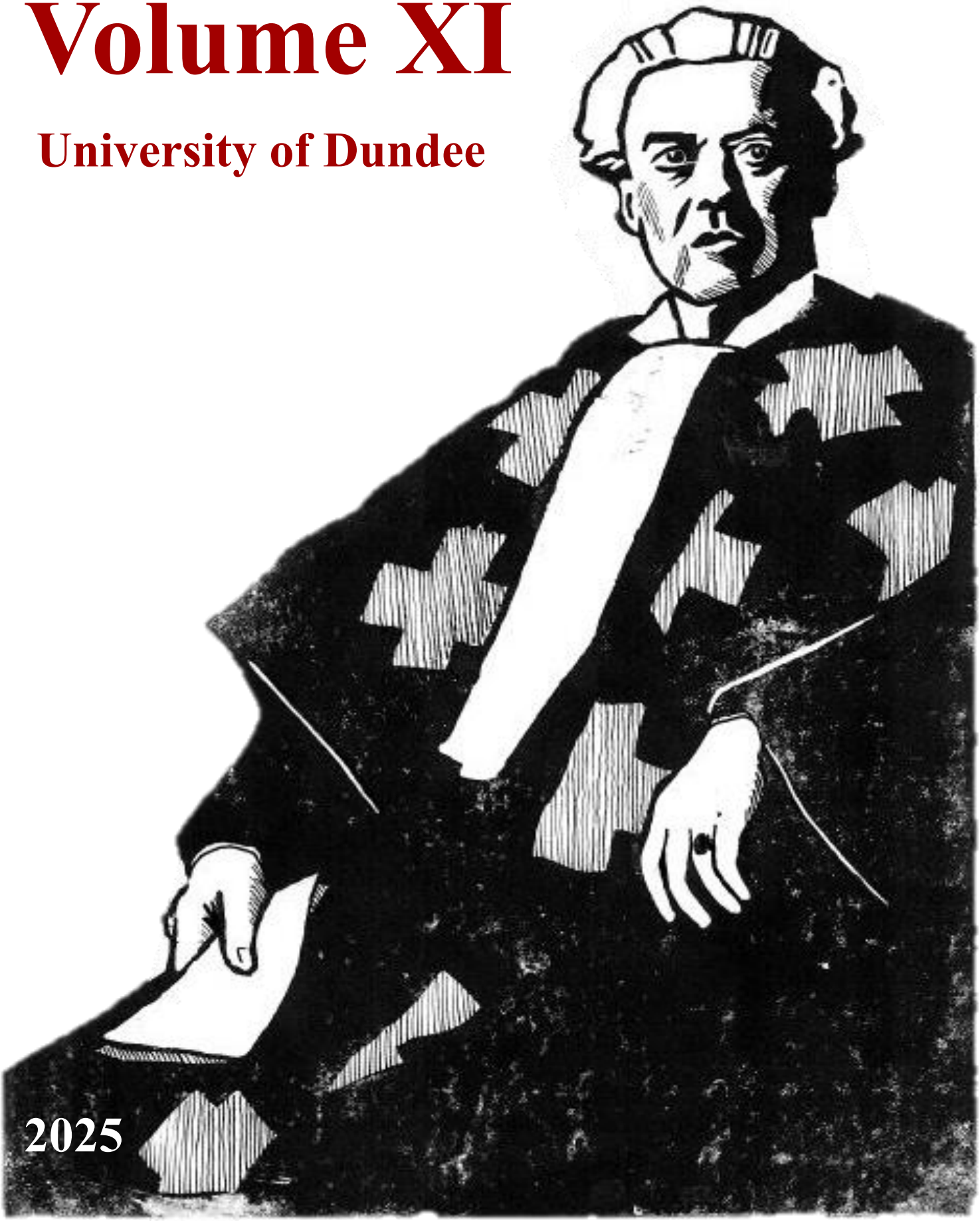
D.S. Law Review

Volume XI

University of Dundee



2025

Dundee Student Law Review

- Editorial Committee -

Volume XI | Autumn 2025

DS. Law. Rev | Contents

Dundee Student Law Review, Volume XI

DOI: https://doi.org/10.20933/100001427

Opening Remarks

By Neil Hay. MA (Hons). LLB. PGDip. Solicitor Advocate.

It is with great pleasure that I introduce this edition of the Dundee Student Law Review, a publication that reflects the vibrant intellectual spirit of Dundee—a city steeped in legal tradition and progressive thought. Over the last thirty years, both the university and Dundee itself have undergone a remarkable transformation, evolving from its industrial roots into a modern, dynamic city known for innovation, culture, and education. This changing image mirrors the forward-thinking approach evident within these pages.

As a criminal lawyer practicing in Scotland, I am heartened to see the next generation of legal minds engaging deeply with the complexities of our law, bringing fresh perspectives and critical analysis to the fore. In the course of my legal practice I often meet graduates in law from the university who are now leading the profession and, when visiting Dundee's courts, I witness at first hand the strength and diligence of the local bar. This is all an enduring testament to Dundee's long relationship with legal excellence. My own positive experience as a student at the University of Dundee instilled in me a lifelong passion for education —qualities I see reflected in the contributors to this review.

The students embody the dynamic energy of Dundee itself, a city that has long been associated with resilience, reform, and a dedication to the rule of law. The articles within this edition address pressing legal issues with clarity and insight, demonstrating a maturity that bodes well for the future of Scottish legal practice.

I commend the editorial team and contributors for their commitment to excellence and scholarship. This journal will continue to inspire and challenge, reinforcing Dundee's proud place within the Scottish legal landscape.

Dundee Student Law Review, Volume XI
DOI: doi.org/10.20933/100001431

Is Sri Lanka in Compliance with Transnational Criminal Law Relating to Human Trafficking?

With special reference to the law relating to human trafficking among domestic migrant workers in Sri Lanka.

Prajapali Obeysekara[1]

Abstract

This paper addresses the question of "Is Sri Lanka in compliance with transnational criminal law relating to human trafficking?" With special reference to the law relating to human trafficking among domestic migrant workers in Sri Lanka. International law can be divided into two categories: core crimes and treaty crimes. The term 'transnational crime' can be denoted from the latter category, giving an appropriate title to 'transnational criminal law'. Human trafficking was recognised within the context of transnational criminal law and developed through the regime by introducing mainly two conventions which are known as UNTOC and the Palermo Protocol.

Sri Lanka has ratified the above-mentioned conventions for the purpose of eliminating human trafficking among domestic migrant workers. As the transnational law stands, the principles and rules have been encompassed by the regimes, allowing the countries to incorporate them into their domestic laws. By taking cognizance of those principles, Sri Lanka has introduced human trafficking as a criminal offence into domestic law. The incorporation has taken place considering the social, cultural, economic, and other aspects in Sri Lanka as an amendment to the Sri Lankan Penal Code.

[1] L.L.M.

This thesis demonstrates the compliance made by Sri Lanka in terms of human trafficking. Moreover, this paper provides an overview of what constitutes human trafficking in transnational criminal law and in Sri Lanka by highlighting the elements to see to what extent Sri Lanka is in compliance with transnational criminal law. This paper will focus on both substantive provisions and enforcement procedures to see the compliance of each regime.

It will arrive at a conclusion upon the findings in answering the research question at the final section.

Table of Abbreviations

AG	Attorney General
CEDAW	Convention on Elimination of All forms of Discrimination Against women
CSO	Civil Service Organizations
HTSIB-CID	Human Trafficking and Smuggling Investigation Bureau
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-Government Organizations
NSP	National Strategic Plan
NSAP	National Strategic Action Plan
SOP	Standard Operating Procedures
TCL	Transnational Criminal Law
TIP	Trafficking In Person
SLBFE	Sri Lankan Bureau of Foreign Employment
UN	United Nations
UNTOC	United Nations Convention Against Transnational Organized Crime

Introduction

Human trafficking is recognised in international law and domestic law across the world. It has been identified as a cross-border crime, in line with the definition given to that in transnational criminal law,[2] with the purpose of eliminating illegal conduct between states that endangers common national interests by providing substantive rules by suppression conventions[3] to incorporate them into domestic law. This extended essay will focus on how human trafficking was acknowledged in the context of transnational criminal law and it will discuss the compliance made by Sri Lanka in terms of human trafficking among domestic migrant workers.

Foreign domestic migrant workers are the largest source of revenue in Sri Lanka, which provides a massive source of income to the government economy. Subsequent to the COVID-19 pandemic situation, a tendency for migration has attracted the labour market in Sri Lanka. Among labour migrations, skilled and unskilled migrants were placed in different countries including the majority in Europe and the Middle East. In 2022, US$51.1 million has been received in Sri Lanka as remittance from domestic migrant workers.[4]

The bulk of transitory, lower-skilled labour migrants have gone to work as domestic workers in Middle Eastern countries. To secure paid employment, the majority of them have enlisted the help of agents and sub-agents (private migration brokers) taking incentives in advance as a security. This kind of situation has opened a platform where most of the domestic migrant workers were subjected to human trafficking, slavery, and human smuggling. The fact that Sri Lanka is highly reliant on foreign remittances received from domestic migrant workers has impacted negatively on putting rules in place to ensure that the rights of domestic migrant workers are respected in several instances. In terms of the recognition of human trafficking in international law and given the relatively long history of migrating for domestic work, Sri Lanka has attempted to address concerns about human trafficking.

[2] Article 3 of the United Nations Convention against Transnational Organized Crime UN Doc. A/55/383, 40 ILM (2001) 335.
[3] N. Boister, Transnational Criminal Law, EJIL 14 2003 953-976.
[4] Sri Lanka Bureau of Foreign Employment, Annual Statistical Report of Foreign Employment 2022 http://www.slbfe.lk/file.php?FID=913.

Research Questions

This research will follow up with the below-mentioned sub-questions in order to answer the research question;

1. What is TCL?
2. How does human trafficking differ from slavery and human smuggling?
3. What is the recognition made in the context of TCL for human trafficking?
4. How does a transnational law become a part of domestic law?
5. What is the recognition made in Sri Lankan law for human trafficking?
    - What are the international conventions that Sri Lanka has ratified related to human trafficking among domestic migrant workers?
    - What is the domestic law in Sri Lanka regarding human trafficking among domestic migrant workers?
    - How has the judiciary assisted in interpreting the domestic law in Sri Lanka in line with the context of transnational criminal law and human trafficking?
6. Is Sri Lanka in compliance with the context of human trafficking recognised in the TCL?

Limitation

By virtue of the constraints on time and space available, this research will restrict the scope of it, the extent to which the recognition made by TCL relates to human trafficking and the extent to which Sri Lanka has complied with it. The argument will be discussed on the basis of laws and regulations available in Sri Lanka. While there are many exploitations where men, women, and children are subject to trafficking, due to the abovementioned limitations this thesis will focus on the laws which have assisted in complying with female domestic migrant workers. In addition to that, even if there are a number of bilateral agreements Sri Lanka has entered into with other countries to protect the rights of female domestic migrant workers, this research will not discuss the same concerning the limitations. Allowing a more in-depth analysis of Sri Lanka, this research avoids comparing different legal systems.

Literature Review

Even though several analyses have taken place over the past few years regarding the questionable area, none of them have addressed the abovementioned research questions numbers 01-04 and 06, linking human trafficking with TCL. While the wide array of literature carries out only the factual aspect as to types of vulnerabilities that could potentially expose migrant workers to human trafficking, this thesis will provide a doctrinal explanation of the legal aspect. Even though there are many works which examine the law relating to human trafficking in Sri Lanka (above research question 5), there is no systematic survey or writing carried out to date regarding the importance of understanding the interaction between TCL and domestic law in terms of incorporation. Hence, this extended essay will provide a genuinely fresh contribution to the existing doctrinally focused literature in Sri Lanka, which subsequently will contribute to the betterment of the readers regarding the importance of complying with the transnational law in the particular area.

Methodology

This research consists of the method of the black-letter approach (doctrinal method) in analysing facts. The reason for adhering to this method is that the thesis will focus on qualitative research in line with the primary sources such as regulations, statutes, and case laws while considering the secondary sources such as books, journal articles, and websites in answering the research question go beyond the "traditional doctrinal method" by analysing not only what the law is, but how the law is applicable in practice.

Section Outline

This research is situated at the confluence of several areas of law: International law, Transnational law, TCL, Sri Lankan Criminal law, Constitutional law, etc. While section 1 (Introduction) provides an overview of the research, section 2 carries out a doctrinal analysis of what constitutes a transnational crime at the very outset. To complement this, while making use of references provided by *Neil Boister* regarding the TCL[5], the argument will proceed with the interpretations given by several legal experts regarding a transnational crime along with the

[5] *Boister N*, "An Introduction to Transnational Criminal Law" (2nd Edition, 2018), page 63.

definition given by the United Nations Convention Against Transnational Organized Crime (UNTOC).

Understanding that human trafficking, slavery, and human smuggling have identical differentiation**s,** this thesis will further discuss the characteristics of each crime as to how human trafficking can be distinguished from slavery and smuggling. The comparison of each will be carried out using the doctrinal method. Moreover, this section will deeply analyse the recognition made to the human trafficking in TCL in-depth. It will provide a comprehensive understanding of the constituent elements of human trafficking, the rights of the victim as discussed in UNTOC and the Suppression Convention to UNTOC, the Palermo Protocol. This section will discuss the definition, protection, prevention and punishment methods recognised by the conventions using the doctrinal method.

In addressing the research question, it is of note that concern should be raised as to how the incorporation of TCL can be made into domestic laws. In section 3, it will briefly analyse the procedure as to how Sri Lanka should incorporate international law into their domestic law as a dualist country. It will elaborate on the importance of interaction between international law and domestic law in incorporating accurate international law for the enforcement of domestic law.

This section will outline the two main steps taken by Sri Lanka to eliminate human trafficking among domestic migrant workers. Those two steps are, by ratifying international conventions and incorporating human trafficking as a criminal offence[6] into domestic law. Accordingly, this section will provide a snapshot as to the recognition made in each convention with regard to human trafficking among female domestic migrant workers.

In addition to that, this section will also examine the recognition made in Sri Lankan domestic law regarding human trafficking among domestic migrant workers. It will mainly outline the pre and post-incorporation eras in Sri Lanka, which were before 2006 and briefly after 2006. Whilst there are a wealth of acts and regulations imposed by the domestic law, due to the limitation of the scope, this thesis will mainly focus on the Penal Code (Amendment) Act no.16 of 2006, where the incorporation made in line with Palermo Protocol, defining human

[6] Section 360 (c) Sri Lanka Penal Code (Amendment) Act No 16 of 2006.

trafficking as a criminal offence under Section. 360 (c) [7] and imposing a mandatory two year imprisonment, which may run up to twenty years.

In common with the section in TCL, section 2, section 3 employs the doctrinal method to carry out analysis to identify what other domestic laws comply with the recognition made in TCL. Even though Sri Lanka has incorporated the SAARC Convention by the Act no. 30 of 2005, Preventing and Combating the Trafficking in Women and Children for Prostitution, the Act is still not in operation, since the Minister has not published a date by gazette. Thus, due to the lack of enforcement, an analysis cannot be carried out regarding this.

However, the Sri Lanka Bureau of Foreign Employment Act no 21 of 1985, The Constitution of 1978 of Sri Lanka, and the relevant sections in the Assistance and the Protection to the Victims of a Crime and Witnesses Act No. 04 of 2015, and provisions of the Sri Lanka Criminal Procedure code will be analysed to recognise how each Article discussed in section 2 has been incorporated and complied with in Sri Lanka through different legal documents.

Further, even if under the above-mentioned research question 5, the involvement of the judiciary in interpreting the domestic law in Sri Lanka in line with the context of TCL and human trafficking has been outlined to discuss, there are no reported judgments delivered by the court. Hence, this research question will not be addressed in this thesis and the omission can perhaps be explained due to the lack of knowledge regarding the TCL.

The first substantive section, section 4, demonstrates an overview of the information gathered from the above sections 2 and 3. It will demonstrate the figures collected by TIP report 2022 and 2023 for the purpose of analysing to what extent human trafficking has taken place among domestic migrant workers. The argument will be based on the concepts recognised in TCL and the incorporation of domestic law and the enforcement mechanism. This section will serve as the groundwork mechanism established in Sri Lanka to strengthen the incorporated domestic law such as providing protection towards the victims and witnesses protection authority,[8] National Anti-Trafficking Task force, the Human Trafficking and Smuggling Investigation Bureau of the Criminal Investigation Department (HTSIB-CID) of the Sri Lankan Police.

This will also illustrate through analysis of the number of complaints lodged by the victims, the number of prosecutions initiated by the Attorney General, and the number of convictions

[7] Section 360 (c) of the Penal Code of Sri Lanka.
[8] Assistance and the Protection to the Victims of a Crime and Witnesses Act no 15 of 2004.

sustained how the laws ultimately assisted victims in meeting justice. It will focus on prevention and protection methods adopted by the government in terms of human trafficking.

However, concerns about the number of complaints received by the SLBFE and the number of prosecutions carried before court are relatively different when considering the data. [9]

Reason being that the different socio-economic-cultural factors, such as influence by the perpetrator, ignorance about the court proceedings, lack of money, corruption of the officers, and delay in proceedings, etc.

Finally, this essay will make a concluding remark in terms of the research question according to the findings.

Section 2

2.1 What is Transnational Criminal Law?

Before highlighting TCL, it is important to know what constitutes a transnational crime. According to *Muller*, the phrase 'transnational crime' was first used by the UN Crime Prevention and Criminal Justice Branch in order to identify several criminal activities which cross international boundaries by violating laws, with an impact on another country. [10] Fijnaut expressed a different approach to this view, stating that the term 'transnational' is misleading since not all transnational crimes cross international borders. [11] This argument was based on the fact that transnational law has indirect control over illegal activities which have a cross-border impact. This control was implemented through the domestic laws of each country.

With this development, the categorisation came into place in respect of the ICL as core crimes (*stricto sensu)* and treaty crimes. [12] Both subdivisions had given shelter before an international criminal court to prosecute the parties who were subject to a violation of their rights. TCL can

[9] The National Strategic Plan to Monitor and Combat Human Trafficking 2015 – 2019, Human Trafficking in Sri Lanka, Situation Report International Migration in South and South-West Asia at https://sitreport.unescapsdd.org/sri-lanka/human-trafficking, and "Mahiyanganaya woman remanded for sex trafficking", Daily News at http://www.dailynews.lk/2021/03/13/law-order/243863/mahiyanganaya-woman-remanded-sex-trafficking (13 March 2021)

[10] Neil Boister, Transnational Criminal Law, EJIL 14 (2003) 953-976.

[11] ibid.

[12] ibid.

be identified in line with the latter division of ICL, which is excluded from the jurisdiction of ICC. [13]

Indeed, as Bassiouni suggests, transnational law is more widespread than ICL, which provides a broader value on socio-economic, political, and cultural aspects for each state. According to Bassiouni's view, transnational crime can be identified in different ways, such as a private crime where, in nature, it can be committed by a non-state actor, such as a group of people or individuals, including a natural person and a company. [14] He further identifies transnational crime as being economic in nature, as most of them are committed for financial gratification. For example, drug trafficking and human trafficking for the purpose of gaining money. [15] Transnational crimes can also be political in nature, where they seek advantages through violence (e.g. Transnational terrorism). Further to this analysis, a broader definition has been provided regarding the 'scope of application' of transnational crime based on an offence that is transnational in nature:-

> "if: (a) It is committed in more than one State;
>
> (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
>
> (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or
>
> (d) It is committed in one State but has substantial effects in another State."[16]

In other situations, to establish an offence, even if it is not identified in the context of TCL, the suppressed conduct can influence the states in a bad manner, where citizens believe that that kind of conduct should be prohibited through treaties.[17] Particularly, TCL aims to eliminate the illegal conduct between and among states that endangers societal values or national interests. In light of the above-mentioned facts, TCL can be defined as an indirect suppression by international law through local penal legislation of criminal activities that has an influence on transboundary activities.[18] As the *actus reus* and *mens rea* for each crime are defined by the

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[13] ibid.
[14] ibid (n10).
[15] ibid (n10).
[16] Article 3 (2) of United Nations Convention against Transnational Organized Crime (UNTOC), General Assembly resolution 55/25 of 15 November, 2225 UNTS 209 in force 29 September 2003.
[17] ibid. (n 8).
[18] ibid (n10). And Boister N, Transnational criminal law, EJIL 14 (2003), 953.

suppression convention accordingly, authority is vested with the states to incorporate them without narrowing down the transnational definition given to each offence.

