law matters.

The private sector that carries out space activities is itself also a solid reason for the revision of the basic norms of international treaties. We suggest that the inclusion of legal persons among the number of international space law subjects as well as their rights, obligations and responsibilities would facilitate the creation of a sustainable legalized market in the space industry, thereby reducing the risk of human rights and business violations.

### 3. Understanding of Appropriation in Space

With respect to the problem of subject matter, the prohibition of national appropriation relates clearly to "outer space, including the moon and other celestial bodies."The Outer Space Treaty is silent on the question of what outer space is, what it encompasses and what its boundaries are in relation to airspace. The only statement contained in the Treaty is that the moon and other celestial bodies are included in outer space. For this reason, the prohibition regarding national appropriation would unquestionably extend to the moon and other celestial bodies. Whether or not the prohibition would extend to outer space in its totality or only to part of it, or would relate to the moon or a celestial body as a whole or only to a part of it, are further significant questions. By common sense interpretation, the prohibition could not very well relate to outer space as a whole since no one could at present appropriate outer space as a whole, but only a part of it. Insofar as the moon and other celestial bodies are concerned, the prohibition could extend to the whole entity if national appropriation of the whole is indeed possible. But even in relation to the moon and other celestial bodies, it would appear by reasonable interpretation that the prohibition would also cover acquisition of a part of the moon or other celestial body. Any contrary interpretation would seem to make the prohibition of national appropriation largely illusory.

In relation to national acquisition of a part of outer space, further questions may be raised. For example, does the prohibition extend to the collection of dust particles or other special elements during flight in outer space? Does the prohibition extend to the appropriation of cosmic rays, gases or the sun's energy, or to the collecting of mineral samples or precious metals on the moon or other celestial bodies? Should the answer depend on the type of resource involved, or on its availability in unlimited (cosmic rays, gases) or limited (minerals, metals) quantities, or perhaps on its location?

In attempting to give answers to these questions, it may be pointed out, first of all, that in the absence of a few special circumstances, little would be gained by insisting on the non-appropriation of resources such as cosmic rays or gases, which are available in inexhaustible quantities. At the same time, the Treaty as it stands seems to make little allowance for national acquisition of exhaustible space resources.

With respect to location, it could be argued that if any parts of outer space, including the moon and other celestial bodies, were found on the Earth, they would not be subject to the prohibition of national appropriation, since they would become part and parcel of the Earth. Under a strict interpretation, it may also be argued that the prohibition extends to the resource irrespective of its location. However, it might be preferable to distinguish between elements of outer space which have reached the Earth as a result of natural causes and those which have done so through human intervention. In the first instance, national appropriation would not be prohibited, whereas in the second example the prohibition would apply. Thus, a meteorite falling to Earth could be appropriated whereas a precious stone or metal brought to the Earth from outer space could not be a subject of national appropriation.

Regarding the jurisdictional boundaries of outer space, particularly the dividing line between airspace and outer space, we seem to know little. Today, after decades of experiments in space, it can be said that an international custom seems to have sprung up which regards the area where space instrumentalities move in durable orbit as outer space. From this we also take for granted that anything above and beyond this area is also regarded as outer space. However, the more precise boundary line between airspace and outer space is still left undetermined.

## 4. Different Views on the Possibility of Appropriation in Space

One of the most talked about questions in international space law in recent years concerns the legal possibility of possession in space, including territories and resource extraction on celestial bodies.

The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space declares that outer space is "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means" (para. 3).[48]

The Outer Space Treaty (in Art. I) insists the exploration and use of outer space will be carried out for the benefit and in the interests of all countries and for the province of all mankind.

[48] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, GA Res. 1962 (XVIII), UN GAOR, 18th Sess., 1280th Mtg., UN Doc. A/RES/18/1962 (1963).