Even if the suppression conventions remain calm about the punishment, it provides a guideline for the domestic states to consider such as, the severe penalties introduced by the previous suppression conventions to a similar offence, severe penalties introduced by later treaties proportionate to the gravity of the offence and provisions to apply some aggravating factors to certain offences. [19]

2.2 **How is Human Trafficking Different from Human Smuggling and Slavery?**

Before moving into the recognition made for human trafficking within the context of transnational criminal law, the distinguishing features of human trafficking, slavery, and human smuggling are similarly important. Even though the three of these crimes are identical, there are unique features which each of them carries.

Human Trafficking and Human Smuggling

Human trafficking as defined involves the recruitment, transportation, transfer, harbouring or receipt of a person, by means of threat or the use of force or other forms of coercion, of abduction, fraud, deception, the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.[20] The most significant group subjected to this are mostly women and children. They were trafficked by the use of improper means, such as the threat or use of force, fraudulent schemes, deception, or abuse of power. Human trafficking can occur within a country or across borders.

Accordingly, the 'three constituent elements' of human trafficking are the *act* (recruitment, transportation, transfer, harbouring, or receipt of people); specific *means* (threats or use of

[19] ibid (n10) page 26,27.

[20] Article 3 (a) of UN Protocol to Prevent Suppress, and Punish Trafficking in Persons Especially Women and Children supplementing the UNTOC (The Palermo Protocol).

force, deception, fraud, abuse of power, or abusing someone's vulnerable condition) and the *purpose* (for example sexual exploitation, forced labour, slavery, or organ removal).[21]

Human smuggling has been defined as "the procurement in order to obtain, directly, or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".[22] It has been further interpreted as 'illegal entry' as 'cross bordering without complying with legal requirements for legal entry into the receiving State'.[23]

Considering the definitions given above, while human trafficking can take place both domestically and internationally, human smuggling can take place only across boundaries. Moreover, smuggling should take place with the purpose of gaining a commercial benefit.

Human Trafficking and Slavery

Given the long history of slavery in the twentieth century, the Slavery Convention has brought a wide definition as to what constitutes slavery. As defined, 'the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised'.[24] As the convention states further: " Any acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery, all acts involved in the acquisition of a slave with a view to selling or exchanging him, all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves".[25]

The ultimate purpose of exploitation is the unique feature which differentiates slavery from human trafficking, where slavery begins with the intention to reduce ownership and trafficking starts with the intention to exploit. However, it is debatable whether trafficking can subsequently turn into slavery, due to which exploitation can turn into asserting ownership. [26] Therefore, it can be argued that the exploitative behaviours exhibited by human trafficking,

[21] UNODC, Human trafficking and migrant smuggling https://www.unodc.org/e4j/en/secondary/human-trafficking-and-migrant-smuggling.html.
[22] Article 3(a) of The Protocol Against The Smuggling of Migrants by Land, Sea, and Air, Supplementing the UNTOC.
[23] ibid Article 3(b).
[24] Article 1 (1) of the Slavery Convention, Geneva 60, LNTS 253, IN force 9 March 1927.
[25] ibid (n 26) Section 1(2) , ibid (n10).
[26] ibid (n 10), N. Boister, page 128.

such as sexual vulnerability, deception, labour exploitation, including withholding of wages, restriction of movements are slavery in nature to some extent.

2.3 Human Trafficking as a Crime within the Context of TCL.

It is fundamentally worth considering what constitutes human trafficking within the context of TCL in answering the research question, because the awareness can assist in determining the compliance made by Sri Lanka in terms of human trafficking. This section will describe the recognition mainly with UNTOC and Palermo Protocol.

First, it is necessary to outline the development of human trafficking with reference to the process which led to the Palermo Protocol. Even though by 1926 and 1956, the Slavery and Supplementary Conventions tried to cover human trafficking, the failure to meet when a crime was committed by the trafficking of a person for temporary commercial gain[27] opened up concern. This motivated the design of a legal document including human trafficking as a separate crime. Initially, it was recognised as a crime which threatened human dignity and national integrity and therefore was categorized as an organized crime by UNTOC, which came into force in 2000 with the ultimate purpose to "promote cooperation to prevent and combat transnational organized crime more effectively".[28]

While human trafficking was initially recognised as an organized crime, the necessity arose to explicitly distinguish it as a separate offence due to how it has evolved into a complex criminal network that exploits victims through several means. This is where an international treaty was adopted by UNTOC, *inter alia* as a supplementary Convention known as the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children".

It aims to combat human trafficking by providing a comprehensive framework for defining, prosecuting, and preventing this heinous crime. The protocol was drafted claiming the statement of purpose as:

(a) To prevent and combat human trafficking, paying particular attention to women and children,
(b) To protect and assist the victims of such trafficking, with full respect to their human rights,

[27] ibid (n 10).
[28] ibid (n 18) UNTOC Article 1.

(c) To promote cooperation among state parties to achieve the objectives[29]

In the realm of the Protocol, a paramount has been devoted to identifying the elements of human trafficking. It has established a legal framework to safeguard the rights of the victims and hold perpetrators accountable. It encourages State Parties to ensure that the legal response is tailored to human trafficking, especially by providing assistance and protection to the victims so that they can access justice.

Articles have been included in the Protocol to allow State Parties to collaborate in addressing the transnational aspect of human trafficking by incorporating it into their domestic laws to combat it more effectively as described following.

Providing a Comprehensive Definition

As described in subtopic 2.2., the Protocol has given a comprehensive definition of human trafficking with three elements constituting human trafficking including the *act* (what is done?), the *means* (how it is done?) and the *purpose* (why it is done?). This protocol was designed with three pillars in addressing the issues of combating human trafficking, known as Prevention, Prosecution and Protection. [30]

Mainly as defined by Article 3(a) (as mentioned in above section), the word "*act"* denotes recruitment, transportation, transfer, harbouring or receipt of a person. "*Means"* can be explained as threat, use of force, other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. [31]

Considering the concept of 'consent' it has been recognised that where the means as specified in article 3(a) are used, the consent of a trafficking victim to any of the forms of exploitation spelled out in article 3(a), shall be irrelevant.[32] In essence, the provision of the Protocol emphasizes that any act committed with the purpose of exploitation involving a child is considered as "trafficking in persons", even if it does not involve any means as described in Article 3(b).[33]

[29] ibid (n 22) Article 2.
[30] ibid 30.
[31] ibid (22).
[32] ibid (n 22) Article 3 (b).
[33] Ibid (n 22) Article 3(c).

Purpose of exploitation has been defined as sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[34] Accordingly, the interpretation given by Palermo Protocol broadens the definition for human trafficking, allowing States to incorporate it into their domestic legislation.

Taking into account the scope of application, this aims to prevent, investigate, and prosecute the offences described in Article 5 of UNTOC, providing assistance to the victims of those crimes.[35]

More importantly, each State Party is empowered by the Protocol to take actions through legislation and other measures to enact laws for the offence as described in Article 3.[36] It also obliges State Parties to criminalize the perpetrators who attempt to commit the offence,[37] who participate as an accomplice,[38] or organized or directed a person to commit such an offence. [39]

Victim Protection and Support

The protocol has given considerable attention to the assistance and protection of the victims of TIP, in Article 6. [40] It encourages State parties to protect the identity and privacy of the victims of trafficking, including the confidentiality of legal proceedings.[41] Further, the protocol requires that State Parties ensure that the legal and administrative system contains measures to provide victims with information on relevant court or administrative proceedings and assistance to express their views and concerns during the court proceedings, without compromising the rights of the defence. [42]

As outlined in the Protocol, it empowers State parties to consider implementing measures to provide physical, psychological, and social recovery for victims of TIP by collaborating with NGOs and other civil organisations.[43] This could include providing them with a safe home, counselling and providing information regarding the legal rights with a language understood

[34] ibid (n 22).
[35] ibid (n 22) Article 4.
[36] ibid (n22) Article 5(1).
[37] ibid (n22) Article 5(2) (a).
[38] ibid (n 22) Article 5(2) (b).a
[39] ibid (n22) 5(2) (c).
[40] ibid (n 22) Article 6
[41] ibid (n 22) Article 6(1).
[42] ibid (n 22) Article 6(a) & (b).
[43] ibid (n 22) Article 3.

by the victims, medical and psychological support, opportunities for employment, education etc.[44] It emphasizes that when dealing with the matters outlined, State Parties should take into account the age, gender, and the special needs of the victims of TIP.

The protocol emphasises the importance of ensuring the safety of the victims of TIP within the territory[45]. A positive approach has been made in respect of the possibility of obtaining compensation for the damage suffered by the victims of TIP, allowing the State Parties to take measures.[46] This article offers a sense of redress to the victims of TIP on their pathway to recovery and also acts as a means of deterrence to the perpetrators.

When considering the subject matter, as per the authority granted by the Protocol, offences established under Article 5 of the Protocol are to be treated as offences established under the Convention (UNTOC),[47] and interpreted under the Protocol together with the Convention. [48] Therefore, the provisions contained in the Convention can also be involved in consideration.

UNTOC recognises the importance of protecting both victims and witnesses separately in criminal proceedings. However, it acknowledges that a victim can serve as a witness in a proceeding. Thus, the protection and rights provided for the witnesses can also be applied to the victims when serving as a witness[49]. It provides that every State Party is obliged to take suitable measures to ensure effective protection for the witnesses who provide testimony related to the offences covered by the Convention. [50] The protection given to witnesses has been extended by the Convention to provide it to their relatives and persons close to them where relevant.[51]

The measures to provide protection have been described as providing physical protection to the witnesses, including relocating and limiting the disclosure of information on their whereabouts.[52] Furthermore, it allows testimony via video link or other secured communication technology. [53]

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[44] ibid (n 22) Article 6(3) (a),(b),(c) & (d).
[45] ibid (n22) Article 6(4).
[46] ibid (n 22) Article 6.
[47] ibid (n 22) Article 1 (3).
[48] ibid (n 22) Article 1 (1).
[49] ibid (n18) UNTOC Article 24 (4).
[50] ibid (n 18) Article 24.
[51] ibid (n 18) UNTOC Article 24(1).
[52] ibid (n 18) UNTOC Article 24(2) (a).
[53] ibid (n 18) UNTOC Article 24(2) (b).

Prevention, Corporation, Prosecution and Sanction

In terms of the prevention of TIP, the Protocol empowers States to establish comprehensive policies and programs in two ways. Those are to prevent and combat TIP and to protect victims of TIP from revictimization, especially women and children. [54] Further, it requires State Parties to take measures, such as conducting research to gain a better understanding of the issue, launching information and mass media campaigns to raise awareness, implementing social and economic initiatives to address the root causes that make individuals vulnerable to trafficking in order to prevent and combat TIP . [55]

It highlights the importance of implementing policies and programmes by the States in collaboration with NGOs and other civil organizations.[56] The protocol directs State Parties to enhance measures through cooperation at bilateral or multi-lateral levels to address factors such as poverty, underdevelopment, lack of opportunities that make individuals susceptible to trafficking, especially women and children. [57] The protocol denotes that State Parties should adopt or strengthen the legislation or other measures, especially regarding women and children. [58] The implementation of these measures assists domestic States in creating a more secure environment for the individual victims and the public at large.

The protocol has laid the basis to acknowledge the immigration law enforcement authorities regarding the types of travel documents that people use for trafficking purposes. [59] The protocol requires State Parties to offer the information exchange and training to the law enforcement bodies regarding the prevention of TIP, prosecuting the traffickers and protecting the rights of the victim. [60] This section demonstrates the importance of equipping the officials with the necessary skills in combating TIP.

This aspect has been further explained in UNTOC as to provide specific programmes for prosecutors and magistrates and for the officials who are involved in preventing, detecting and controlling the offence. [61]

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[54] ibid (n 22) Article 9 (1) (a) & (b).
[55] ibid (n 22) Article 9(2).
[56] ibid (n18) Article 9 (3).
[57] ibid (n 22) Article 9(3).
[58] ibid (n 22) Article 9(4).
[59] ibid (n22) Article 10 (1) a,b, and c.
[60] ibid (n 22) Article 10(2).
[61] ibid (n18) Article 29 (1).

Even if it does not provide *prima facie* criminal sanctions on the states through suppression conventions, it has left a significant discretion and authority to national legislation when penalizing the perpetrator in accordance with the domestic legal framework, in response to any breaches of the obligations as stated in Article 3. [62] Considering the aspects demonstrated by the UNTOC in prosecution, adjudication and sanctions, it empowers State Parties to impose suitable penalties for offences established in accordance with Articles 5,6,8, and 23 of the Convention, taking into account the seriousness of each offence. [63] Article 11 (6) gives a rise to a standard by mentioning that;-

> "Nothing contained in this convention shall affect the principle that the description of an offence established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of the State party and that such offences shall be prosecuted and punished in accordance with that law."[64]

This definition allows State Parties to enjoy the incorporation at their choice.

However, it provides factors to be taken into account by State Parties when deciding the punishment, such as the nature of the offence, severe penalties introduced by the previous suppression conventions to a similar offence, applying *mutadis mutandas,* and the gravity of the offence. [65]

As outlined above, the establishment of UNTOC and Palermo Protocol has contributed to the betterment of the prevention of human trafficking and the protection of the victims of TIP. The State Parties are encouraged to review and comply with the provisions by incorporating them into domestic laws.

Section 3

An understanding of the differing outlooks of the monist and dualist approaches is particularly important in addressing the research question. Therefore, this section provides an overview of how dualism interacts with Sri Lanka. It then investigates how the dualist approach is applied

[62] ibid (n 22) Article 11 (4).
[63] ibid (n 18) UNTOC Article 11(1).
[64] ibid (n 18) Article 11 (6).
[65] ibid (n18) Article 11.

in Sri Lanka concerning the international conventions it has ratified, particularly focusing on human trafficking. The section will give a snapshot of each article within the conventions, aimed at eradicating human trafficking among female domestic migrant workers. This section will provide a doctrinal background to the subsequent section s discussing how each transnational concept has been incorporated by Sri Lanka into domestic law.

3.1 **How does a Transnational Law become a Part of Domestic Law?**

There are two theories of reception that assist in determining the adoption of international law into a domestic legal system. These are known as Dualism and Monism. The view of monist theory is that international law is incorporated into domestic law automatically. The contrary view is the dualist view that developed in different spheres of international relations, that international law has to be specifically transformed into domestic law by some appropriate act such as legislation".[66]

The importance of understanding the differentiation is that it demonstrates the interaction between international law and domestic law and the relationship between domestic law and the people of the country as well. The following table provides an overview of the characteristics of each approach.

No	Monism	Dualism
1.	In a monist legal system, international law is automatically considered a part of the country's internal legal framework without needing separate domestic implementation. As two philosophers named *Hans Kelsen* and *Lauterpacht* recognise, the universal applicability of the principles in supporting monism states that " all	On the other hand, in a dualist legal system, international law exists separately from national law and requires domestication through legislation to be applicable within domestic law, affecting the rights of people.

[66] M. Sonarajah, "The Reception of International Law in the Domestic Law of Sri Lanka in the Context of the Global Experience", 2016 https://jil.law.cmb.ac.lk/wp-content/uploads/2018/08/Vol25_01.pdf> accessed 07 July 2023.

	law is one and the international law and municipal law are part of a single system"[67]	
	The ratification is sufficient to consider the international law as a domestic law without incorporating.	The doctrine of transformation applies, enabling countries to incorporate international law to domestic law over the ratification.
	International law will get priority over domestic law.	Whenever there is a disagreement between international law and domestic law, the domestic law will get priority over international law.
	Rights recognised in international law will prevail with both States and individuals.	It believes that rights prevail only with the states under international law, not with the individual citizens.

Application of Dualism in Sri Lanka

The focus to explore how dualism is implemented within the context of the Sri Lankan legal system is also of paramount importance. When considering the dualist approach in Sri Lanka, dualism is not directly expressed by a legal document. However, the concept of dualism has been centred on the doctrines of supremacy of the Constitution and judicial precedent.

According to Article 4(d) of Sri Lankan Constitution,[68] the government must respect, protect, and promote Fundamental Rights through all organs of the government. Additionally, Article 27(15) of the Constitution reads;

> "The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order and shall

[67] R.M.S.Dilhani, The Reception of International Law and the Application of Dualism and Monism in Sri Lanka, http://ir.kdu.ac.lk/bitstream/handle/345/4491/Dilhani%2c%20RMS.pdf?sequence=1&isAllowed=y > accessed 07 July 2023.

[68] Article 4(d) Of The Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

endeavour to foster respect for international law and treaty obligations in dealings among nations."

When we combine these two articles, it suggests that the judiciary in Sri Lanka has the power to safeguard Fundamental Rights while also integrating international law, which the country has agreed to follow, into its domestic legal system through innovative interpretations to uphold and enforce the rights of individuals within the country. Further, the Constitution provides that, "The President shall have power…to do all such acts and things, not being inconsistent with the provisions of the Constitution or any written law, as by international law, custom or usage he is required or authorised to do."[69] This article emphasizes the fact that the President should not make laws against international customary law, while highlighting that priority should be given to domestic law in a conflict between international and domestic laws.

Article 157 states that the treaties which are essential for the development of the national economy shall be passed by the 2/3 majority and thereby shall have the force of law. [70] Accordingly, one can argue that the Sri Lankan Constitution has given consideration in line with the monist approach regarding the international law involved in economic activities.

Considering the judicial precedent in respect of the dualist approach a series of case laws can be considered. In the case of *Sepala Ekanayake v. AG* it was decided that the international customary law can be adopted only when the domestic law is silent following a monism approach.[71] The argument was built up on the basis that Sri Lanka can make retrospective laws regarding matters which have an interest in international law.[72]

Further In the *Weerawansa v. AG*[73] case, the court ruled that Article 27(15) of the Constitution suggests that the State must not only respect international law and treaty obligations in its interactions with other countries but also extend this respect to its own citizens, especially when their freedom is at stake. This means that the State is required to provide its citizens with the protections and rights recognised by international law.

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[69] ibid (n 71) Article 33 (h).
[70] ibid (n 71) Article 157.
[71] (1988) 1 SLR 46.
[72] ibid (n 71) Article 13 (6) Constitution 1978.
[73] (2000) 1 SLR 387.

In the *Eppawala case,*[74] the court embraced a broad interpretation of Article 12(1) of the Constitution by incorporating "soft law" international standards. They considered agreements based on principles mentioned in the Stockholm and Rio De Janeiro Declarations. This was a significant step taken by the Sri Lankan judiciary to protect the Fundamental Rights of the country's citizens in line with the concept of "intergenerational equity" recognised in international environmental law, which had not existed in the Sri Lankan legal system. In this case *Amarasighe J* held that, even though these international instruments are categorized as "soft law," as a member of the United Nations, Sri Lanka cannot disregard them. Furthermore, the court stated that if these instruments have been explicitly incorporated into domestic law through adoption by the superior Courts of record, especially the Supreme Court in their decisions, they would be binding. In other words, this has encouraged interactions between international law and domestic law to protect the rights of the citizens.