At the U.S. Senate Committee on Foreign Relations the term "province of all mankind" has been interpreted as equivalent to "benefit of all mankind" related to the exploration and use of outer space.[49] The concept of the "province of all mankind" does not appear in the Outer Space Treaty; however, some scholars have concluded that the word "mankind" is meant to denote:

(1) all States;

(2) all States, particularly developing States;

(3) all nations;

(4) all living human beings; or

(5) all living and future human beings.[50]

Art. II of the Outer Space Treaty declared such an important rule of the space law system as the principle of non-appropriation.

According to the non-appropriation principle, or *res communis omnium*, certain property is the common heritage of mankind, owned by everyone and by no one. To conclude, specific property rights in celestial bodies cannot exist.[51]

Thus, the Outer Space Treaty excludes from application to the domain of space the traditional modalities of acquisition of unclaimed territory.[52]

Common interest requires states to refrain from giving their individual interests precedence over that of mankind.[53]

While the exercise of gathering samples is not different from the collection of lunar rocks during the Apollo Program missions of the United States, the crucial distinction is that in the case of mineral prospecting, the samples are collected for ultimate private commercial profit rather than public scientific gain. Accordingly, this raises issues as to the lawfulness of such activities in outer space.[54]

Resource extraction can be defined as appropriation because physical matter is being removed from the source and placed in the possession of certain individuals.[55]

There is an opposite view on the matter of appropriation in space, however.

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[49] Diederiks-Verschoor & Kopal 2008, at 25.

[50] David Tan, *Towards a New Regime for the Protection of Outer Space as the "Province of All Mankind,"* 25(1) Yale Journal of International Law 145, 162 (2000); Ernst Fasan, *The Meaning of the Term "Mankind" in Space Legal Language*, 2 Journal of Space Law 125, 131 (1974).

[51] Nicole Ng, *Fences in Outer Space: Recognising Property Rights in Celestial Bodies and Natural Resources*, 7 The Western Australian Jurist 143, 149 (2016).

[52] Ivan A. Vlasic, *The Space Treaty: A Preliminary Evaluation*, 55(2) California Law Review 507, 512 (1967).

[53] Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* 47 (Dordrecht, The Netherlands: Martinus Nijhoff, 1998).

[54] Ricky Lee, *Law and Regulation of Commercial Mining of Minerals in Outer Space* 13 (New York: Springer Science & Business Media, 2012).

[55] Norry Harn, *Commercial Mining of Celestial Bodies: A Legal Roadmap*, 27 Georgetown Environmental Law Review 629, 638 (2014).

Some believe that it is an obligation of all states to consider the legitimate interests of other states in their use of outer space.[56] The use of outer space is free to the extent that it does not disregard the interests of other states.[57]

Art. I of the Outer Space Treaty establishes the freedom of scientific investigation in outer space and underlines that, "States shall facilitate and encourage international cooperation in such investigation."

Art. III of the Treaty provides that,

> States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international in the peaceful exploration and use of outer space.[58]

Art. I of the Treaty lists what has become known as the three freedom principles. The "freedom of access" principle ensures that all mankind will benefit from exploration and use of outer space, despite economic or scientific development, and that outer space "shall be the province of all mankind." In addition, every state will have "freedom of exploration" and free access to all celestial bodies. Finally, all nations have "freedom of use" for scientific investigation, along with a pledge to facilitate cooperation among states.

All people are entitled to equal access to outer space, all people are entitled to live under peaceful skies, and all people are welcome to become equal partners in space exploration. This leaves mankind with the same decision it has always faced: to work together or race against each other in the pursuit of what should be considered a common goal. The challenges of space are already as numerous as the stars; it would be counterproductive to add more obstacles such as a competitive structure.[59]

Currently, two international documents have important implications for property and ownership rights in outer space: the Outer Space Treaty and the Moon Treaty.[60]

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[56] Ram Jakhu, *Legal Issues Relating to the Global Public Interest in Outer Space*, 32 Journal of Space Law (2006).

[57] Manfred Lachs, *The Law of Outer Space* 108 (Leiden: Sijthoff, 1972).

[58] Kai-Uwe Schrogl & Julia Neuman, *Article VI* in *Cologne Commentary on Space Law, Vol. I: Outer Space Treaty* 70–93 (S. Hobe et al. (eds.), Cologne: Carl Heymans, 2009).