While the judiciary supported the monist approach in the case of *Nallaratnam Sinharasa v. AG*[75], the court took a different approach regarding the use of international law as an aid. They ruled that Sri Lanka's accession to the Optional Protocol to the ICCPR was unconstitutional leading to a significant drawback to the existing precedent created by the Eppawala *case*. This decision appears to be based on the dualist approach. Some might argue that even if Sri Lanka hadn't ratified the ICCPR, the international norms included in it could still be applied or used by the courts because Customary International Law would impose a duty on Sri Lanka to respect basic human rights norms in terms of protecting the rights of its people. In contrast, the *Sinharasa* case affirms the fact that, "The framework of our Constitution adheres to the dualist theory, the sovereignty of the people of Sri Lanka and the limitation of the power of the President as contained in Article 4 (1), read with Article 39(f) in the discharge of functions for the republic under customary international law". [76]

The liberal approach taken by Amarasinghe J, in the *Eppawala* case involving the Public Trust Doctrine states that "Sri Lankan judges can refer to the international law in the absence of

[74] *Bulankulama and others v. Secretary, Minister of Industrial Development and others* (2000)3 Sri L.R. 243.

[75] S.C. SPL (LA) No.182/99 (2006).

[76] ibid 245.

enabling legislation in Sri Lanka", has been dropped by the *Sinharasa* case following a different approach towards dualism.

In light of the argument mapped out above, with respect to the courts in Sri Lanka, it can be seen that the current view held by the judiciary is that irrespective of how a treaty has been ratified, to be effective, it has to be incorporated into domestic law to respect the sovereignty of the people. Tying the articles in the Constitution with judicial activism has highlighted the necessity of incorporation to have an effect in domestic law, giving rise to a dualism approach in the legal system of Sri Lanka.

3.2 What is the Recognition Made in Sri Lankan Law for Human Trafficking?

This section starts by providing an overview of the approach to the identification predominated by the Conventions which Sri Lanka has ratified regarding human trafficking among domestic female migrant workers. Firstly, it will make a snapshot of the averments declared by each international convention to secure the protection of the victims of TIP.

As discussed in-depth in section 2, the recognition made by transnational criminal law regarding human trafficking in UNTOC and Palermo Protocol, there are other international conventions to which Sri Lanka has been a party in order to eradicate human trafficking among female domestic migrant workers.

The UN's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 and has been ratified by several countries including Sri Lanka. The purpose of this Convention is to promote women's rights by addressing issues related to discrimination against women to achieve equality between genders. [77] It particularly focuses on encouraging State Parties to take appropriate measures, including implementing legislation to combat the problem of trafficking in women.[78] In completing this target, the convention encourages the State Parties to respect, protect and fulfil the rights of women. [79]

Failure to take such actions results in unequal and discriminatory treatment, which is considered a violation of the state's obligation under CEDAW. The Convention requires a gender- sensitive response for State Parties in terms of anti-trafficking measures. This includes

[77] Article 1 CEDAW.
[78] ibid Article 6.
[79] ibid Article 2.

allocation of resources, establishing national mechanisms, collecting sex and age-based data on victims, and analysing trafficking means, causes, and relationship to perpetrators.[80]

In order to manage transnational issues, like trafficking, it highlights the importance of having gender based bilateral, regional agreements and diplomacy services to ensure protection against discrimination.[81] Importantly, it demonstrates that the State Parties must establish victim and witness protection measures in reporting of human trafficking without fear of repercussion. The measures should include rehabilitation, reintegration, legal assistance, and compensation to the victim. [82]

Sri Lanka ratified the "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" in 1996. This convention was established for the purpose of safeguarding the rights of migrant workers and their families. It sets a moral standard and serves as a guide to promote migrant rights in each country. The convention recognises the rights of the migrants *inter alia,* that migrants are not just workers; they are human beings deserving of respect and protection and fair working conditions.

Even if the above convention does not specifically address the victims of TIP, it has given particular consideration to the rights of the migrants and their families.

Sri Lanka ratified ICCPR in 1980.[83] In terms of the recognition by the Universal Declaration of Human Rights, the ICCPR was established to respect the civil, cultural, and political rights of people. It emphasizes the responsibility of State Parties to ensure equal civil and political rights for men and women. [84]

It further urges freedom from being subjected to torture, cruel treatment,[85] and it expressly prohibits slavery or forced/compulsory labour in Article 8. Even though it does not comply with the definition of 'human trafficking', as explained in section 2, the exploitation, including labour, has been covered by the convention. This statement proclaims that everyone should be treated equally before the law, without any discrimination based on factors like race, gender,

[80] CEDAW – General Recommendation on Trafficking in Women and Girls in the Context of Global Migration.
[81] CEDAW Article 8.
[82] CEDAW Article 15.
[83] UN Human Rights Treaty Bodies Database https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=en> accessed 08 July 2023.
[84] ICCPR Article 3.
[85] ibid Article 7.

religion, social background, or any other status. The law must protect all individuals' rights, upholding the equal opportunity to justice, irrespective of any other circumstances. [86]

It further provides that a person is free to choose a place to live and to leave any country, including his own.[87] Human trafficking, by its very definition, involves the transfer of a person from one place to another through force, coercion, or deception. As such, it directly violates the principles of freedom of movement in terms of coercion. Consequently, this article can play a crucial role in safeguarding the rights of trafficking victims, offering support and protection to those affected by this crime.

The ILO has formulated conventions that comprehensively address various aspects of workers' rights. Notably, Sri Lanka has ratified ILO Convention No. 95, which focuses on the protection of wages. Sri Lanka has ratified ILO Convention No. 29 concerning forced labour and ILO Convention No. 111 on discrimination in employment and occupation. As ILO members, these countries are bound to uphold the fundamental rights enshrined in these conventions.

Furthermore, the ILO Declaration on Fundamental Principles and Rights at Work recognises "elimination of discrimination in respect of employment and occupation" as one of the "fundamental rights" that all ILO members are obligated to respect, promote, and realize. This responsibility extends even to those members who may not have ratified the core ILO conventions pertaining to these rights (ILO, 1998) The ILO convention on the "Abolition of Forced Labour (1957)" is aimed at safeguarding individuals from any form of forced or compulsory labour.

The ILO convention on "Migration for Employment Convention (1949)" is designed to safeguard workers from discrimination and exploitation when they are employed in countries other than their own. This convention aims to shield migrant workers from the illegal and clandestine trafficking of labour and sets standards for social security to ensure equal opportunities and fair treatment for migrant workers. By doing so, it seeks to promote better conditions and opportunities for these workers who move across borders for employment.

In section 2, it was elaborated that human trafficking involves three key elements: the *act*, the *means*, and the *purpose,* often leading to slavery and forced labour. Consequently, the

[86] ibid Article 26.
[87] ibid Article 14.

conventions established by the ILO, as described above, which Sri Lanka has ratified, play a crucial role in protecting the rights of human trafficking victims.

The SAARC "Convention on Preventing and Combating Trafficking in Women and Children for Prostitution" is crucial as a regional convention in addressing the issue of trafficking victims through various measures. It emphasizes proactive measures to prevent trafficking, such as awareness campaigns, education programs, and addressing root causes like poverty and lack of opportunities. It calls for effective interdiction strategies, cooperation between member states, and stringent legal actions to hold traffickers accountable. The convention advocates for stringent legal frameworks and proper prosecution to ensure justice. Specially emphasizing 'the aggravating factors' for the courts to consider when determining the sentence for the particular crime.[88] Victim protection is also recognised, with provisions for safe housing, medical care, counselling, and legal assistance.[89] The convention has adopted a positive approach by addressing the issue of extradition for nationals, where extradition is not permitted under their respective laws.[90] In such cases, nationals who have committed offences under the present Convention shall be subject to prosecution and punishment by their own courts. While demonstrating the requirement for State Parties to provide adequate resources, training, and support to their authorities to ensure effective inquiries, investigations, and prosecution of offences under the Convention[91.] It also highlights the necessity of having a regional mechanism to measure the offence of human trafficking.[92] However, some argue that the convention's definition of trafficking may not fully encompass all forms of trafficking, especially those involving migrant women. Efforts to address these limitations and expand the scope of protection are essential to ensure comprehensive safeguarding of the rights of all trafficking victims.

When examining the ratified conventions, it becomes evident that Sri Lanka has taken significant steps to combat human trafficking and protect the rights of victims. However, as discussed earlier in section 3, Sri Lanka follows a dualist system, which requires us to explore how these conventions have been incorporated into domestic law and identify corresponding legislation for each recognition made by the international conventions.

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[88] SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Article IV 1 (a) –(e).
[89] ibid (n93) Article V.
[90] ibid (n 93) Article VII.
[91] ibid (n 93) Article VIII.
[92] ibid (n 93) Article IX.

3.3 What is the Domestic Law as Incorporated by Sri Lanka?

This section aims to assess how Sri Lanka has incorporated these conventions, particularly the Palermo Protocol, to ensure compliance with their obligations. The analysis will be divided into four key areas: definition, prevention, protection of victims, and prosecution, with a focus on how these aspects are addressed in Sri Lanka's domestic laws.

Before 1995, trafficking in women and children was addressed primarily through provisions related to procuration, unnatural offences, kidnapping, abduction, and slavery in the Penal Code. However, since 1995, additional criminal offences such as rape, forgery of documents, sale and distribution of obscene material, have been introduced to address trafficking more comprehensively. Amendments were made in 1995 and 1998 to specifically target the increasing incidence of trafficking in women and children for exploitative purposes. However, the substantive provision which defines human trafficking as a criminal offence came into force by the (Amendment) Act No. 16 of 2006 to bring it in line with the Palermo Protocol. By this amending Act repealed Section 360C of the principal Act and the following provision entitled "Trafficking" was substituted as;

> "(1) Whoever—
>
> (a) buys, sells or barters or instigates another person to buy, sell or barter any person or does anything to facilitate or induce the buying, selling or bartering of any person for money or other consideration;
>
> (b) recruits, transports, transfers, harbours or receives any person or does any act by the use of threat, force, fraud, deception or inducement or by exploiting the vulnerability of another for the purpose of securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation or any other act which constitutes an offence under any law;
>
> (c) recruits, transports, transfers, harbours or receives a child or does any other act whether with or without the consent of such child for the purpose of securing forced or compulsory labour or services, slavery, servitude or the removal of organs, prostitution or other forms of sexual exploitation, or any other act which constitutes an offence under any law, shall be guilty of the offence of trafficking."

It states that a person who is convicted of trafficking will be sentenced to imprisonment for a minimum of two years and a maximum of twenty years, and may also be punished with a fine.[93] If the trafficking involves a child, the imprisonment may run not less than three years to not exceeding twenty years.[94] "Child" here refers to a person under eighteen years old.[95] The section also clarifies the definitions of "forced or compulsory labour" and "slavery" as outlined in section 358A of the Penal Code (Amendment) Act No 16 of 2006. Furthermore, "exploiting the vulnerability of another" means compelling a person to submit to an act by taking advantage of their economic, cultural, or other circumstances.

Under Section 360 (c) of the Sri Lankan Penal Code, consent is not a factor in determining whether an act constitutes human trafficking. The focus is on the exploitative nature of the act, and it applies irrespective of whether the victim gave consent or not. This approach aligns with the recognition made in defining human trafficking without considering consent, as stated in Article 3(b) and (c) of the international conventions.

Further, Section 100 of the Penal Code of Sri Lanka defines abetment as instigating, conspiring, or aiding an act, which can be done by instigating someone to do it, engaging in a conspiracy for its commission, or intentionally aiding the act through any act or illegal omission. Section 101 clarifies that abetment occurs when a person supports either the actual commission of an offence or an act that would be considered an offence if done by someone legally capable of committing the offence, with the same intention or knowledge as the abettor. Further, as per Section 32 of the Penal Code multiple individuals are liable for a criminal act if they act with the common intention of all, acting as if they were acting alone. Hence, even though abetting and aiding are not explicitly covered by Section 360 (c) of the penal code, when initiating charges, Section 360 (c) can be coupled with Section 101 or Section 32 to prosecute the abettors for the same crime.

Apart from that, the Penal Code Amendment Act No. 22 of 1995 introduced the offence of procuration. Section 360A now criminalizes procuring any person, with or without consent, for prostitution, illicit sexual intercourse, or sexual abuse. These amendments aimed to address and deter such exploitative practices. As averred in Article 5 of Palermo Protocol, even if

[93] Section 360 (c) 2 of the Penal Code (Amendment) Act No. 16 of 2006 in Sri Lanka.
[94] ibid.
[95] ibid 360 (c) (3).

Section 360 (c) does not mention the 'attempt to human trafficking' as an offence, Section 113 of the Penal Code states that individuals intending to commit an offence in Sri Lanka can be punished with imprisonment, a fine, or both. This means that if a person attempts to commit a crime, they can face imprisonment, a fine, or both, as prescribed in the specific offence they attempted to commit.

Therefore, Sri Lanka's incorporation of these provisions into their domestic laws, in terms of definition, is in compliance with the established international standards.

Victim Protection and Support

As outlined in the Palermo Protocol, Sri Lanka has taken steps to protect the rights of victims of TIP. Sri Lanka has recognised that the confidentiality of information must be protected during a court proceeding, to be protected by the Attornies-at-law under the Supreme Court rules of Sri Lanka. [96] Enjoyment for the rights of a victim has been documented in several legislations. The requirement which states that victims of TIP should be informed about relevant administrative and court proceedings and to provide assistance to express their views has been recognised in Sri Lanka.[97] The Sri Lankan Constitution of 1978, which contains a section III for fundamental rights, has recognised the right to access to information. [98] Similarly, right to access to information has been identified by the Right to Information Act of Sri Lanka.[99]

More importantly, The Assistance to and Protection of Victims of Crime and Witnesses Act was established in line with Article 6 of Palermo Protocol, Article 15 of CEDAW to protect and assist the victim/witnesses of a crime. The Act aims to set out, uphold, and enforce the rights and entitlements of victims of crime and witnesses, and provide a mechanism for promoting, protecting, and exercising these rights. It also enables victims to obtain compensation from convicted offenders, provides redress, sets out duties and responsibilities for state, judicial, and public officers, outlines offences against victims, and implements best practices for their protection.

This act has been established as an authority on 'National Authority for Victims of a crime and Witnesses' to give rise to the rights of the victims in several instances, including investigation

[96] SC Rules -Rule 2.
[97] ibid (n44) Article 6(a)(b).
[98] Article 14 (a) Nineteenth Amendment to 1978 Constitution of Sri Lanka.
[99] Section 03 of Act No. 2 of 2016 RTA.

and court proceedings. This act considers equality before the law, respecting the privacy of the victim of a crime. [100] It demonstrates that upon a request made by a victim to the authority, they are entitled to receive information regarding the civil/criminal remedies that they can seek.[101] The victim has the right to be aware of the progress of investigation regarding a complaint lodged by her, [102] the right to know the dates for hearings, progress, and disposal of judicial proceedings related to their crime, including non-summary inquiries, trials, appeals, and revision applications, [103]

Furthermore, the section entitles the victim to be informed through the police, Attorney General, or Registrar of the court regarding the release of the suspect on bail, convictions or acquittals entered by the court, and if the suspect is released from prison. All this information should be accessible to the victim whenever she requires it.[104]

In Sri Lanka the victim is recognised as someone who has suffered injury, harm, impairment, or disability due to an alleged offence or infringement of a fundamental right. This includes a child victim, their parents, guardians, family members, and dependents.[105] Therefore, since the victims of human trafficking can also be included under the interpretation of witness, and more often, human trafficking cases are reported by the victims themselves, they can also be considered as witnesses.

In Sri Lanka, when the complaint is lodged for human trafficking, the officers from the relevant police station represent the victims, while a prosecuting counsel representing Hon. AG in Provincial High Courts stands for the rights of the victim. [106] The Act allows victims to present written representations through legal counsel to the Attorney-General before, during, and after an investigation into an alleged crime against them.[107] Victims are also required to be present at all judicial proceedings relating to an offence, unless the court determines that their evidence would be materially affected. Legal counsel can be represented at various stages of criminal proceedings without prejudice to the prosecution. Following the offender's conviction, they

[100] Section 3 of Act No. 04 of 2015.
[101] ibid Section 3 (f).
[102] ibid Section 3(f) (2).
[103] ibid Section 3 (f) (3).
[104] ibid Section 3 (f) (4) a-e.
[105] ibid (n 105) Section 46.
[106] Section 193 of the Code of Criminal Procedure Act No. 15 of 1979.
[107] ibid (n 105) Section 3 (j).

must submit the manner in which the offence affected their life, including their body, state of mind, employment, profession, income, quality of life, property, and other aspects.

As a prosecutor, we are vested with the responsibility to represent the victim's view at the stage of final submission as to how the offence affected their life. This can be considered in line with Article V of the SAARC convention, where the facts can be referred to as aggravating factors, such as physical and mental harm suffered by the victim, victim's age, relationship to the accused, and interference with the victim's family. Upon the submission, inherent power is vested with the judiciary to consider a justifiable sentence on the accused.

As recognised by the Protocol, a compensation mechanism is also established in Sri Lanka. Criminal Procedure Code as the correspondence legislation mentions that even upon an acquittal court can grant compensation to the victim following the harm which the victim suffered as a consequence of the crime. [108] It has been incorporated by the Victims' Protection Act by allowing both Magistrate's and High Courts the power to award compensation up to one million to a victim upon a conviction of the accused. The court considers medical reports and the impact of the offence before determining the sentence. [109]

Moreover, a victim's protection fund has been created in terms of the act to provide compensation to the victims upon a physical/mental harm that they suffered as a result of a crime. The awarding of compensation to the victim has been extended including their family, and the next of kin.[110] As averred in article 24 of UNTOC, the Act provides protection to a victim of a crime and witness upon a request including security to a person or property, [111] temporary or permanent relocation,[112] employment, [113]

The act empowers the authority to grant protection to the victim upon request, and if any intimidation prevails, the authority shouldn't disclose the whereabouts of the victim in line with article 24 (2) (a) of UNTOC.[114] Recording of evidence or statements through contemporaneous audiovisual linkage allows for real-time and remote testimony of witnesses or victims in legal proceedings.[115] This method enables individuals to provide their testimony from a different

[108] ibid (n111) Section 17.
[109] ibid (n105) Section 28 of the Victims and Witnesses Protection Act.
[110] Section 29 (4) (b) of Act No. 4 of 2015.
[111] ibid (n 105) Section 22(1) (a).
[112] ibid Section 22 (1) b, c.
[113] ibid Section 22(1) d.
[114] ibid Section 24(1) & (2).
[115] ibid Section 31.

location using audio and video technology, reducing the need for physical presence in the courtroom. This approach also helps streamline legal processes, protect vulnerable witnesses, and facilitate cross-border testimonies in international cases.

In light of the need for court proceedings to be held in a familiar language, as discussed in Article 6 of the Palermo Protocol, Article 24 (2) of the Constitution allows parties, applicants, or legal representatives to initiate proceedings, submit documents, and participate in court proceedings in Sinhala and Tamil, which are considered as National Languages in Sri Lanka.[116] However, as per the 13th Amendment, Article 18 declares Sinhala as "the" official language, while Tamil is designated as "an" official language, indicating a lack of parity. This disparity has significant implications, particularly in Sri Lanka's ethnic conflict. The Official Languages Commission has not demonstrated a tangible impact, raising concerns about equal access to legal proceedings and government services in their preferred language. Especially in human trafficking cases in relation to domestic female migrant workers who hail from the central province of Sri Lanka and are mostly of Tamil ethnicity. Therefore, even if the interpreters are supportive during the proceedings, the lack of qualified interpreters to assist in court proceedings again hinders the pursuit of justice.

The Sri Lankan ratification of CEDAW has led to the formulation of the Sri Lankan Women's Charter in 1993. The charter aims to eliminate discrimination against women and promote women's right to economic activity and benefits. It focuses on non-discrimination and gender equality, and acknowledges the need for NGOs and community-based organizations to help victims of violence. The charter also includes the National Committee on Women (NCW), which focuses on political and civil rights. However, the impact of the charter on Sri Lankan lives remains uncertain due to the dynamic political system and it has not been evident for years that the charter has given a rise to eliminate the human trafficking among females.

In light of Articles 5 and 8 of CEDAW and Article 3 and 26 of ICCPR, they can be identified as corresponding with Article 12 of the Constitution. These articles enable equal protection before the law and freedom from discrimination under any circumstances. Furthermore, the Constitution encourages the implementation of special provisions for women and children through legislation[117] while recognising the right to be free from cruel, inhuman, and degrading treatment or punishment, by Article 11 of the 1978 Constitution. Therefore, the fundamental

[116] Article 19 Constitution 1978.
[117] Article 12 (4) of 1978 Constitution.

rights section can be read in alignment with the rights recognised by the international treaties in order to protect the rights of victims of TIP.

Sri Lanka has incorporated the ICCPR (International Covenant on Civil and Political Rights) into domestic law through Act No. 56 of 2007. The ICCPR is a significant international treaty that guarantees civil and political rights to individuals. However, this Act has primarily been applied in cases of arbitrary arrest and cases where a person's liberty is disturbed. Despite the recognition of civil and political rights through this Act, it has not been effectively utilized in human trafficking cases. As a result, its impact on protecting the rights of human trafficking victims is questionable and subject to debate.

Sri Lanka has incorporated provisions against forced labour and slavery into its Penal Code, ratifying ILO conventions and Article 8 of the ICCPR. The amendment act no. 16 of 2006 under Section 358A, makes these offences criminal, with a maximum sentence of 20 years imprisonment. This aligns with international human rights standards and aims to deter practices and enforce laws against individuals violating rights through forced labour and slavery.

Section 62 of the SLBFE Act addresses offences where labour migrants are sent overseas in contravention of the Act. It states that anyone who makes or attempts to make an agreement with someone to assist them in emigrating or departing from Sri Lanka for employment or demands money from them is guilty of an offence under the Act. Upon a conviction under this offence, the sentence is a fine not less than one thousand rupees and not exceeding one thousand five hundred rupees and imprisonment of either description for a term not less than twelve months and not exceeding two years. Additionally, anyone who operates a foreign employment agency without a license is also guilty of an offence under the Act. Section 62 of the SLBFE Act seems to be more focused on regulating foreign employment agencies' operations, rather than directly addressing human trafficking concerns. Meanwhile, human trafficking related prosecutions in Sri Lanka are typically conducted under specific provisions of the Penal Code, such as Section 360 (a), (b), and (c).

Further, It appears that Sri Lanka has incorporated the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution through Act No. 30 of 2005. However, the Act has not been operational to date. As a result, despite its incorporation, the effectiveness of the Act in addressing human trafficking cannot be discussed because it has not been implemented or put into practice.

Preventive and Co-operation Mechanisms

In terms of the article 3, 6, 9 and 24 of the Palermo Protocol Sri Lanka has taken several preventive methods to combat human trafficking among female domestic migrant workers. Sri Lanka has set up various government and non-government institutions in collaboration with NGOs to combat human trafficking effectively.

The National Anti-Human Trafficking Task Force (NAHTTF) was established in Sri Lanka with the purpose of enhancing coordination among key government stakeholders to combat human trafficking. The Task Force comprises 22 representatives from various institutions, including the AGs Department, SLBFE, Ministry of Foreign Employment, Ministry of Women and Child's Affairs, CID, and the Department of Labour. This collaborative effort aims to increase prosecutions related to trafficking cases and improve the identification and protection of victims.

As part of its efforts, the SLBFE has set up a counter-trafficking desk and established a hotline and walk-in facility to support migrant workers who claim to have been trafficked. These measures are meant to provide assistance and support to potential victims of trafficking among migrant workers. Sri Lanka has introduced various strategic plans, such as the National Strategic Plan (NSP) and the National Strategic Action Plan (NSAP), aiming to strengthen coordination with NGOs to address human trafficking effectively. The Standard Operating Procedures (SOP) for screening to identify the victims of TIP have been implemented as a guideline to the officials who are engaged in combating human trafficking.

The HTSIB-CIDof the Sri Lanka Police is responsible for handling complaints related to TIP from various government institutions and first responders. Once cases are identified and investigated, the HTSIB-CID refers them to the Attorney General's Department for forwarding indictment and initiate prosecution. In addition, the Women and Media Collective (WMC) collaborates with the HTSIB-CID by updating its database on TIP complaints. This database serves as a valuable resource in tracking and addressing trafficking cases and in improving overall coordination and response efforts.

There is an Anti-Human Trafficking unit established in SLBFE to handle complaints related to human trafficking. Once the unit identifies a case as human trafficking, they forward the file to the HTSIB-CID for the investigation. During the investigation process, CSOs provide shelter and support to the victims. The Women's Bureau, under the Ministry of Women and Child Affairs, operates the sole state-run shelter dedicated to female victims of TIP. This shelter was

established in December 2012 to provide a safe haven and support for women who have been officially identified as trafficking victims.

In cases where potential trafficking victims are identified by CSO service providers, they are referred to other shelters available in the country. These shelters, likely run by non-governmental organisations (NGOs), can accommodate victims of trafficking and provide them with necessary assistance and support.

Further, training programs have been conducted for officers in various Sri Lankan departments, such as the Criminal Investigation Department (CID), Sri Lanka Bureau of Foreign Employment (SLBFE), and the Attorney General's Department, including prosecutors, judicial officers, and other relevant personnel involved in combating trafficking. These training programs were funded by USAID and aimed to enhance the knowledge and skills of the officers to better serve trafficking victims.

As discussed extensively in this section, it is crucial to ensure that Sri Lanka's prevention, prosecution, and punishment methods align with international standards, particularly those outlined in the Palermo Protocol, which addresses human trafficking and related issues. However, compliance with international standards is not solely limited to legal frameworks and law enforcement efforts. Equally important is the enforcement of these measures through a victim-centred approach.

Section 4:

4.1 Is Sri Lanka in Compliance with the Transnational Criminal Law in Relation to Human Trafficking, with Special Reference to the Law Relating to Female Domestic Migrant Workers in Sri Lanka?

This section carefully examines the information gathered in the previous sections to assess Sri Lanka's compliance with transnational laws on human trafficking. The incorporation of domestic laws, as discussed in section 3, serves as the foundation for this evaluation, enabling a precise analysis of the country's adherence to international standards. This section will focus on the most recent figures, including 2022 and 2023.

The importance of having effective legislation in Sri Lanka is underscored by the significant impact of foreign remittances received from domestic migrant workers, particularly those

employed in the Middle East. For years, Sri Lanka has been sending domestic workers to Middle Eastern countries, drawn by the large amount of foreign income flowing back into the country's economy. Therefore, ensuring laws and regulations is crucial to safeguard the rights and well-being of these workers and to maximise the positive impact of their remittances on the country's financial stability.

SLBFE data base provides a comprehensive overview regarding the foreign remittance earned by the country from the Middle East.

Figure 1 - Foreign remittance received in 2010-2022.

Source – SLBFE Annual Statistics Report of Foreign Employment 2022.

Year	Remittances				Middle East as a % of total Remittance
	Middle East		Total		
	(Rs. Million)	(US$ Million)	(Rs. Million)	(US$ Million)	
2010	279,688	2,474	465,372	4,116	60.1
2011	335,201	3,030	569,103	5,145	58.9
2012	428,593	3,358	763,980	5,985	56.1
2013	460,195	3,562	827,689	6,407	55.6
2014	509,487	3,902	916,344	7,018	55.6
2015	512,437	3,769	948,957	6,980	54.0
2016	566,260	3,889	1,054,489	7,242	53.7
2017	565,642	3,711	1,091,972	7,164	51.8
2018	582,719	3,592	1,138,124	7,015	51.2
2019	618,394	3,459	1,200,766	6,717	51.5
2020	680,892	3,673	1,317,007	7,104	51.7
2021	560,989	2,834	1,087,188	5491.5	51.6
2022	640,030	1,936.	1,252,504	3,789.5	51.1

Source – Central Bank of Sri Lanka

According to the report in 2022, a total of 124,091 females had migrated by registering at the SLBFE. This number constitutes approximately 39.89% of the total migrant population.[118] Among these registered female migrants, approximately 30.19% have been identified as lower-skilled migrants seeking opportunities in domestic and housekeeping work. Furthermore, the majority of these migrants fall within the age group of 40-44 years old. These figures highlight the significant number of women involved in the migration process, particularly in lower-skilled job sectors such as domestic work, emphasizing the need for protective measures and

[118] SLBFE Annual Statistics Report of Foreign Employment 2022, Outward labour migration in Sri Lanka, Table 1, http://www.slbfe.lk/file.php?FID=912> accessed 13 July 2023.

effective legislation to ensure their well-being and rights are safeguarded throughout their employment abroad.

Considering the complaints received, it is evident that the rate of complaints is higher among female migrant workers than male migrant workers. Whereas the complaints are exploitative in nature. The following tables testify as to the number of complaints received.

Figure 2 – Number of complaints received in 2022.

Source – SLBFE Annual Statistics Report of Foreign Employment 2022.

Table 55: Migrant workers' Complaints Received by Gender -2022*

Year	Male	%	Female	%	Total
2022	831	18.47	3,669	81.53	4,500

*Provisional Source-Information Technology Division-SLBFE

Table 60. : Number of cases received related to labour exploitations during 2018-2022

No	Nature of Complaint	No of Complaints				
		2018	2019	2020	2021	2022
1	Harassment at the work place, with or without SLBFE registration. (Lack of food, accommodation, wages & medical facilities, Sexual harassment, removal of organs, etc.)	39	42	16	01	11
2	Sending workers from one country to another.(with or without SLBFE registration)	5	1	1	0	09
3	Not allowed to repatriate to Sri Lanka after expiring the employment contract	0	0	0	0	0
4	Not providing promised job or salary.	3	2	2	0	4
5	Recruitment for prostitution. (with or without SLBFE registration)	0	1	1	0	4
6	Sent under age persons for domestic sector employment.	2	2	0	0	1
7	Other	2	1	0	2	7
	Total number of complaints	**51**	**49**	**20**	**03**	**36**

Source: Counter Human Trafficking Unit -SLBFE

Figure 3 - Foreign remittance received in 2010-2022.

Source – SLBFE Annual Statistics Report of Foreign Employment 2022.

As depicted in Figure 3, out of the total 36 complaints received, 18 complaints were reported by female migrants.[119] Notably, a significant proportion of these complaints (34 out of 36) were reported by migrants working in the Middle East.[120] These figures underscore a concerning trend, indicating that female migrant workers employed in the Middle East are at a higher risk of exploitation and facing challenges in their work environment. Therefore, in a situation where female migrant workers, particularly those in the Middle East, are facing exploitation and labour abuses, it is possible to recognise such situations as being in line with human trafficking as explained in section 3.

However, assessing the number of prosecutions and investigations initiated during the period is crucial to determine the effectiveness of complaints lodged with the SLBFE in bringing perpetrators to justice. A rise in prosecutions and investigations indicates a proactive approach by authorities to address human trafficking and exploitation cases in order to comply with international standards.

The HTSIB-CID and police initiated 34 investigations involving 60 suspected traffickers, and has continued 11 investigations of 20 suspects.[121] This increase compared to the previous reporting period, when 16 investigations involved over 63 suspects.[122] During the current reporting period, Sri Lanka has initiated prosecutions against 23 suspects of human trafficking. Among them, 15 for sex trafficking, including procurement (360A), sexual exploitation of children (360B), and trafficking (360C). Additionally, eight suspects have been prosecuted for labour trafficking under Section 360C. In comparison, the previous reporting period witnessed 16 prosecutions. Thus, the rate of prosecution has increased in numbers.

As mentioned in the TIP report of 2023, the judiciary of Sri Lanka imposed four convictions against traffickers. Two of these traffickers were convicted under Section 360A for Procuration, while the other two were convicted for labour trafficking under Section 360C. Additionally, during this period, the courts acquitted 22 suspects. This represents an improvement compared

[119] ibid (n123) SLBFE report Table 61.
[120] ibid (n123) table 62.
[121] US Department of States, 2023 TIP report Sri Lanka, http://www.state.gov/reports/2023-trafficking-in-persons-report/>accessed 01 July 2023.
[122] US Department of States, 2022 TIP report Sri Lanka, https://www.state.gov/reports/2022-trafficking-in-persons-report/sri-lanka

to the previous year, which saw convictions of only three sex traffickers under Section 360A.[123] As part of the sentencing, one trafficker was ordered to pay a fine or face six months imprisonment, while another trafficker received a one-year prison sentence and was also ordered to provide restitution to the victim. [124]

One could argue that, as discussed in-depth in section 3, Sri Lanka has defined human trafficking as a separate offence in line with the Palermo Protocol. However, in practice, as indicated in the TIP report, there is a greater tendency to forward indictments under Section 360A and 360B rather than Section 360C. As a prosecutor vested with the power to prepare and sign indictments on behalf of the Attorney General in Sri Lanka, I will comment that the reason for this is that proving the elements of trafficking under Section 360C is challenging, particularly regarding the perpetrator's *mens rea* or knowledge. Since Section 360C charges only require proving the *actus reus*, it is comparatively easier to establish compared to trafficking.

When charges are forwarded under Section 360C of the Penal Code, the non-cooperation of the victim significantly affects prosecutors' ability to proceed with the case. The reason behind this lies in the fact that when these particular victims return to Sri Lanka as migrant workers, they are urgently seeking to reunite with their families to overcome the psychological impact they endured as a consequence of the crime. In Sri Lanka, almost all female domestic migrant workers migrate due to poverty with the expectation of providing a better life for their families, including their children. Therefore, the unexpected and traumatic experiences they face while abroad lead them to prioritize rejoining their families over engaging in lengthy legal proceedings. As a result, the reluctance of these victims to cooperate poses a significant challenge for prosecutors in building a robust case under Section 360C, where establishing their testimony and collaboration is vital to the successful prosecution of human trafficking cases.

These social and cultural backgrounds create loopholes for injustice against the victims. On the other hand, even in cases where the accused is convicted under Section 360C, the judiciary has imposed lenient sentences that could indirectly encourage perpetrators. For instance, in 2022, three convictions were sustained, and three of the accused were ordered to pay a fine or serve three months' imprisonment. However, it's important to note that these individuals were

[123] ibid (n 126).
[124] ibid (n126).

charged under Section 360A. In 2023, the courts imposed sentences of a fine or six months' imprisonment in one case and one year of imprisonment in another, despite the statutory penalty for the offence of trafficking in Sri Lanka being a term of not less than two years and not exceeding twenty years, which also applies to Section 360A offences. The reason for imposing a minimum mandatory sentence in the Sri Lankan Penal Code is the recognition of the gravity of the offences. Furthermore, Section 303(2) of the Amendment Act No. 47 of 1999 of the Criminal Procedure Code states that a court shall not make an order suspending a sentence of imprisonment if a mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed. Hence, the verdicts delivered by the judiciary are in contrast with Section 303 (2) of the Sri Lankan Criminal Procedure Code. Additionally, it raises questions as to whether the punishments imposed by the judiciary, as recognised in Article 11 of UNTOC, can effectively act as a deterrent or whether they may create a more unsafe environment for the victims.

Further, in the context of the definition provided, "serious crime" refers to conduct that constitutes an offence punishable by a maximum deprivation of liberty of at least four years or a more severe penalty.[125] The discrepancy between recognising human trafficking as a serious crime and imposing mandatory minimum imprisonment of two years raises doubts about Sri Lanka's commitment to addressing human trafficking effectively. By not aligning the penalties with the gravity of the offence, it may create the perception that human trafficking is not being treated as a serious crime in practice. Moreover, the recognition of slavery and forced labour as criminal offences[126] without the inclusion of a mandatory minimum sentence opens the possibility for the judiciary to exercise discretion in imposing suspended sentences or other lenient penalties.

As discussed in section 3, the establishment of the National Authority for Victims' Protection fund aims to assist and protect victims of crimes, including domestic migrant workers who are often vulnerable to trafficking. However, it appears that victims, especially those suffering from financial constraints, find it challenging to come to court due to transportation costs. While the authority has the power to provide financial assistance to those in need, it is concerning that thus far, none of the victims have received such support.

[125] Article 2 (b) UNTOC.
[126] Section 358 A of the Penal Code.

There could be several reasons for this discrepancy. It is possible that victims are not aware of the available financial assistance or that the authority's effectiveness in implementing its provisions needs improvement. Despite substantial efforts to incorporate the law into the domestic system, the practicality of the process falls short of meeting the purpose outlined in the Palermo Protocol to assist and support victims.

In 2022, Sri Lankan diplomatic missions allocated 100 million LKR ($275,480) for shelters and safe houses,[127] but these facilities proved inadequate to meet the needs of trafficking victims. Observers reported substandard conditions, including insufficient food, unhygienic living conditions, and limited legal assistance. During the reporting period, Sri Lankan missions abroad provided assistance to 134 migrant workers, a decrease from the 226 assisted in the previous period.

Furthermore, in line with international mechanisms to provide assistance to victims, the SLBFE has established a mechanism to provide training to migrant workers. This training includes language proficiency assistance, legal knowledge, and screening for emotional maturity, recognising that the distance from home and the challenges of working abroad can have a significant mental impact on female workers.

However, diplomats and other officers are also offering training in collaboration with USAID. However, there have been cases, such as that of Rizana Nafeek, which highlight shortcomings in the system. Rizana Nafeek was employed as a domestic worker in Saudi Arabia for only two weeks when her employers' 4-month-old baby died under her care. Investigations revealed discrepancies in her age, with her birth certificate showing her year of birth as 1988, while her passport listed it as 1982. Such falsification of documents by labour recruiters to meet age requirements for overseas jobs is a common issue faced by migrant workers. Rizana Nafeek was first arrested in 2005, but did not have access to legal counsel until after she was sentenced to death in 2007. It came to light that she had stated her age as 23, while she was actually only 17 at the time of her arrest. Following the incident, Sri Lanka increased the minimum age for female domestic workers travelling to Saudi Arabia to 25. However, this case raises questions about the effectiveness of screening procedures by the SLBFE and the failure of diplomats and the government to provide adequate assistance to Rizana Nafeek. This highlights the

[127] TIP report 2023.

importance of further improving support mechanisms and legal assistance for migrant workers to ensure their rights and well-being are adequately protected while working abroad.

To address these exploitative practices, in which recruitment agencies are involved, the SLBFE has established an online system for migrant worker registration and complaint resolution. In 2022, the SLBFE compensated migrant workers with 38 million LKR ($104,680) for fees exceeding the permitted limit. The government also takes stringent action against errant agencies, cancelling licenses and blacklisting 57 agencies. To prevent corrupt recruitment practices, guidelines have been issued, mandating changes to licensing processes for recruitment agencies and sub-brokers. These measures aim to improve oversight and accountability within the recruitment industry and protect the rights and financial interests of migrant workers.[128] Although legal assistance was extended to workers registered with the SLBFE, the policy was revised to allow access to resources from the worker's welfare fund for all migrant workers, irrespective of their registration status. However, the ignorance of migrants regarding these facilities has not been resolved thus far by Sri Lanka. For example, most of the migrant workers reported from Central and North Central provinces. But to lodge a complaint, they must travel to SBLFE, which is based in Western Province. Therefore, the chance that migrants volunteer to lodge a complaint by coming such a distance is questionable.