[59] Daniel A. Porras, *Comment the "Common Heritage" of Outer Space: Equal Benefits for Most of Mankind*, 37(1) California Western International Law Journal 143 (2006), Art. 5.

[60] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature on December 18, 1979, 1363 U.N.T.S. 3; 18 I.L.M. 1434 (1979).

Together, the Outer Space Treaty and the Moon Treaty promote a legal regime seemingly inhospitable to the commercialization of outer space. However, the two treaties do not prohibit the commercialization of outer space outright. Rather, they resist private ownership and appropriation, and even that resistance is not absolute. Ultimately, the two treaties do permit the private ownership and appropriation necessary to commercialize space, so long as international interests are given their due consideration.[61]

As a general observation, the Outer Space Treaty is steeped in the rhetoric of the "common interest of all mankind," especially expressing the concern that one part of "all mankind" – the less-developed nations – will be left out of the exploration and use of outer space while the other part of "all mankind" – the developed nations – will reap all the rewards of exploiting outer space. Specifically, the Treaty declares that the exploration and use of outer space is to be conducted "for the benefit and in the interests of all countries... and shall be the province of all mankind."

To that end, outer space is to "be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."

Given the principle of "freedom of access," it is little surprise that neither outer space nor celestial bodies are "subject to national appropriation." However, this does not directly address non-national appropriations, i.e. supra-national activities by the international community or sub-national activities by individuals. As to sub-national activities, the signatory states are required to "bear international responsibility for national activities in outer space" and on celestial bodies, which includes activities conducted by governmental bodies, non-governmental entities, or both. If the activities are conducted by non-governmental entities, then the appropriate state must authorize and continuously supervise such activities. However, beyond authorization and supervision, there is no indication as to what this "responsibility" means for the extent of permitted sub-national appropriation.

The Moon Treaty generally echoes the Outer Space Treaty, but it is also more extensive. The Moon Treaty recognizes "the benefits which may be derived from the exploitation of the natural resources of the Moon and other celestial bodies," and it protects those natural resources with rhetoric more potent than a common "interest." To wit, the Moon Treaty declares that those natural resources "are the common heritage of mankind." Is "heritage" exploitable? If so, who can exploit it, "mankind"? How does an ideal like "mankind" exploit resources? It would appear from the text of the Moon Treaty that "heritage" is exploitable only by "mankind" and that "mankind" is roughly translated into "international consensus." That is to say, the Moon Treaty establishes a default rule generally prohibiting any exploitation of the natural

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[61] Zach Meyer, *Private Commercialization of Space in an International Regime: A Proposal for a Space District*, 30 Northwestern Journal of International Law & Business 241 (2010).

resources of any celestial body in the solar system other than Earth, and then provides for two exceptions based on international consensus. First, celestial bodies in the solar system other than Earth and the moon are no longer subject to the restrictions of the Moon Treaty if contrary "specific legal norms enter into force with respect to any of these celestial bodies." Second, if an appropriate international regime is created, then exploitation of the natural resources of celestial bodies may proceed.

According to the Moon Treaty, an appropriate international regime for regulating the exploitation of celestial natural resources need only fulfill four purposes: (1) "the orderly and safe development of the natural resources"; (2) "the rational management of those resources"; (3) "the expansion of opportunities in the use of those resources"; and (4) "[a]n equitable sharing" of the benefits of those resources giving "special consideration" to the "interests and needs of the undeveloped countries" and also "the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon." That international regime is supposed to be established "as such exploitation is about to become feasible."