Additionally, the SLBFE operated a transit shelter near Colombo airport to aid returned migrant workers who experienced abuse while working abroad. However, still, the malpractices of the recruitment agencies are in place beyond the implementation of laws. In terms of the training provided to government officials to educate on human trafficking, and even if the SOPs are provided with the guidelines, the lack of competency of officers has led to failure in screening the victims of TIP. As a prosecutor, I have encountered some instances where some victims have been charged under some other laws despite being identified as a victim. This has led to instances where victims have been revictimized and made vulnerable even during court proceedings.

Moreover, even though recordings of evidence through video/audio link using technology is recognised in Sri Lanka, considering the infrastructure facilities provided to the court houses, there are no facilities to play recorded evidence in the courts. In some instances, when we need to record evidence in video, we must get the assistance of a service provider, which will cost a

[128] TIP report 2023.

huge amount to bring down equipment to the court. Thus, even if the law is incorporated, it has been difficult to implement.

Sri Lanka is placed in Tier 2 in the TIP report due to its significant efforts in addressing human trafficking but with certain deficiencies that still need to be addressed. Tier 2 indicates that a country doesn't fully meet the minimum standards for combating human trafficking set out in the TVPA but is making significant efforts to do so. Countries in Tier 2 are making efforts to improve their anti-trafficking measures, such as enacting legislation, increasing prosecutions, providing support for victims, and raising awareness. However, they may still have shortcomings in certain areas, such as inadequate victim protection, insufficient enforcement of anti-trafficking laws, or a lack of effective measures to address certain forms of trafficking. These shortcomings are visible in Sri Lanka as well.

Section Five

Conclusion

The findings from this research have shed light on the question, is Sri Lanka in compliance with transnational criminal law relating to human trafficking, with special reference to the law relating to human trafficking among domestic migrant workers Sri Lanka. section 2 provided an overview of transnational crimes and transnational criminal law, distinguishing human trafficking from slavery and smuggling. It further discussed human trafficking in the transnational context, focusing on the main conventions, UNTOC, and the Palermo Protocol. These conventions outlined definitions, protection, prevention, and punishment methods related to human trafficking.

Sri Lanka, as a country with a dualist system, needed to incorporate international law into its domestic system to give rise to these conventions. Section 3 explored how Sri Lanka ratified several conventions to combat human trafficking among female domestic migrant workers. The nature of incorporation discussed in correspondence with the legislation demonstrated considerable efforts to align with transnational recognition.

It is evident that the Sri Lankan legal framework, as discussed in section 3, has made impressive efforts to incorporate international standards in combating human trafficking. However, when it comes to implementation, it has fallen short of the purpose established in the Palermo Protocol to prevent, protect, prosecute, and punish trafficking.

The failure lies in the lack of involvement and knowledge of the judiciary in this area, leading to a fundamental flaw in the system. Recognising the definition of a crime is insufficient; the effective protection and implementation of rights is a mandatory need in combating human trafficking to fulfil the purpose of establishing laws as recognised by the Palermo Protocol.

In this regard, it is important to see that the incorporated law has failed to combat the issue of trafficking effectively while protecting the rights of victims. Thus, it should be stressed that Sri Lanka is not in compliance with transnational law relating to human trafficking, especially in relation to human trafficking among female domestic migrant workers. The gap between the declared law and its practical application highlights the need for further improvement in ensuring effective protection and implementation of rights to combat human trafficking in Sri Lanka.

Dundee Student Law Review, Volume XI

DOI: https://doi.org/10.20933/100001428

The Great War and

Parliament House, Edinburgh

Dr. Robert Shiels[1]

Introduction

The Great War is said to have dramatised the transition from the Victorian and Edwardian eras to the 1920s, and, as a watershed, it emphasised that things would never be the same again: it was the boundary between two different societies.[2] Not least of the remarkable consequences of the war was the price in human life: the scale of the war losses for Scotland was perhaps 74,000 individuals.[3] The effects of war were widespread and generally immediate and an economic turning point.[4] The effects of conflict came to be experienced everywhere: 'the post war world was in large part a world paralysed by grief'.[5]

Notwithstanding a major war over five years, the legal systems in Great Britain and Ireland had to function: life went on amidst war even if it was not that experienced previously. Many lawyers left to go to serve in the Navy, the Army or in government service, known as 'national work'.[6] There was certainly suitable work for lawyers: 'victory rested on a prodigious administrative achievement'.[7] Some lawyers stayed at home and kept the legal system viable. The effect of the Great War on Parliament

[1] MA, LLB, University of Dundee; LLM, PhD, University of Glasgow.
[2] H. Perkin, *The Rise of Professional Society: England since 1880* (Routledge, 1989), 224-5.
[3] E.A. Cameron, *Impaled Upon A Thistle: Scotland Since 1880* (Edinburgh University Press, 2010), 121, gives the figure suggested by the 1921 Census.
[4] C.M.M. Macdonald and E.W. McFarland (Eds.) 'Scotland and the Great War' (1999) Chap.1, 'The Scottish Economy and the First World War', 11.
[5] J. Nicholson, *The Great Silence: 1918-1920 Living in the Shadow of the Great War* (John Murray, 2009), 5.
[6] R.K. Hannay, *The Society of Writers to His Majesty's Signet* (T & A Constable, 1936), xviii.
[7] D. Stevenson, *With Our Backs to the Wall: Victory and Defeat in 1918* (Penguin, 2012), xvii.

House, Edinburgh remains ephemeral. Perspective is perhaps only possible now as intense personal involvement can and does lead to distortion.[8]

One study of manpower resources concluded that the available contemporary sources do not lend themselves well to statistical analysis of Scotland's contribution in the Great War.[9] For example, some names appear on several memorials, demonstrating that individuals were often remembered by different communities, and not just their place of birth or usual residence.[10] It is not impossible then that the loss of lawyers, and court employees were not listed in legal sources but merely left for remembrances elsewhere. This short study may be considered at best impressionistic, and probably statistically naïve.

The Legal Profession

The view of one Scots lawyer was that 'the shining crystal bowl was smashed in pieces by the outbreak of war on 4 August 1914'.[11] Assessing the full effect of the war on the legal profession in Scotland would be a major project; in the meantime, consideration is given to the supreme courts in Parliament House, just off the High Street, Edinburgh. This was the centre of the Scottish legal system, and a community composed of lesser communities.[12] The loss of manpower there was often that of qualified *and* practising lawyers.[13]

To assess, even superficially, the nature and extent of the effect of the Great War the starting point might reasonably be the lists of lawyers in the pages of *The Scottish Law List*.[14] The front page of the *first* edition had the subtitle of *A Legal Almanac Directory and Remembrancer* and it was asserted there that it had been corrected to 1 January 1848. Published annually thereafter, the law list provides perhaps the easiest guide to the membership of the profession, and like all formal lists it captures a brief moment of administrative details which might provide a base line of sorts.

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[8] A. Gregory, *The Last Great War: British Society and the First World War* (Cambridge University Press, 2008), 1.
[9] Patrick Watt, 'Manpower, Myth and Memory: Analysing Scotland's Military Contribution to the Great War' (2019) 39(1) *Journal of Scottish Historical Studies* 75-100.
[10] ibid, 100.
[11] J.A. Lillie *Tradition and Environment in a Time of Change* (Aberdeen University Press, 1970), 72.
[12] John Finlay, *The Community of the College of Justice: Edinburgh and the Court of Session, 1687-1808* (Edinburgh University Press, 2012), 251.
[13] Many of the recruits went straight from school: see e.g., J. Lewis-Stempel, *Six Weeks: The Short and Gallant Life of the British Officer in the First World War* (Orion Books, pb 2010), chapter 1.
[14] *Index Juridicus or The Scottish Law List* (Wm. Blackwood and Sons, 1848).

By 1914 the Scottish legal profession had referral Bar in the Supreme Courts in Edinburgh (the Court of Session and the High Court of Justiciary), all members of which had the nomenclature of 'advocate' and all were members of the Faculty of Advocates. There were also instructing lawyers whose title varied: some were 'solicitors', others 'solicitors in the Supreme Courts of Scotland', there were 'writers' and others were 'procurators', locally there were 'advocates in Aberdeen', and some who were probably content with the title of 'law agent'.[15]

Business at Parliament House

The demographic problem arising from the Great War has long been known but perhaps the detail has been missing.[16] While the business for the profession of advocate had been flourishing at the start of the twentieth century, the volume of work had declined in the years leading up to 1914. Thereafter, in the inter-war years the courts were less busy due to the Great Depression. Such a superficial explanation has no regard to the effects of the Great War.

The various editions of *Index Juridicus or The Scottish Law List* to 1914 provide for each year, all members of the Faculty of Advocates but not all these members were either in practice at all or were available to instruct. Of the former, some had retired or never really been in practice at the Bar: 'many gentlemen are admitted solely for the purpose of becoming members of a genteel profession - the others are the working members'.[17] Appointment to a judicial or academic position in Scotland or elsewhere or engagement in some other occupation meant that the number of those in practice was smaller than the lists suggested.

It has never been easy to determine how many people entered the Faculty of Advocates in order to practice and how many did so for other reasons.[18] One way of quantifying the number of advocates in practice is to note those who had a particular clerk specified against their name: to have a clerk is to indicate *prima facie* an availability to accept instruction.[19] Not to be in practice and therefore not being available to take instructions did not necessarily mean that an advocate was without employment: there

[15] Lord Macmillan, *A Man of Law's Tale* (Macmillan, 1952), 35-7.
[16] D.M. Walker, *A Legal History of Scotland: Volume VII The Twentieth Century* (W. Green, 2004), 527-8: some of the description there seems, as it is without sources, to be an example of oral history.
[17] (1860) 2 *The Scottish Law Journal* 25. For an example of non-practising advocates see the obituary at (1916) 31 *Scottish Law Review* 138: 'he ceased attending at Parliament House some years ago'.
[18] N.T. Phillipson, 'Lawyers, Landowners and Civic Leadership of Post-Union Scotland' 171, 175 in Sir Neil MacCormack (ed.) 'Lawyers in Their Social Settings' (W. Green, 1976).
[19] Walker (n. 15), 527

was no restriction on an advocate engaging in collateral occupations, paid or unpaid, provided that he or she was not employed by or in partnership with a solicitor.[20] Such clerks dealt with the business of several advocates, but that did not negate the possibility or probability that there were other clerks who were employed by individual senior counsel and who were thus not listed for the information of instructing solicitors at large.[21] Post-nominal letters for a few advocate's clerks suggest that they were legally qualified as law agents.

At the outset of the twentieth century the 'correct designation' of lawyers, other than advocates, was 'law agent'.[22] For solicitors, as known today, *The Scottish Law List* contained several long lists of Certified Practitioners being those who obtained duly stamped certificates during the November of the year before the year of publication. This certification was a requirement of the Stamp Act 1891 (c.39), section 43. Not all solicitors needed then or now to be members of either *the Society of Writers to the Signet* or *the Society of Solicitors in the Supreme Court of Scotland,* but many were members although not in practice in the Edinburgh area.

By 1914 there was a system of demarcation: access to advocates as the Supreme Court pleaders was through solicitors who might be their clerks. This worked both ways as advocates could not take business directly from the public. It has to be said, however, that an advocate might be in practice and not receive much work: H.P. Macmillan (later Lord Macmillan of Aberfeldy) was called to the Bar on 5 November 1897 and received his first brief four days later, from an uncle who was a solicitor. His next brief was three months later.[23] This was a period when the Court of Session was 'in a high state of prosperity and efficiency'.[24]

The effects of war in this system of demarcation was both particular and general: the loss of specialists in Supreme Court pleading had a consequence for all of the solicitors branch of the legal profession, as throughout Scotland all solicitors may have had recourse to the specialists. Conversely, the loss of a solicitor in business other than in Edinburgh might end or disrupt the flow of a certain type of work from a particular geographical area to advocates.

[20] Walker (n. 15), 529
[21] Walker (n. 15), 536
[22] Walker (n. 15), 544 but no reason or source is cited in support of that purported correctness: it is likely that the origins lie in the law of principal and agent and the work of the lawyer in immediate contact with the client.
[23] Macmillan, (n. 14), 31, 37-38.
[24] Macmillan, (n. 14), 44.

The table annexed to this paper is a list of King's Counsel, advocates, advocates clerks and solicitors (in the two Parliament House societies). A straight arithmetical total of each group has been produced for the ten years before and after the Great War as well as the war years. The inherent problems with this may be specified easily: while it might be reasonable to assume that the legal press would record the death of a lawyer for the information of others in the business, that was not necessarily universal: one solicitor was missing for some time before he was declared to be missing and assumed to be dead.[25] As with all administrative lists, a time-lag might exist between a death and removal of the appropriate name.

The state of business of Parliament House at the start of the twentieth century was said to have been flourishing. Not everybody flourished: 'Penury and affluence are more rudely contrasted at the Bar than anywhere else - or at least were in those days before 1914'.[26] The smaller matters of Court business were handed to very junior counsel to deal with by solicitors with something of reluctance for there was little guidance from books; and solicitors and the Parliament House clerks had the greater competence of experience to direct them. 'The heavier litigation – and there was a great deal of that - was consequently in the hands of a few established junior counsel and an even smaller number of seniors. To reach these ranks was the stamp of success – present and in prospect. Only then did one make a living of it - and at what price, but a price which those fit to pay it very gladly paid as for a sense of high-powered achievement realised day by day in an abandonment of disciplined effort. So men of distinguished capacities were attracted to the profession and their availability further set success apart as on a pedestal or pinnacle'.[27]

Lawyers as Soldiers: 1914-1915

The enthusiasm of some gentlemen to be part-time soldiers was nothing new: in the 1860s Sir Henry Campbell Bannerman had had 'a brief and not very serious experience of military matters in the 1st Lanarkshire Volunteers, as the Captain of a Company manned by staff from the family firm.'[28] In the 1880s David Lloyd George had joined the Volunteers and he was 'a most unsatisfactory soldier'.[29] On 18 May 1859, in the aftermath of the Indian Mutiny and the Crimean war, the Faculty of Advocates resolved to become members of the Volunteers and 110 of their number formed No. 1 (Advocates)

[25] (1917) *Scots Law Times* (News) 114.
[26] Quote from Macmillan (n. 14) in Walker (n. 15), 527.
[27] Lillie, (n. 10), 74.
[28] J. Wilson, *CB: A Life of Sir Henry Campbell Bannerman* (Constable, 1973), 48.
[29] Roy Hattersley, *David Lloyd George: The Great Outsider* (Little, Brown Group, 2010), 21.

Company of the 1st City of Edinburgh Rifle Volunteers. That unit ended when the numbers fell to 25. At the time of the Boer War Faculty members felt sufficiently enthused about events to list all who had been original members of the Volunteers, those who were living members of Faculty who had been in the Militia or Volunteers in the past, and the present members of Militia, Yeomanry, or Volunteers. A list was given of Faculty members then serving in South Africa.[30]

Similarly, the WS Society in 1900 had sought to find the best means to show sympathy with and give support to the Volunteer movement.[31] Many Scots lawyers volunteered and departed for war which they soon experienced.[32] Some lawyer-soldiers were experienced volunteers: one advocate had served as a militia officer prior to his going to the Boer War.[33] Another, James Ferguson KC, had served in the volunteers for many years and had rejoined aged about 57 years on the outbreak of war in 1914.[34]

In October 1914 the initial enthusiasm that became apparent throughout the United Kingdom, extended to Parliament House: 'chivalry, self-sacrifice and heroism were the catchwords of those early days of the war and there were very few people who did not respond to the call'.[35] The local campaign to raise an Edinburgh battalion, accordingly, 'received every encouragement. From the two societies representing the solicitors' branch of the profession, the WS and SSC societies sent out 'whips' full of noble and patriotic sentiments. The legal profession just now for young men represents a blind alley, and a depletion of office staff is the natural result'.[36]

The enthusiasm for participation in the war was most obvious with the offer by Sir George McCrae (formerly a Member of Parliament for Edinburgh) to raise a battalion for service.[37] That was done swiftly and it became the 16th Battalion, The Royal Scots. The historian of the battalion has enumerated the occupations of the original members by civilian occupation: of the officers there was one advocate,

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[30] 'Notes from Edinburgh' (1900) 16 *Scottish Law Review* 76-80.
[31] Report by *The Committee of the WS Society as to the Volunteer Movement* dated 5 February 1900 It was noted, at 4-5, that part of the difficulty then was that companies composed exclusively of any particular society or profession were not then encouraged as they had been in earlier times
[32] See (1900) 7 *Scots Law Times* (News) 169, 173 and 181; (1900) 8 *Scots Law Times* (News) 9 and (1901) 9 *Scots Law Times* (News) 25, 149, 157 and 169 for biographies of Scots lawyers, photographed in uniform, who went to South Africa.
[33] 1917 *Scots Law Times* (News) 29.
[34] 1917 *Scots Law Times* (News) 49.
[35] T. Royle, *The Flowers of the Forest: Scotland and the First World War* (Birlinn, 2006), 25 and 246- 251 for the arrangements for those who protested at having to serve in the war.
[36] (1914) 30 *Scottish Law Review* 226.
[37] J. Alexander, *McCrae's Battalion: the Story of the 16th Bn. Royal Scots* (Mainstream, pb 2004), 72.

two apprentice solicitors, two law clerks, three solicitors, and one Writer to the Signet. Amongst the other (non-officer) ranks there were two law apprentices, eleven law clerks and seven solicitors.[38]

By November 1914 it was noted that over 40 members of the Faculty of Advocates had gone away to some branch of the armed forces. Apart from the occasional service uniform in Parliament House there was 'little suggestion that outside our doors this city is more or less a barrack town full of armed men'.[39] The number of advocates who were absent on military service was revised up to 66 in a published list and 21 of them more or less enjoyed lucrative practice.[40] The place was noted as being 'not so lively as it was wont to be. In fact, when the several Courts have started each day, and such counsel as are employed are inside the Court rooms, the aspect of the great hall is decidedly depressing'.[41]

Lawyers as Soldiers: 1915-1916

The names of advocates on naval or military service were published in a provisional list in the *Scots Law Times* of 5 December 1914: there were 67 advocates and 12 intrants.[42] It had been noted by contemporaries that a number were serving in the ranks but it was said that those 'who appear in the list as privates are wisely content to bide their time till commissions come their way, and they have certainly set a good example by giving their services at once in the ranks rather than making the holding of a commission a *sine qua non* of their joining the forces'.[43]

Within a short time of the publication of the list of serving advocates and intrants, it was reported that commissions had been granted to other members of the Faculty of Advocates. It was suggested that 'when hostilities are over, it is pretty safe to say, the peaceful career of a lawyer will not appeal to many who, having come safely through a time of adventure and excitement will prefer to keep to the profession of arms'.[44]

The historian of the SSC Society recorded that as muster lists were not available it was difficult to say which members of the Society were called up as existing members of the Territorial Army and which

[38] ibid, 290-1. Perhaps, the battalion is best remembered for the thirty professional footballers who joined it.
[39] (1914) 30 *Scottish Law Review* 246.
[40] (1914) 30 *Scottish Law Review* 262.
[41] (1914) 30 *Scottish Law Review* 246.
[42] (1914) *Scots Law Times* (News) 138.
[43] (1914) 30 *Scottish Law Review* 246.
[44] (1915) 31 *Scottish Law Review* 9.

joined out of spontaneous patriotic duty. The report of the Widows' and Orphans Fund for 1915 showed that within nine months of the commencement of hostilities eleven of the fund's contributors were on active service, six of them bachelors and five married men.[45]

Matters from early to mid-1915 started to take on a different hue with a consequential and bitter note appearing: 'War means waste – waste of accumulated wealth, waste of fruitful energy, and, most serious of all, waste of hopeful manhood. The last is being felt in all businesses and employments, and in proportion to its numbers, not least in the legal profession. The profession responded loyally to the country's needs, and the war is taking its heartless toll'.[46]

Possibly the first formal intimation in the professional press was that of the death of an infantry officer on 13 July 1915 who had been a partner in a firm of solicitors in Motherwell.[47] Thereafter, many other comparable losses were recorded in the trade press but as the focus of attention is Parliament House, Edinburgh notice here is restricted to solicitors by whatever name then preferred who were most probably associated with the Supreme Courts. Two other solicitors, both Writers to the Signet in Edinburgh, were killed in action a short time later.[48] In October 1915 an advocate died of wounds.[49]

The exodus from 'PH' meant that in 1915 around the first anniversary of the outbreak of war there were estimated to be about 60 advocates *left in practice* and of eligible age then to serve.[50] It was also noted that four King's Counsel had enrolled as special constables and five others had become members of what were described as 'Volunteer Corps'.[51] In early 1916, it was announced that there were to be no appointments of King's Counsel made in Scotland during the period of the war. An anonymous commentator thought then that few of those juniors who had gone on military service were likely to be aspirants for silk for several years to come. Further, there were then more seniors than there was suitable work for them.[52]

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[45] J.B. Barclay, *The SSC Story: 1784-1984* (The Edina Press, 1984), 139. This is the history of the Society of Solicitors in the Supreme Courts of Scotland.
[46] (1915) *Scots Law Times* (News) 53.
[47] (1915) 31 *Scottish Law Review* 176.
[48] (1915) 31 *Scottish Law Review* 178.
[49] (1915) 31 *Scottish Law Review* 255-6.
[50] (1915) 31 *Scottish Law Review* 238.
[51] (1915) 31 *Scottish Law Review* 239.
[52] (1916) 32 *Scottish Law Review* 21-2.

A published note of 31 March 1916 suggested that 'the legal profession can claim a preponderance of first hand patriotism' because of the 'vast number of active participants in the great struggle who are members of the profession'.[53] Such patriotism doubtless took on a different perspective when Edinburgh citizens saw a Zeppelin that had flown across Leith and Edinburgh on the night of 2/3 April 1916 and there dropped a variety of bombs and incendiary devices.[54] The injuries to members of the public in the Grassmarket led to the death of one of their number, and others elsewhere.[55] The physical threat to Parliament House was real, and the absence of direct damage was probably a matter of chance.

The losses had reached the point then that five out of the thirteen Court of Session Judges had lost a son, 'and the average is lamentably high'.[56] While on the Bench, Lords Dewar, Salvesen, Cullen and Ormidale had all lost a son in war and Lord Mackenzie had a son who had gone missing shortly after the commencement of the war.[57] Lord Kingsburgh had, after he had retired, lost a son.[58] So too had Lord Salvesen.[59] Lord Ashmore, the first Judge appointed after the Great War, had also lost a son.[60] There were deaths of sons amongst members of the shrieval bench.[61]

The death toll was relentless: in July 1916 killed in action were an advocate and a Writer to the Signet.[62] In August 1916 there was intimation of the death of an advocate.[63] In October 1916 there was intimation of a Writer to the Signet in Edinburgh.[64] Further in November 1916 there was intimation of the death in action of a Writer to the Signet who was a partner in an Edinburgh firm, and an advocate.[65]

The effect of the departure of those in practice and the deaths was beginning to be felt seriously: from 12 May 1916 it was noticeable that 'the Faculty of Advocates has been pretty well drained of members capable of bearing arms or at least wearing uniform... good juniors cannot be said to be actually scarce.

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[53] (1916) 32 *Scottish Law Review* 96.
[54] *The Scotsman* newspaper, Tuesday April 4, 1916.
[55] National Archives of Scotland: HH 31/21/8: Chief Constable's Report.
[56] (1916) 32 *Scottish Law Review* 96.
[57] There are other references to the sons of lawyers: see Barclay, (n. 43), 139; the practical point may be a concern about the heirs or successors to family businesses.
[58] N. Macdonald, *Sir John Macdonald: Lord Kingsburgh* (Lumphanan Press, 2010), 202-3.
[59] H.F. Andorsen (Ed.), *Memoirs of Lord Salvesen* (Chambers, 1949), 104; and a nephew, an Army Officer, was killed in a railway accident, ibid, 106.
[60] 1920 *Scots Law Times* (News) 65.
[61] E.g., Sheriff T.A. Fyfe lost two sons killed in the war: (1928) *Scots Law Times* (News) 81.
[62] (1916) 32 *Scottish Law Review* 189.
[63] (1916) 32 *Scottish Law Review* 215-6.
[64] (1916) 32 *Scottish Law Review* 239.
[65] (1916) 32 *Scottish Law Review* 293-4.

Their ranks are, of course, thinned down, so much so that work which used to be scattered is being offered to a select few, which leads to papers having frequently to be returned, whereby certain young counsel who might have otherwise have waited for years for a chance are receiving substantial crumbs swept from the tables of their busier brethren. There are now chances going which, but for the war, could not have been hoped for...'.[66]

Within a month or so it was rather written in a contradictory way that if the war 'lasts much longer there is one national institution in Scotland which will require to have its constitution revised, and that institution is the Court of Session. At present the fact is patent that there is not enough work to justify the presence of two-thirds of the bench and the officials, and if economy is to be practiced, the greater part of the Court premises ought to be closed...'.[67]

It was said, sadly no doubt; 'Parliament House has now no population worth speaking about...'.[68] The Great Hall had been taken over for office work 'of national importance' and the art work moved to a place of safety because of the threat of bombs from Zeppelins.[69] They were returned after about three years.[70] The office work in the Great Hall was later moved and the staff soon missed as the 'spectacle of real honest toil in progress in Parliament House would have kept away the feeling of depression which the empty aspect of the place engenders.'[71]

Lawyers as Soldiers: 1916-1917

It was said on 28 February 1917 that the Court of Session 'has been drained pretty well dry of its available manhood of military age, and now, if National Service is to take many volunteers [*sic*] from the remaining population of Parliament House, some shutting down of a portion of the establishment will be necessary. The population which does remain is not a large one, and any reduction of it would mean that difficulty in finding counsel in sufficient numbers to attend to the business being disposed of from day to day would necessarily be experienced. Even with the existing shortage of work in the Outer House, steady employment is yet being found all over for about a score of counsel daily...'.[72]

[66] (1916) 32 *Scottish Law Review* 140.
[67] (1916) 32 *Scottish Law Review* 165, and 241.
[68] (1916) 32 *Scottish Law Review* 165.
[69] (1916) 32 *Scottish Law Review* 216.
[70] (1919) *Scots Law Times* (News) 18.
[71] (1916) 32 *Scottish Law Review* 267.
[72] (1917) 33 *Scottish Law Review* 79.

By April 1917 three Writers to the Signet in Edinburgh had been killed in action. In May 1917 there was notice of the deaths of two advocates.[73] In July 1917 a Writer to the Signet in an Edinburgh firm died in action.[74] Death during military service was noted for two partners from separate Glasgow firms.[75] An advocate was killed in action in August 1917.[76]

Lawyers as soldiers: 1917-1918

In January 1918, the Court of Session, it was noted: 'is a most conservative institution and even the existence of the present great war [*sic*] is not allowed to interfere with the maintenance of the track beaten down by our forefathers. Agents without assistants are kept in Court until 4 p.m. attending to their cases, and their indoor work must be done as best as can be managed in the evenings. Counsel are scarce, yet all the motion rolls and single bills are disposed of in seven Courts simultaneously'.[77]

By April 1918 the complaint was that the Court of Session 'already considerably depleted of counsel, is certain to be still harder hit by the raising of the age limit for service with the forces to fifty-one, the number of juniors in active practice who come into the net being liable to well-nigh exhaust the supply presently available, while of seniors there are four eligible, of whom one has been for some time past holding military rank, while another has just intimated his acceptance of a non-combative post in London... The scarcity of seniors has for some time past been acutely felt, and the withdrawal of any more will make the shortage very awkward'.[78]

The view was that the solicitor branch was less likely to have numbers called up as an official announcement has been made that 'the stage had been reached at which the number of solicitors and their skilled clerks should not be further depleted as there were more aged men to be found in the solicitors branch than at the Bar'.[79] To a large extent the passage of time that year lessened the problem:

[73] (1917) 33 *Scottish Law Review* 159.
[74] (1917) 33 *Scottish Law Review* 217.
[75] (1917) 33 *Scottish Law Review* 245.
[76] (1917) 33 *Scottish Law Review* 273.
[77] (1918) 34 *Scottish Law Review* 23.
[78] (1918) 34 *Scottish Law Review* 128.
[79] (1918) 34 *Scottish Law Review* 128-9.

with Armistice in November 1918, and a Royal visit, some life was infused into a 'decayed legal world'.[80]

The year 1918 had been grim for the legal profession: an advocate with two years seniority was killed in action as was another with thirty years.[81] Notification early in 1918 was made of the death of a Writer to the Signet who had been missing in action for nine months.[82] An advocate died in Edinburgh of an illness contracted on active service in France.[83]

Lawyers as Soldiers: 1918-1919

When the war ended lawyers returned at different times from one another, to where they may have left off: the members of the Faculty of Advocates who returned to practice were able with the authority of the Dean of Faculty to intimate their availability for consultation.[84] Solicitors individually intimated their return.[85] The *Scottish Law Review* commented that 'the war cloud' that had hung over Parliament House for four years had drifted away.[86]

Walking back and forward in the Great Hall in Parliament House was a very well established legal habit: '"The Floor" was a great forum. Decisions involving new applications of legal principle were questionably discussed, and to say that a case was regarded on The Floor as bad law was enough to detract from its value as a guide or precedent. The merits of leading and rising counsel, the latter especially, were expertly assessed, and on the merits and peccadillos of judges and divisions equally so, especially of newcomers to the Bench whose qualities of intellect and temperament as shown at the Bar were not always without re-education assets as shown on the Bench'.[87]

By January 1919 the numbers in Parliament House were well nigh up to normal standard.[88] Before the war it had been an extremely busy place.[89] However, afterwards there seemed to be 'some brooding

[80] (1918) 34 *Scottish Law Review* 280.
[81] (1918) 34 *Scottish Law Review* 21.
[82] (1918) 34 *Scottish Law Review* 49.
[83] ibid.
[84] See (1918) *Scots Law Times* (News) 78; (1919) *Scots Law Times* (News) 6, 9,17, 22, 25, 30, 41, 54, and 90
[85] E.g. (1919) *Scots Law Times* (News) 10, 25 and 30.
[86] (1919) 35 *Scottish Law Review* 18.
[87] Lillie, (n. 10), 70-1.
[88] (1919) 35 *Scottish Law Review* 48.
[89] Lillie, (n. 10), 75.

influence still hanging over us which undoubtedly must be ascribed to the war. There is no animated conversation, nor are there any hearty outbursts of laughter in the great hall such as used to be pleasant features of the place, and though daily there are plenty of men under the roof of the building, they seem to have a habit of hiding themselves in odd corners, and as everybody now lunches at the same hour there is a time in the day when not a soul is to be seen going about, a thing unknown a few years back'.[90]

Moreover: 'one can readily pick out the active service men from the returned men who have been absent on civilian duties, for without exception the former are thinner than when they set out, and their weather-beaten features have hard lines on them which they did not have formerly, while military moustaches have in several instances been cultivated while on service'.[91]

Honours and Awards

The war effort required different skills, some of them less obvious than others. TM Cooper, later Lord Cooper of Culross, had been called to the Bar in 1915 and rejected for military service on medical grounds but he gave up a practice and worked in the Blockade Department of the Ministry of Trade, receiving the OBE at the end of the war. He commenced practice again in 1919.[92] Robert Horne, later Chancellor of the Exchequer, was on the outbreak of war a well-established senior advocate aged 43 with 18 years seniority: his military service was of an executive nature as a senior Army officer and later he was created KBE for his war work.[93]

Yet, it has to be said the dislocation of ordinary life by exposure to the violent side of war probably led to an unsettled work force later in peace: the honours and awards may have been in themselves a measure of the nature of the disruption. Major Alan Ker VC WS gave up his employment at the age of 32 and became an infantry officer. His leadership and bravery in a prolonged episode of severe close quarter action led to his award. It must have been difficult to return to office practice in George Street after the war at the very edge and a period as a prisoner of war.[94] Two members of the SSC Society were each awarded the DSO, one was awarded the OBE and the MC as well as a *Croix de Guerre*, and another received the MC. [95]

[90] (1919) 35 *Scottish Law Review* 75.
[91] ibid.
[92] Lord Cooper of Culross, *Selected Papers 1922-1954* (1957), xiv.
[93] Robert S. Shiels, 'Lord Horne: a forgotten advocate?' 2007 *Scots Law Times* (News) 284.
[94] Lord Ashcroft, *Victoria Cross Heroes* (Headline, 2006), 182-3.
[95] Barclay (n. 44), 139.

Alternatives to Uniform

There were other means for lawyers to provide assistance by way of 'national work'. As one recent historical account has it: 'For all the suffering that accompanied it [the Great War], victory rested on a prodigious administrative achievement'.[96] One member of the SSC Society had the rather onerous sounding task of being 'solicitor for Scotland for the War Office, the Ministry of Munitions, the Scottish Office and other Departments'.[97] Two other members of the SSC Society were similarly used in their civilian capacity in Government Departments.[98]

Discussion

One historian has referred to the stubborn persistence of the image of the Great War as a demographic disaster.[99] This view rejected the common belief that the war resulted in a Lost Generation - defined as all the dead, or specifically, as those educated elites who would otherwise have become post-war leaders. How might this approach affect the view of Parliament House?

(a) The Dead

Psychologists with an interest in bereavement see the public naming of the dead as crucial to the process of recovery.[100] Thus, there is in the Advocates' Library on a plaque a list of 22 advocates and four intrants who died. The historian of the WS Society noted that 'a large number' of members and their apprentices answered the call to arms and of these 32 members and ten apprentices died.[101] The WS Society published a booklet with a list of those who served and those who died.[102] Inexplicably, no such listing exists for the SSC Society.[103] In the first year of the war, five Court of Session officials died.[104] The final total of dead lawyers and clerks associated with 'PH' may be about 75, but that is uncertain.

[96] D. Stevenson, *With Our Backs to the Wall: Victory and Defeat in 1918* (Penguin, 2011), xvii
[97] Barclay, (n. 44), 140
[98] ibid, each individual mentioned received the OBE for their war efforts.
[99] G.J. De Groot, *Blighty British Society in the Era of the Great War* (Longman, 1996), 271
[100] A. Gregory, *The Silence of Memory: Armistice Day 1919-1946* (Berg Publishers, 1994), 23.
[101] R.K. Hannay, *The Society of Writers to His Majesty's Signet* (T & A Constable, 1936), xviii
[102] *Roll of Honour: Members of the Society of Writers to His Majesty's Signet, and Apprentices, 1914-1919* (Wm. Blackwood and Sons, undated, probably c.1920).
[103] Barclay, (n. 44), 139.
[104] (1915) 31 *Scottish Law Review* 179.

(b) The Legal Society

An historian of the Great War and its aftermath has asserted that the 'inhibiting effects of a cultural malaise are from their very nature difficult to calculate, particularly in circumstances where it has not generated violent social or racial victimization or serious civil strife'.[105] In short, the effect of the war was the loss of people and the exhaustion of those still alive. The matter is not helped by the fact that there seems to be little in the legal literature of the effect of the Great War on the legal profession in Scotland; hence the importance of what is recorded. Sheriff Lillie wrote: 'Thus was suddenly ended a period of great brilliance and abounding prosperity at Parliament House. The war years were a virtual blank. The return of peace saw its fortune at the lowest ebb. Of pre-war practising counsel there remained in attendance there little more than a third. The on-lookers had practically disappeared'.[106]

(c) The Trends

There are discernible trends in the figures in the table annexed to this paper. The most obvious event was the fall in the number of advocate's clerks in 30 years from 21 in number to 5. The clerks kept the diaries and discussed the availability counsel with those seeking to instruct them. In 30 years the number of silks had slightly more than doubled. In the same period the number of advocates who it may be assumed were available for instruction rose from 191 (in 1904) to 242 (1916) and then back to 144. It is a rather simplistic notion in many ways, but from 1916 to 1929 the diminution in numbers was that of 98 advocates.

The WS and SSC members were solicitors but they were listed separately in *The Scottish Law List*. The WS membership had increased from 536 to 634 (1914), which must be regarded as substantial, but thereafter it fell to 551. The loss in numbers was from the peak in 1914 that of 83. The SSC members rose from 379 by a handful of members in the period 1905 to 384 but then fell relentlessly to 280 in 1929, a fall of 104.

Concluding remarks

There seems on the available evidence to have been several threads to the demographic effect of the Great War on the legal profession in Parliament House: first, there was a loss of qualified lawyers who were there in different capacities and in practice; this was an immediate loss. Secondly, there was a loss

[105] Richard Overy, *The Morbid Age: Britain Between the Wars* (Allen Lane, 2009), 383.

[106] Lillie, (n. 10), 72.

of those who certainly intended entering the legal profession (students and those in training); this was a loss for the medium and long term. To that one must also add the apparent loss of business: the advocates' clerks diminished markedly in number down to a quarter of the pre-war total, itself a clear indication it may reasonably be presumed, of the dramatic fall in business available to the Bar.

The lawyers in practice in Parliament House, and elsewhere for that matter, in the years after the Great War had to survive in the following inter-war business cycle: '1920-21, post war recession; 1922-26, a period of relative stagnation; 1926, short economic downturn; 1927-29, a short period of boom'.[107] None of this or what occurred in the 1930s could have been conducive to building a practice or achieving and maintaining a living. In 1929 it was suggested that while it might be an exaggeration to say that the legal profession in Scotland was then in a precarious position, it was certainly in an unsatisfactory one. Further: 'no other profession or trade is less well protected or more subjected to encroachment on what were once deemed to be its privileges and prerogatives'.[108] References to 'starving juniors' may have been exaggerated for effect but not necessarily wrong in principle.[109]

The demographic trough started *during* the war: in 1925 the new calls had been noted by year: 1914 (13 advocates); 1915 (4 advocates); 1916 (*nil* advocates); 1917 (*nil* advocates); 1918 (1 advocate); 1919 (10 advocates); 1920 (4 advocates); 1921 (8 advocates), 1922 (4 advocates) and 1923 (4 advocates).[110] Later figures are available for *after* the Great War was most noticeable for new calls to the bar:[111] 1924 (13 advocates); 1925 (7 advocates); 1926 (1 advocate); 1927 (4 advocates); 1928 (*nil* advocates); 1929 (2 advocates); 1930 (3 advocates); 1931 (5 advocates); and 1932 (7 advocates). The decline from 1914 took ten years to reach again the figure of that year and then it dwindled away for some years. It was an explicit comment, and a separate issue, that the fall in the numbers of new members of the Faculty of Advocates was due to the absence of litigious business.[112]

A generation later, Lord Gibson recalled the period after the Great War.[113] He noted in a speech in 1946 that during the Second World War the number of Counsel in attendance in Parliament House fell to a

[107] Overy (n. 104), xxi.
[108] J.C. Gardner, 'A suggestion for strengthening the position of the legal profession in Scotland' 1929 *Scots Law Times* (News) 163.
[109] 1931 *Scots Law Times* (News) 45.
[110] *Index Juridicus* (n. 12), see for the year 1925, 50-71.
[111] 1931 *Scots Law Times* (News) 51; 1933 *Scots Law Times* (News) 93.
[112] 1930 *Scots Law Times* (News) 24.
[113] 'Post War prospects for Lawyers in Scotland' (1947) 63 *Scottish Law Review* 1.

minimum of forty-five. Members returned from the all services and new entrants raised the figure to eighty-one: 'which corresponds with a figure of about 144 in the year 1920, that number gradually dropping to about 100 in the early and mid-1930s.'[114] It is clear that a close watch was being kept on the number 'in attendance' and that if those quoted by Lord Gibson are correct, and it is certain that they were, then the figures given in the attached schedule were probably wrong in that those who were qualified as lawyers generally were not in attendance in the numbers suggested from a mere head count.