In synthesis, the Outer Space Treaty and the Moon Treaty do not prohibit private property rights or forbid exploitation of natural resources in space. The Outer Space Treaty only outright prohibits "national appropriation," not supra- or sub-national appropriation, and requires that outer space be explored and used to benefit the interests of "all mankind." The principle of "freedom of access" does not prohibit private property rights or exploitation either, because there is no indication of the specified level of access – it could be free access to claim the property within an international regime or free access for scientific investigation, or perhaps it means the absence of a right to exclude. The first interpretation of "free access" is perhaps best in light of the Moon Treaty, because that treaty openly recognizes the benefits inherent in the exploitation of natural resources in space and even desires such exploitation. Thus, the two treaties together simply resist unilateral appropriation or exploitation. Instead, the two treaties envision a regime, created by international consensus, which will regulate such exploitation with due regard for the interests of not only developed nations but also undeveloped nations.

Thus, according to the thoughts expressed above, private commercial space enterprises probably can appropriate outer space and celestial bodies, but only in certain circumstances. While the Outer Space Treaty generally prohibits such appropriation, that prohibition is limited to "national" appropriation. Similarly, the Moon Treaty, where applicable, prohibits appropriation unless executed according to an international regime. The two treaties are policing not against appropriation per se, but against unilateral appropriation contrary to international interests.

A private commercial space enterprise can exploit the resources of the moon, and eventually other celestial bodies in the solar system, provided that the enterprise does so according to an appropriately established international regime. The Moon Treaty permits the exploitation of the natural resources of the celestial bodies in

our solar system provided that an appropriate international regime governs the process. For the moon, the most important requirement of such a regime is that there be an "equitable sharing" between developed active states and undeveloped passive states. For other celestial bodies, there need only be "specific legal norms" in place regarding the body. So long as an international consensus is established, private commercial space enterprises can indeed exploit the natural resources of the moon and other celestial bodies.

In our view, however, both points of view on the matter of appropriation in space could exist and criticizing the Outer Space Treaty and the Moon Treaty for their ambiguity is justified. Yet, the very substance and idea of law that was laid down in these treaties should be taken into consideration. And this idea of law was not in favor of national commercialization in space.

## Conclusion

In the field of space activities the commercialization process is actively developing. For objective reasons, this process could not be taken into account during the drafting and adoption of major international treaties. In this regard, some questions remain open, as such they require a speedy settlement. We distinguish the following issues that merit special attention.

To begin with, it is necessary to include legal persons carrying out activities in outer space. The fundamental international agreements on outer space do not contain an explicit prohibition against private operations in space nor do they regulate outer space commercial use issues. Responsibility for those kinds of activities is left solely with the state. It seems that the modernization of space law at the international level on the aspect considered is seen as Outer Space Treaty amendments on including legal persons in the list of international space law subjects and the determination of their legal status.

We propose that this subject be specified at the national level on the assumption of the balance of public and commercial interests. We consider it appropriate to impose responsibility on the persons owning the space object as the source of increased danger within the framework of national civil proceedings. At the same time, fixing responsibility on private organizations according to domestic law, the legal entities' insurance should be provided for as well as the limits of compensation.

Also, the exploitation of space brings the hazard of inflicting harm on third parties, which could evoke civil liability for a guilty party. Up to the present time, as a result of space activities or rather failures during space activities, hundreds of people have been killed, not to mention huge financial losses incurred. To protect oneself against claims, it is of course possible to purchase third-party liability insurance for space losses. The need to procure third-party liability insurance is based on protection against financial claims resulting from certain fundamental principles of international space law.

Thus far there have been only a few cases of third-party liability for space losses. It should also be noted that there has never been a substantial claim on a space liability insurance policy. It remains to be seen whether this type of coverage would remain available if a major accident was to occur. The trouble is that fifty years have passed since the establishment of the major international documents in the field of international law. Yet the faultfinding mechanism is not clearly determined. What is more important is that relations between states do occur beyond the atmosphere of the Earth, and this is exactly where international law lacks proper liability regulation.

Additionally, there is a lack of order and clarification in respect of the search for minerals and extraction processes in outer space. We share the opinion that the state has no right to claim sovereignty or sovereign rights over the exploration and production of mineral resources in outer space (national appropriation). These provisions should be fixed in the Outer Space Treaty (by making appropriate amendments) in such a way that would not allow for a double interpretation.