Statistically, 'it remains a startling fact that, of males aged between 19 and 22 when the war broke out, over one in three did not live to see the Armistice, and that war-related mortality was greatest at the age of 20'.[115] The loss of talented people during and because of the Great War has been held to be the cause of the grave deficiency in men of political ability in the turbulent decade of the Thirties.[116] That recognition of the effects of a demographic trough was probably true of many trades and professions.

The range of potential candidates for judicial office and other vacancies to be filled by those with legal qualification was narrow and after, say, 1920 became smaller by the year. Financial constraints on government, however, meant that there may not have actually been many vacancies arising. Attitudes are difficult to assess and while Harold Macmillan had been happy as an undergraduate at Oxford for many years afterwards he would not go there: 'everybody was dead. It was a terrible place, terrible atmosphere'.[117] The same was probably true of the morale in Parliament House.

[114] ibid, 2.
[115] G.R. Searle, *A New England? Peace and War 1886-1918* (Clarendon Press, 2004), 779 and fn. 13.
[116] J Lewis-Stempel *Six Weeks: The Short and Gallant Life of the British Officer in the First World War* (Orion, 2010), 317.
[117] A. Horne, *Macmillan 1957-1986* (Macmillan, London, 1989), 268.

Appendix

The numbers of practitioners listed by general description of status or occupation at Parliament House, or at least for membership of the legal societies there

	KC	advocates	WS	SSC	Advocates clerks
1904	28	191	536	379	21
1905	34	236	551	384	25
1906	35	235	557	384	25
1907	38	238	571	382	21
1908	40	230	574	376	21
1909	42	233	582	373	21
1910	47	232	592	368	21
1911	46	244	593	363	21
1912	44	238	611	364	21
1913	47	237	620	352	19
War					
1914	49	237	634	356	19
1915	50	247	624	345	18
1916	46	242	612	341	17
1917	46	238	603	339	16
1918	40	226	587	335	16
1919	37	215	565	325	16
Peace					
1920	49	185	565	328	7

1921	54	183	562	325	6
1922	58	177	561	324	6
1923	56	156	565	323	6
1924	59	157	552	324	5
1925	65	160	554	318	5
1926	66	162	553	321	5
1927	67	157	548	310	5
1928	67	151	567	305	5
1929	65	144	551	280	5

Source: *The Scottish Law List 1904 to 1929*

Dundee Student Law Review, Volume XI

Doi: doi.org/10.20933/100001429

Balancing Acts: The Impact of Bilateral Investment Treaties on TRIPS Flexibility

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Abstract

Bilateral Investment Treaties are powerful tools to protect foreign investment from the arbitrary actions of the host states. However, the broad and unqualified clauses in Bilateral Investment Treaties have expanded their scope to challenge the states' regulations. Therefore, through the investor-state arbitration mechanism in Bilateral Investment Treaties, a legitimate regulation can be invalidated if it adversely affects the value of investment or expected future profit. Furthermore, in the absence of general or specific exceptions, limiting the broad scope of Bilateral Investment Treaties threatens the well-established Trade-Related Aspects of Intellectual Property Rights, flexibilities incorporated to safeguard developing countries' development concerns. In the evolving jurisprudence, Trade-Related Aspects of Intellectual Property Rights may constitute an act of indirect expropriation. Therefore, the stringent Intellectual Property protection in most modern Bilateral Investment Treaties may undermine Trade-Related Aspects of Intellectual Property Rights flexibility. In such a situation, a delicate balance needs to be struck between the rights of the states and investors to reduce Bilateral Investment Treaties' far-reaching implications on Trade-Related Aspects of Intellectual Property Rights flexibility to safeguard public health imperatives. This article analyzes the legal issues surrounding Intellectual Property protection under Bilateral Investment Treaties and its potential effects on the flexibility of Trade-Related Aspects of Intellectual Property Rights, suggesting mechanisms to ensure BITs do not undermine essential public health policies.

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Keywords: Bilateral Investment Treaties, Expropriation, Intellectual Property, Investment, Investor-State Arbitration, TRIPS

I. Introduction

Bilateral Investment Treaties (BITs) are important tools for protecting private investment from discriminatory treatment by host states[2] through enforceable rights.[3] The fear that the host state's social, political, and economic uncertainty may backlash private investment necessitated the construction of a regime that protects the entity's valuable assets and profits.[4] However, the most contentious and controversial aspect of modern BITs is the investor-state arbitration dispute settlement mechanism,[5] through which an investor can directly challenge the state's regulatory measures, adversely affecting the value of the investment.[6] The peculiarity of investor-state arbitration is that it allows foreign investors to bypass the host state's domestic courts and bring claims directly to an international arbitral tribunal,[7] even if the host state's regulatory measures were pursued to safeguard legitimate public health[8] or other public policy issues.[9]

In the competition to attract foreign investment, developing countries accept onerous and strict restrictions on their power to exercise sovereign functions without being fully aware of their implications.[10] The uncritical adoption of the BITs is due to the perception that they are instruments that can bring a wide array of economic benefits, from technology transfers to the creation of employment for the host states.[11] However, there is no conclusive evidence that BITs alone attract Foreign Direct

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[2] ShayerahIlias Akhtar & Martin A. Weiss, *U.S. International Investment Agreements: Issues for Congress* (Congressional Research Service 7-5700, 2013), https://fas.org/sgp/crs/row/R43052.pdf.
[3] Kevin P. Gallagher & Elen Shrestha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal* (Tufts University, Global Development and Environment Institute Working Paper No. 179093, 2011), http://ageconsearch.umn.edu/record/179093/files/11 ... ationReappraisal.pdf.
[4] Wasseem Mina, *Political Risk Guarantees and Capital Flows: The Role of Bilateral Investment Treaties*, 9 ECONOMICS: THE OPEN-ACCESS, OPEN-ASSESSMENT E-JOURNAL (2015).
[5] *The arbitration game*, THE ECONOMIST (October 11, 2014) https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game.
[6] Claire Provost & Matt Kennard, *The obscure legal system that lets corporations sue countries*, THE GUARDIAN (June 10, 2015) https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid.
[7] *Michele Potestà*, *State-to-state dispute settlement pursuant to bilateral investment treaties: Is there potential?*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES (Nerina Boschiero et al. eds., 2013).
[8] *Trading IP through FTAs & BITs: Implications for access to medicines*, ACCESS (October, 2014) http://www.lawyerscollective.org/wp-content/uploads/2014/12/Access-News-Letter-IV-1-Trading-IP.pdf.
[9] *The arbitration game, supra* note 4.
[10] Eric Neumayer & Laura Spess, *Do bilateral investment treaties increase foreign direct to developing countries*, 33 WORLD DEVELOPMENT (2005) http://eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf.
[11] Deborah L. Swenson, *Why Do Developing Countries Sign Bits*, 2 U. C. DAVIS J. INT'L L. & POL'Y 1 (2005).

Investments (FDIs) to the host countries.[12] Instead, empirical studies have shown that the state's macroeconomic conditions and other governance factors are responsible for attracting FDIs.[13]

For instance, Brazil signed several BITs between 1994 and 2020 and 13 Cooperation and Facilitation Investment Agreements (which substantively deviate from traditional BITs) with investment provisions between 2015 and 2020 but has been broadly reluctant to ratify them.[14] Nevertheless, it received generous FDI[15] due to its liberal FDI regime and reasonably transparent and predictable governance.[16] Thus, International Investment Agreements (IIAs) or BITs do not significantly affect FDI inflows.[17] On the other hand, BITs result in a fall in FDI inflows in BRICS Brazil, Russia, India, China, South Africa) group.[18] Nevertheless, under the impression that BITs will increase economic activities, many developing countries are shoring up Intellectual Property (IP) protection under BITs, which could have a negative impact on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) flexibilities that are designed to help them provide affordable innovation to their citizens.[19]

Ironically, when the TRIPS agreement was being negotiated, developing countries feared that a strong IP regime would restrict their ability to provide affordable essential life-saving medicines to cater to public health needs.[20] However, they do not seem apprehensive about the same concern while signing and ratifying BITs. Historically, the US started incorporating IP into BITs to further its economic interest. It also forced developing countries like South Korea and Brazil to negotiate the stringent IP standards in their BITs.[21] As a result, most BITs now explicitly recognize IP as a form of investment and accord stringent protection to foreign investment.[22] This transition has expanded the protection

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[12] *Neumayer, supra* note 9.
[13] Prabhash Ranjan, *Medical Patents and Expropriation in International Investment Law – with Special Reference to India*, 5 MANCHESTER J. INT'L ECON. L. (2008).
[14] Christian Bellak & Markus Leibrecht, *The (Political) Economics of Bilateral Investment Treaties—The Unique Trajectory of Brazil* 12(6) Economies (2024), 130.
[15] *See FDI in Figures – Latin America*, (OECD, 2019) https://www.oecd.org/investment/FDI-in-Figures-April-2019-Latin-America-English.pdf.
[16] Daniela Campello & Leany Lemos, *The non-ratification of bilateral investment treaties in Brazil: a story of conflict in a land of cooperation*, 22 REVIEW OF INTERNATIONAL POLITICAL ECONOMY (2015).
[17] Paulo Cavallo, *Brazil, BITs and FDI: A Synthetic Control Approach* 20(1) The Journal of World Investment & Trade, (2019), 68-97; Rodolphe Desbordes, *A Granular Approach to the Effects of Bilateral Investment Treaties and Regional Trade Investment Agreements on Foreign Direct Investment* (2016) https://aric.adb.org/pdf/events/aced2016/paper_rodolphedesbordes.pdf.
[18] Surabhi Gupta, et al, *Interlinkages between bilateral investment treaties and FDI flows to emerging economies: evidence from BRICS*, 21(4) Journal of Advances in Management Research (2024) 667-687.
[19] Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs have some bite: The political-economic environment for bilateral investment treaties,* THE REVIEW OF INTERNATIONAL ORGANIZATIONS (2011).
[20] Carlos M. Correa, *The Trips Agreement and Developing Countries,* in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, 1 (Patrick F. J. Macrory et al., eds., 2005).
[21] Carlos M. Correa, *Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses*, 26 MICH. J. INT'L L. 331 (2004).
[22] Deepak Raju & Ayesha Ali Khan, *Hurdles in Way of Compulsory Licensing by Developing Nations: Multilateral Murder or Bilateral Suicide?: An Empirical Analysis of Bilateral Investment Treaties of India, Bangladesh and Pakistan,* 2 NUJS L. Rev. 213 (2009).

available to IP beyond the existing TRIPS standard, which may have a negative impact on TRIPS flexibilities available to developing countries.[23]

TRIPS is a multilateral agreement that sets minimum standards for IP protection. However, it also includes flexibilities that allow developing countries to derogate from its strict implementation.[24] On the other hand, BITs are a mechanism to protect foreign investment. However, they are curtailing the TRIPS flexibilities by allowing foreign investors to directly sue host countries for breaching their commitment.[25] Therefore, BITs not only restrict the state's regulatory power but also conflict with the objectives and norms stipulated in the TRIPS agreement.[26] Despite the potential conflict between BITs and TRIPS, not much adequate research has been done to find ways to harmonize them.[27] Often, the existing research focuses on investor-state arbitration under BITs and its impact on economic growth, while less attention has been paid to its potential implications for public health.

This article examines the BITs and their consequences on the TRIPS agreement. It also explores how the two regulatory frameworks can be balanced. Section II examines the various unqualified IP definitions in BITs and their repercussions on the TRIPS flexibilities. Section III focuses on the adverse effects of BITs on compulsory licensing and parallel import. Section IV analyses the recent developments in the Philips Morris and Eli Lilly cases to contextualize BITs and their relationship with the TRIPS agreement.

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[23] Carlos M. Correa, *Bilateral investment agreements: Agents of new global standards for the protection of intellectual property rights?*, GRAIN (August 3, 2004) https://www.grain.org/article/entries/125-bilateral-investment-agreements-agents-of-new-global-standards-for-the-protection-of-intellectual-property-rights.

[24] Antonietta Di Blasé, *Intellectual property protection in investment agreements and public concerns*, in GENERAL INTERESTS OF HOST STATES IN INTERNATIONAL INVESTMENT LAW (Pia Acconci et al., eds., 2014).

[25] *Ranjan*, *supra* note 12, at 104.

[26] Reiko Aoki et. al, *Patent policy and public health in developing countries: lessons from Japan,* 84 BULLETIN OF THE WORLD HEALTH ORGANIZATION (2006) https://www.who.int/bulletin/volumes/84/5/417.pdf.

[27] Crina Baltag, Riddhi Joshi & Kabir Duggal, *Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?*, 38 (2) *ICSID Review - Foreign Investment Law Journal* (2023), 381–421; Jean Paul Roekaert, *Investment Treaty Arbitration and the Trips Patent Waiver: Indirect Expropriation Analysis of Covid-19 Vaccine Patents Expropriation Analysis of Covid-19 Vaccine Patents,* 46 HASTINGS INT'L & COMP. L. Rev. 59 (2023); Carlos M. Correa, *Interpreting the Flexibilities Under the TRIPS Agreement* in ACCESS TO MEDICINES AND VACCINES (Carlos M Correa & Reto M. Hilty, eds, Springer 2022);Christine Haight Farley, *Trips-Plus Trade and Investment Agreements: Why More May Be Less for Economic Development,* 35 U. Pa. J. Int'l L. 1062 (2014); Bertram Boie, *The Protection of Intellectual Property Rights through Bilateral Investment Treaties: Is there a TRIPS-plus Dimension?*, Working Paper No 2010/19, NCCR TRADE, https://www.wti.org/media/filer_public/c5/47/c5475d4a-f97c-4a8b-a12a4ae491c6abb3/the_protection_of_iprs_through_bits.pdf;

II. Broad Assets-Based Definition of IP

The term 'investment' is relatively new. The economic liberalization, particularly factors such as 'duration' and 'movement,' compelled states to use the more dynamic phrase 'investment' instead of 'foreign property.' In the context of BITs, rapid developments in technology and pharmaceuticals led to the crystallization of IP as a valuable asset, requiring maximum and effective protection in the form of investment.[28] However, its imprudent application resulted in the adoption of a broad and unqualified definition of BITs.[29] Generally, the definition of 'investment' in BITs determines the scope of investors' rights and obligations.[30] However, no standard definition exists as to what constitutes an investment as the object and purpose of investment differ from one BIT to the other.[31] Modern BITs ordinarily refer to the phrase 'every kind of assets' followed by the general statement[32] and then a non-exhaustive list of categories.[33] For example, the US-Model BITs (2012)[34] states that

'investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans;(d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.'

A cursory look at the US Model BIT's asset-based definition reveals that the language adopted is quite broad and without any exception. The same broad assets-based definition is followed by many other countries, except for Canada, which combines a broad definition with a specific exception on the line of the North American Free Trade Agreement (NAFTA).[35]

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[28] *Intellectual Property Provisions in International Investment Arrangements*, UNTCAD (IIA Monitor No. 1, 2007) https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=2445.
[29] INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 47 (2008).
[30] *Id.*
[31] *Id.* at 46.
[32] *Id.*at 49.
[33] Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2013). *See* Rachel Lavery, *Coverage of Intellectual Property Rights in International Investment Agreements: An Empirical Analysis of Definitions in a Sample of Bilateral Investment Treaties and Free Trade Agreements*, 2 TRANSNATIONAL DISPUTE MANAGEMENT (2009).
[34] *U.S. Model Bilateral Investment Treaty*, (2012) https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.
[35] *INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS*, *supra* note 26, at 50.

The definition of "Investment" is a cornerstone of the investment treaty protection.[36] Therefore, a claimant enterprise must be qualified as an investment to succeed in substantive and procedural guarantees under bilateral agreements.[37] Thus, the definition of investment is a jurisdictional prerequisite for bringing a dispute before a treaty-based tribunal such as the International Centre for Settlement of Investment Disputes (ICSID).[38] Consequently, the definition of investment prescribes the limits of protection granted under the ICSID Convention and bilateral investment treaties. However, the ICSID Convention does not define what constitutes investment but only refers to it.[39]

Does the absence of a specific definition of investment in the ICSID mean Article 25 of the Convention does not limit what transactions are considered investments, or that certain transactions do not qualify as investments because they lack characteristic features?[40] In Salini v. Morocco,[41] the ICSID tribunal held that to be considered an investment under Article 25(1), it must satisfy four criteria: (1) a contribution; (2) a certain duration; (3) a risk; and (4) a contribution to the economic development of the host State. Generally, ICSID tribunals apply the Salini test to determine what constitutes an investment under Article 25(1) of the ICSID Convention. However, some tribunals have adopted divergent approaches to what constitutes investment, as the Salini test converts descriptive characteristics of investments into rigid and legally binding requirements to establish jurisdiction.[42] Despite this, most BITs continue to incorporate an expansive asset-based definition of investments for dispute settlement.[43]

In the modern economy, IP is an important source of capital for entities and businesses. Therefore, the investment definition in BITs is much broader than that generally found in the domestic laws of host states.[44] The broad 'investment' definition in BITs acknowledges that IP is a valuable and critical asset

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[36] Mavluda Sattorova, *Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond*, 2 Asian Journal of International Law (2012), 261
[37] *Id.*
[38] *Id.*
[39] Article 25(1) of the ICSID Convention provides that 'the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.'
[40] Michael Waibel, *Subject Matter Jurisdiction: The Notion of Investment* 19 (2021) *ICSID Reports*, 25–82.
[41] Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 July 2001).
[42] Anhad Miglani, *Revisiting 'Investment' under Article 25 of the ICSID Convention,* Kluwer Arbitration Blog (June 2022) https://arbitrationblog.kluwerarbitration.com/2022/06/20/revisiting-investment-under-article-25-of-the-icsid-convention/#comments
[43] Wenhua Shan & Lu Wang, *The Concept of "Investment": Treaty Definitions and Arbitration Interpretations* in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (Julien Chaisse et al., eds., 2021).
[44] Mahnaz Malik, *Recent Developments in the Definition of Investment in International Investment Agreements,* 2nd Annual Forum for Developing Country Investment Negotiators, held in Marrakech, Morocco, 2–4 November, International Institute for Sustainable Development (2008) https://www.iisd.org/pdf/2008/dci_recent_dev.pdf.

for the economic growth of the states and investors.[45] As IP is an invaluable asset, BITs not only contain phrases such as 'intellectual property rights' but also consist of copyrights and patents.[46] For example, the BIT between Australia and Egypt (2001) states that 'Investment means every kind of asset, owned or controlled by investors of one Party and admitted by the other Party subject to its law and investment policies applicable from time to time and includes: (iv) intellectual property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill.' Such broad phraseology has enabled foreign investors to bring disputes against host states for the actions or omissions, either directly or indirectly, adversely affecting their investment.[47] Moreover, the general reference to 'intellectual property rights' internalized that IP is a protected investment under BITs.[48]

Some BITs, such as Canada-Argentina BIT (1991), refer to the 'rights' over IP. It states that investment includes 'intellectual property rights, including rights with respect to copyrights, patents, trademarks as well as trade names, industrial designs, goodwill, trade secrets, and know-how.' The incorporation of 'rights' over different IP types in the BITs definition has enlarged and expanded its enforcement, which could become problematic for developing countries as governments would have less flexibility to regulate IP in the public interest.[49] Therefore, this broad and unqualified investment definition, covering enforcement to application beyond the TRIPS agreement, may make poor and developing countries vulnerable to expropriation claims.[50] The problem with the broad assets-based definition of 'investment' in BITs is that it covers every kind and phase of IP, from its enforcement to application that goes beyond the TRIPS agreement, which, in effect, attenuates its flexibilities.[51] For instance, the farmers' and breeders' rights have not been contemplated under the TRIPS.[52] However, some BITs protect these kinds of IP but, due to the potential expropriation claims, could limit the ability of developing countries to implement policies that support farmers and breeders.[53]

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[45] WIPO, *Intellectual Property as a Business Asset,* https://www.wipo.int/sme/en/ip_business/ip_asset/business_assets.htm.
[46] *Lavery*, *supra* note 32.
[47] Gavin Pereira, *India's Obligations under Bilateral Investment Treaties (Part A): "Bilateral Inhibiting Treaty?" — Investigating the Challenges that Bilateral Investment Treaties pose to the Compulsory Licensing of Pervasive Technology Patent Pools*, Centre for Internet & Society (Aug. 2013) http://cis-india.org/a2k/blogs/bilateral-inhibiting-treaty-investigatingchallenges-that-bilateral-investment-treaties-pose-to-compulsory-licensing-of-pervasive-technology-patent-pools.
[48] Henning Grosse Ruse-Khan, *Protecting intellectual property rights under BITs, FTAs and TRIPS: Conflicting regimes or mutual coherence?*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, 485 (Chester Brown & Kate Miles eds., 2011).
[49] *Correa*, *supra* note 20, at 8.
[50] *Correa*, *supra* note 19.
[51] *Id.*
[52] *The Agreement on Trade-Related Aspects of Intellectual Property Rights,* https://commerce.gov.in/writereaddata/trade/wtopdfs/TRIPS_matter_amended.pdf.
[53] *Correa*, *supra* note 19, at 338.