At the same time, in relation to the question of whether or not there is any room for the exercise of some form or degree of superior authority, jurisdiction, use or occupation in outer space, the answer would seem to be in the affirmative, since the Moon Treaty prohibits the exercise of such authority, use or occupation only if it amounts to national appropriation. Under such interpretation, the temporary use of a celestial resource without its transformation or deterioration may be permissible, whereas the consumption or destruction of such a resource may not be.

Furthermore, insofar as the exercise of authority is concerned, the state on whose registry an object launched into space is carried must retain jurisdiction and control over such object, and over its personnel, while in outer space or on a celestial body. The Moon Treaty also makes it clear that states will be internationally responsible for national activities in outer space, including the moon and other celestial bodies, irrespective of whether such activities are carried out by governmental bodies or non-governmental entities. In fact, the activities of non-governmental entities require authorization and continuing supervision by the state concerned. The fact that some measure of at least temporary exclusive jurisdiction may be exercised over a particular area on the moon or other celestial bodies, including a space station and its adjacent elements, is also apparent from Art. XII of the Treaty, which makes access by representatives of a foreign state contingent on reciprocity.

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# BOOK REVIEW NOTES

## COMPETITION LAW ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES: LEGAL AND ECONOMIC ASPECTS*

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It is undeniable that the issues surrounding enforcement of competition law in the BRICS countries are receiving considerable attention from competition law scholars considering the scale of the economies of the BRICS countries and the fact that very little has been said on either the policies or the problems of enforcement in these jurisdictions. The book "Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects" edited by Frederic Jenny and Yannis Katsoulacos is a timely contribution to the debates on competition policy, the enforcement of the relatively new competition laws, the role and application of economic analysis in law enforcement procedures and other factors of policy-making in the named jurisdictions.

The book should, however, be read critically as the papers are based on presentations at the 2014 and 2015 CRESSE conferences and present original research, rather than being just review papers.

The editors divide the chapters into two main categories. The first category covers a variety of enforcement issues while the second one examines specifically the role of economic analysis and evidence in competition law enforcement. The papers in

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* Reviewed book: *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (F. Jenny & Y. Katsoulacos (eds.), Cham: Springer, 2016).

the first category on institutional design, public interest, competition authorities' objectives, procedural fairness, procurement procedures and compulsory licensing may be of particular interest to practising lawyers and academics of law and political studies. The chapters covering economic analysis and economic evidence seem to be addressed to a broader audience as they not only employ econometric methodology but also examine the lessons on the use of this evidence in regulation.

Overall, sometimes it is not easy to find patterns of enforcement, narrative plots and selection criteria for comparison and analysis of jurisdictions although the book presents a number of genuinely original research papers and offers valuable insights into the enforcement of competition law in jurisdictions that have not yet been examined as thoroughly as the EU or common law countries.

From the beginning, I felt that the book attempts to cover too broad a range of issues for one volume: abuse of dominance and bid-rigging; institutional issues and enforcement of laws; anti-cartel regimes and certain indicators of effectiveness of competition; regulation of public procurement in certain countries and the role of public interest. This excessively broad approach can be also observed in the geographical distribution and classification of the countries in question. Reading the book, I struggled to find a justification for this approach and felt that the chosen methodology does not address the issues. For example, in his chapter "The Institutional Design of Competition Authorities: Debates and Trends" Frederic Jenny examines the goals, functions and organisation of competition authorities in Australia, Norway, Germany, Hungary, Iceland, Ireland, Korea, Switzerland, New Zealand, the USA. The employment of comparison is a great tool if it is used to highlight the peculiarities of the policies in the investigated countries rather than just to inform a reader about regimes having nothing in common either with the BRICS or developing countries.

Then, although it is difficult to investigate all the most typical areas of competition law including horizontal agreements and hard-core cartels; issues of dominance including abuse of dominance with all sorts of market powers and the control of concertation (M&A) in one volume, I felt that none of the questions chosen by editors are examined for all BRICS or developing countries, what makes the content quite fragmented. For example, in terms of anti-cartel policies, the reviewed book comprises chapters on the relation between Brazil's procurement procedure and bid-rigging; some success stories of South Africa's anti-cartel enforcement and the economic paper on cartel damages in a few developing countries only. Issues of Russia's anti-cartel regime are barely touched on. Some statistics on cartel cases in Russia can be found in the chapter "Economic Analysis in Competition Law Enforcement in Russia: Empirical Evidence Based on Data of Judicial Reviews" by Svetlana Avdasheva, Yannis Katsoulacos, Svetlana Golovanova and Dina Tsytulina however virtually nothing is said about the anti-cartel policies in India and China. The chapter "Cartel Damages to the Economy: An Assessment for Developing Countries" written by economists

Marc Ivaldi, Frederic Jenny and Aleksandra Khimich examines economic damage of cartels for Brazil, Russia, South Africa and a number of developing countries, but again India and China are completely out of the scope of this paper as well.

However, despite the fragmented nature of the contents, the majority of the texts are informative, well-written and thought-provoking. For instance, the later paper of Marc Ivaldi, Frederic Jenny and Aleksandra Khimich may be of particular interest for Russia's practitioners and enforcers. Researchers found that economic damage from cartels already detected in developing countries is substantial, and the average ratio between penalties and excess profits in developing countries remains extremely low (19%) compared to the U.S. level (57%) and even the EU level (26%). This may have implications for reconsidering fines policies in anti-cartel regimes in developing countries and some of BRICS jurisdictions.

Then, Rafael Pinho de Morais' in his paper "Antitrust and Compulsory Licensing in BRICS and Developing Countries" examines policies of all BRICS countries in regard of pharmaceutical markets. The balance between competition law and IP rights remains one of the most debatable areas of antitrust enforcement and this chapter outlines the concerns of this confrontation and seeks criteria for the consistent interventions of competition law in the area of intellectual property rights.

Despite the fact that some results should be treated with caution due to differences in the methods of researchers, those who look into the use of economic evidence in antitrust can benefit from the quite consistent analysis of the issue in the volume. Tembinkosi Bonakele examines the use of economic evidence in competition enforcement in general and gives a special emphasis to the case of South Africa; Eduardo Pontual Ribeiro reviews experience of economic analysis in antitrust cases in Brazil, Geeta Gouri in India and Svetlana Avdasheva with Yannis Katsoulacos, Svetlana Golovanova and Dina Tsytulina in Russia.

Regarding competition policies in particular countries, the most complete coverage in the book is provided for Brazil and South Africa. In addition to the economic analysis in antitrust cases, overview of compulsory licensing and cartel damage, Cesar Mattos examines procurement procedures in Brazil and concludes on risks of auctions in the Brazilian context and Dimas Mateus Fazio with Simone Maciel Cuiabano and Luiz Alberto Esteves share their findings on the application of a hypothetical monopoly test to particular Brazilian markets. Regrettably, the book does not pay much attention to the institutional issues and Brazil's success story of reforming enforcement institutions is out of its scope.

South Africa's researchers contribute to the debate on anti-cartel enforcement with their analysis of the remarkable cartel cases and the assessment of public interest for the purposes of competition law.

While China plays a great role on the global markets, its enforcement of competition law remains a mystery to international scholars and practitioners. Unfortunately, the chapter on enforcement of China's competition law does not

answer the question of consistency of Chinese competition law enforcement with principles universally applied in other jurisdictions because it only looks at it in the narrow aspect of the compliance of competition laws with Chinese administrative laws. This results in the obvious conclusion that there is no inconsistency between two branches of laws in one jurisdiction.

Overall, these two small criticisms – on the criteria for selection of papers and consequently some inconsistencies in analysis of particular issues for the claimed jurisdictions should not detract the reader from the informative, well-written and though-provoking texts. By all accounts, the book "Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects" is one of the very first attempts to address the enforcement in the jurisdictions that have recently adopted competition laws and as such is an enjoyable read providing "food for thought" and enriching the literature in this field.

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