The broad and wide definition of 'investment' in BITs enables foreign investors to challenge almost any measure that dilutes the economic value as expropriation.[54] In addition, these broad assets-based definitions open up endless possibilities for foreign investors to use the general guarantees afforded to investors in the form of National Treatment (NT) and Most-Favored Nation (MFN) to challenge states.[55] In this context, it is desirable to find ways and devise approaches to shield the states' legitimate 'regulatory power' by narrowing the scope of IP in the definition of investment.[56]

One way to protect the state's regulatory power over IP is to limit its protection to the national laws of the contracting states, as done in the BIT between Benin and Ghana (2001). It provides that 'investments mean every kind of asset and in particular, though not exclusively, includes '(iv) intellectual property rights, goodwill, technical processes and know-how and all similar rights recognized by the national laws of both Contracting Parties…' Another approach is to protect specific IP types registered with national authorities, reducing the scope of protection conferred to it as done in the BIT between Benin and Ghana (2001).[57]

However, a better proposition is to completely immunize IP definition from MFN, NT, or indirect expropriation claims.[58] The most suitable example is provided in the BIT between the United States and Uruguay (2004), which articulates that 'Articles 3 and 4 do not apply to any measure covered by an exception to or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.' These approaches can effectively restrict the ability of foreign investors to sue states for failing to protect their IP investment. However, they should be implemented at the time of negotiation of BITs. Once BITs come into force, their amendment is an arduous process that requires the consent of both states.[59]

Many BITs incorporate the phrase 'intangible property' in their definition of investment,[60] which comprises both granted rights and pending applications.[61] Some IPs, such as copyright and trade secrets, do not require any formal process for their registration. They get protection as soon as they come into

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[54] *Raju*, *supra* note 21, at 224.
[55] *UNTCAD*, *supra* note 27, at 4.
[56] *Id.*
[57] *Id.*
[58] Simon Lester, *Tobacco Etc. Carveout in the New Australia-Hong Kong Investment Agreement,* INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (March 29, 2019) https://worldtradelaw.typepad.com/ielpblog/2019/03/tobacco-in-the-new-australia-hong-kong-investment-agreement.html.
[59] *See* Article 39, Vienna Convention on the Law of Treaties.
[60] The BIT between Mexico and Austria (1998) states that: (2) investment by an investor of a Contracting Party means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party, including:(h) any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs. *See Lavery*, *supra* note 32.
[61] *Correa*, *supra* note 19, at 340.

existence.[62] However, other IPs, such as patents, trademarks, and designs, undergo a rigorous scrutiny process for registration and must be registered to be enforceable. However, the inclusion of pending IP rights in the definition of investment implies that even if an IP has not yet been registered, it can still be protected under a BIT.[63] Thus, any action that prevents a business from obtaining exclusivity over pending IP registration could be considered an infringement of BITs.[64] Similarly, if a patent is revoked or invalidated without conformity with national law or done through a change to the law, it could also be challenged as expropriation under a BIT.[65] The Eli Lilly[66] case is an example of that. Therefore, under BITs, unregistered intangible properties have economic value, thus are investments unless the definition of investment categorically excludes pending IP applications.

In essence, broad and unqualified IP definitions in BITs can give unfettered power to foreign investors to restrict the host state's ability to regulate IP.[67] It is irrelevant whether the state exercises that power to give effect to any legitimate public policy or whether such authorization is permissible under TRIPS.[68] Thus, the broad and unqualified IP definitions in BITs can negatively impact the TRIPS flexibilities, which are critical for protecting public health.[69]

III. Subtle or Profound Erosion of TRIPS Flexibilities?

The primary objective of the IP is to promote and disseminate technological innovation for socio-economic benefits[70] while incentivizing people for their efforts.[71] To achieve these goals, the TRIPS agreement introduced global minimum standards for protecting and enforcing nearly all forms of IP, including patents.[72] During the TRIPS negotiations, developing countries raised concerns that the agreement would significantly impact public health. Consequently, to address these concerns, a compromise was reached in the form of various flexibility or exemptions from the TRIPS agreement.

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[62] WIPO, *Understanding Copyright and Related Rights*, http://www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo_pub_909.pdf. *See* WIPO, *How are Trade Secrets Protected?,* http://www.wipo.int/sme/en/ip_business/trade_secrets/protection.htm.
[63] *Correa*, *supra* note 19, at 340.
[64] *Id.*
[65] Marie Louise Seelig, *Can Patent Revocation or Invalidation Constitute a Form of Expropriation?*, 2 TRANSNATIONAL DISPUTE MANAGEMENT (2009).
[66] *Eli Lilly and Company v Government of Canada,* ICSID Case No. UNCT/14/2.
[67] *Id.* at 335.
[68] Lorenzo Cotula, *Do investment treaties unduly constrain regulatory space?*, QUESTIONS OF INTERNATIONAL LAW (November 24, 2014) http://www.qil-qdi.org/investment-treaties-unduly-constrain-regulatory-space/.
[69] *Ranjan*, *supra* note 12, at 73.
[70] Sisule Musungu, *The use of flexibilities in TRIPS by developing countries: can they promote access to medicines,* Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH Studies, 2005) https://www.who.int/intellectualproperty/studies/TRIPSFLEXI.pdf.
[71] Karin Timmermans & Togi Hutadjulu, *Report of an ASEAN Workshop on the TRIPs Agreement and its Impact on Pharmaceuticals Jakarta, 2-4 May 2000*, World Health Organization (2000) http://apps.who.int/medicinedocs/pdf/h1459e/h1459e.pdf.
[72] Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement,* 46 HOUS. L. REV., 979 (2009) https://houstonlawreview.org/article/4269-the-objectives-and-principles-of-the-trips-agreement.

These flexibilities reflect a conciliatory approach of the member states to reconcile two conflicting positions, i.e., to maximizing IP protection (developed countries) and protecting public interests, especially public health (developing countries).[73] One such flexibility vital for public health is a compulsory license, provided under Article 31 of the TRIPS agreement.[74]

Nevertheless, Article 31 of TRIPS does not provide any specific grounds for issuing a compulsory license. Instead, it merely recognizes the inherent rights of the member states to grant a compulsory license without the consent of the right holder and lays down procedural safeguards.[75] In other words, Article 31 does not confer any right to the member states to grant compulsory licenses. It only provides that states may authorize the issuance of a compulsory license in specific situations.[76] In light of this, it is important to analyze whether foreign investors can bring investment-related disputes under BITs against host states if flexibilities, especially compulsory license, and parallel import, result in an economic loss to the investment.[77]

i. Compulsory License

The pharmaceutical industry relies heavily on patent protection,[78] which gives companies the exclusive rights to sell their products for a certain period as huge resources were invested in research and development, and patents are seen to incentivize such investment.[79] However, this exclusivity to pharmaceutical products and processes has raised fears among developing countries that it can lead to high medicine prices for medicines, making it difficult for people to access essential medicines.[80] For example, product-process protection prevents a generic manufacturer from developing affordable medicines. In the absence of competition in the market, higher medicine prices would make essential drugs unaffordable to millions of people worldwide.[81] Therefore, in terms of accessibility and affordability, patented pharmaceutical products significantly affect public health.[82]

The TRIPS agreement contains flexibilities for member states to derogate from its strict implementation after fulfilling certain conditions.[83] Later on, to allay the fears of the developing countries over the

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[73] *Raju*, *supra* note 21, at 214.
[74] *See* Article 31: Other Use Without Authorization of the Right Holder.
[75] *Raju*, *supra* note 21, at 214.
[76] *Raju*, *supra* note 21, at 219.
[77] *Correa*, *supra* note 20, 1.
[78] *Timmermans, supra* note 70, 8.
[79] Bruce Lehman, *The Pharmaceutical Industry and the Patent System,* https://users.wfu.edu/mcfallta/DIR0/pharma_patents.pdf.
[80] Carlos Correa, *Integrating Public Health Concerns Into Patent Legislation In Developing Countries,* WTO (2000) http://apps.who.int/medicinedocs/pdf/h2963e/h2963e.pdf.
[81] *Aoki, supra* note 25.
[82] *Correa*, *supra* note 69.
[83] *Blasé, supra* note 23,194.

TRIPS implications on public health, the WTO, in the Doha Declaration on Public Health,[84] reaffirmed various flexibilities institutionalized in the TRIPS agreement.[85] The Doha Declaration states that the TRIPS agreement can and should be interpreted in such a manner that the member state's right to protect public health and access to medicine can be maintained.[86] To reflect on the public health concerns, one of the flexibilities provided in the TRIPS agreement is 'Compulsory Licensing.'[87] However, this phrase has not been used in the TRIPS agreement but is employed in the Doha Declaration.[88]

As noted earlier, compulsory licensing allows states to authorize third parties to use IP without the permission of the rights holders.[89] However, a compulsory license is only an exception to the exclusive rights. The IP rights remain with the holder even in the event a compulsory license is issued to the third party.[90] It is widely accepted that certain measures may be tantamount to expropriation, even if the investment's ownership remains with the investors.[91] If investors believe the remuneration paid does not mitigate the economic loss suffered, they can directly bring disputes against the host state under a BIT.[92] In this context, BITs may severely compromise compulsory license flexibility guaranteed under the TRIPS agreement.[93] Therefore, huge tension exists between the right of states to protect public health and the right of investors to be protected from expropriation.

In Middle East Cement Shipping v Egypt,[94] a tribunal held that the import prohibition of cement into Egyptian territory constitutes indirect expropriation. Interpreting the expression 'the effect of which is tantamount to expropriation' in the concerned BIT, the tribunal held that any deprivation of the use and benefit of an investment would amount to 'creeping' or 'indirect' expropriation, irrespective of nominal ownership over investment. Similarly, in the Starrett Housing Corporation v Islamic Republic of Iran,[95] a tribunal held that if a state's interference with property rights rendered them useless, then such interference is deemed to have expropriated the property, even if title to the property formally remains with the owner. Therefore, full or total deprivation of the use, enjoyment or sale of the properties may qualify as indirect expropriation. However, it gets complicated when the deprivation or interference is

[84] *See* Declaration on the TRIPS agreement and public health, WTO (2001), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.
[85] *Timmermans, supra* note 70, 10.
[86] *Ranjan*, *supra* note 12, at 78.
[87] *See* Article 31: Other Use Without Authorization of the Right Holder.
[88] *See* Declaration on the TRIPS agreement and public health, WTO (2001), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.
[89] Christopher Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation,* 25 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 364 (2010).
[90] *Correa*, *supra* note 19, 347.
[91] *Ranjan*, *supra* note 12, at 102.
[92] *Id.* at 85.
[93] *Id.*
[94] Middle East Cement Shipping v. Egypt ICSID Case No. ARB/99/6.
[95] Starrett Housing Corporation v. Islamic Republic of Islam (1983) 4 Iran–US Claims Trib Rep 122, 154.

less than total.[96] In such a scenario, it is unclear whether partial deprivation of property for a temporary period is tantamount to expropriation. The approach adopted by some tribunals suggests that even lesser destruction of property can also constitute deprivation and, hence, expropriation.

In Metalclad v Mexico,[97] a tribunal found that the Mexican government's refusal to grant a permit for a hazardous waste landfill constituted expropriation under the NAFTA provisions. The tribunal held that expropriation not only includes the taking of property, such as outright seizure or formal or obligatory transfer of title in favor of the host state, but also comprises any covert or incidental interference with the use of property that deprives the owner in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. Therefore, the grant of a compulsory license to the third party by the host state can instigate an investor to bring a compensation claim.[98] Accordingly, the issuance of a compulsory license can amount to indirect expropriation if it erodes the economic benefits of the investment,[99] even though the ownership or exclusive rights remain with the investor.

In contrast, some tribunals held that expropriation could occur only in the event of substantial deprivation of investors' rights.[100] For example, in LG&E Energy Corp v Argentine Republic,[101] the tribunal held that the deprivation must be substantial to qualify for compensation, even if the expropriation reduces profit. Similarly, in Telenor Mobile Communications A.S. v The Republic of Hungary,[102] the tribunal held that 'the interference with the investor's rights must be such as substantially deprive the investor of the economic value, use, or enjoyment of its investment.' In such a situation, what constitutes substantial deprivation? Some tribunals have adopted a legal approach, focusing on the rights that have been interfered with.[103] Others have adopted an economic approach, focusing on the economic impact of the interference.[104]

Although the tribunals may use a legal or economic approach to examine deprivation, it is not clear what would be the threshold for substantial deprivation. Is it 50%, 70%, or more? How do we draw lines between mere interference and substantial deprivation?[105] Therefore, it is inconclusive as to what shrinking constitutes substantial deprivation.[106] However, the combination of legal and economic

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[96] Santiago Montt, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2012).
[97] Metalclad v. Mexico ICSID Case No. ARB(AF)/97/1.
[98] *Correa*, *supra* note 19, 348.
[99] *Correa*, *supra* note 19, 348.
[100] Dolzer, *supra* note 32, 104.
[101] LG & E Energy Corp v. Argentine Republic ICSID Case No.ARB/02/1.
[102] Telenor Mobile Communications A.S. v. The Republic of Hungary ICSlD Case No.ARB/04/15.
[103] *See* Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania ICSID Case No. ARB/05/22; Pope & Talbot Inc. v The Government of Canada (2000); CMS Gas Transmission Co. v Republic of Argentina ICSID Case No. ARB/01/8.
[104] Telenor Mobile Communications AS v. Republic of Hungary ICSID Case No. ARB/04/15; Técnicas Medioambientales Tecmed, S.A. v The United Mexican States ICSID Case No. ARB (AF)/00/2.
[105] *Montt, supra* note 95, 261-264.
[106] *Montt, supra* note 95, 261-264.

approaches was applied in the Plama Consortium Limited v Republic of Bulgaria case.[107] The tribunal held that the decisive elements in the evaluation of expropriation conduct should be the assessment of (i) substantially complete deprivation of the economic use and enjoyment of the rights to the investment or of identifiable, distinct parts thereof, i.e. approaching total impairment; (ii) the irreversibility and permanence of the contested measures, i.e. not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor.

From the above discussion, tribunals can analyze whether issuing a compulsory license has lasting effects and substantially deprives investment when determining expropriation. However, merely having an adverse economic impact on the investment cannot be qualified as expropriation.[108] In the case of Sporrong and Lönnroth v Sweden,[109] the European Court of Human Rights (ECtHR) held that restricting the party from selling the property and undertaking renovation did not amount to expropriation. The ECtHR pointed out that although the right has lost some of its substance, the applicant continues to use and possess the property. Therefore, the effects of the measures did not deprive the applicant of the possession.

Evidently, the above approaches adopted by tribunals suggest that mere economic loss due to the issuance of a compulsory license may not amount to expropriation because it only targets the 'use' of the IP and does not deprive foreign investors of their ownership.[110] However, if the compulsory license severely impacts on the investor's ability to enjoy or use the IP-based investment, it may qualify as expropriation.[111] The cumulative effect term, scope, duration, and remuneration of the compulsory license determines whether an expropriation has taken place.[112] There is no straight-jacket formula to determine whether the issuance of a compulsory license is an expropriation. It must be decided on a case-to-case basis,[113] taking into account the specific facts of the case.[114]

On the other hand, one may argue that the issuance of a compulsory license, if done in accordance with the TRIPS framework, is an exercise of sovereign regulatory powers.[115] It cannot be challenged as a discriminatory measure, even if it substantially or significantly deprives the economic value of the investment. However, this approach is problematic. In the absence of any explicit exception to a compulsory license, it would be difficult to convince an arbitral tribunal to give effect to public interests or argue that states are exercising their sovereign power. The treaty language must support the

[107] Plama Consortium Limited v. Republic of Bulgaria ICSID Case No. ARB/03/24.
[108] *Correa*, *supra* note 20, 348.
[109] Sporrong and Lönnroth v. Sweden IHRL 36 (ECHR 1982).
[110] *Gibson, supra* note 88, 365.
[111] *Gibson, supra* note 88, 384.
[112] *Gibson, supra* note 88, 384.
[113] *Correa*, *supra* note 20, 11.
[114] *Gibson, supra* note 88, 392.
[115] *Correa*, *supra* note 19, 349.

'sovereign authority' argument. Otherwise, it will fall short of normative value before a tribunal. Even if compatible with TRIPS obligations, the issuance of a compulsory license may still be tantamount to expropriation, as BITs and the World Trade Organization (WTO) are two different, distinct, and independent frameworks within international law. Additionally, under the guise of receiving FDI, states have ceded their sovereignty by undertaking BIT obligations. Therefore, states cannot claim unfettered regulatory power over foreign investors under the BIT framework.[116]

Nonetheless, the obligation on the host state to pay adequate remuneration in Article 31 of TRIPS, foreign investors may find it difficult to prove that the issuance of a compulsory license can amount to 'creeping' or 'indirect' expropriation unless it substantially reduces the economic value of their investment. Thus, the TRIPS remuneration mechanism in relation to compulsory licenses largely excludes the possibility of substantial deprivation.[117] Nonetheless, the possibility of it being challenged in the investor-state arbitration always looms large. In any case, whether a compulsory license is an indirect expropriation or not can only be determined on a case-to-case basis.[118] If a tribunal finds that the issuance of a compulsory license substantially deprives the investors of economic value or profit from the investment, in such a situation, the tribunal may favor foreign investors, and the host state may end up paying significant compensation.[119]

Most of India's BIT contains the phrase 'measures having effect equivalent to expropriation.' For example, clause 5(1) of the BIT between India and Germany (1995) states that

'Investments of investors of either Contracting Party shall not be expropriated, nationalised or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except in public interest, authorised by the laws of that Party, on a non-discriminatory basis and against compensation which shall be equivalent to the value of the expropriated or nationalized investment immediately before the date on which such expropriation or nationalization became publicly known. Such compensation shall be effectively realizable without undue delay and shall be freely convertible and transferable. Interest shall be paid in a fair and equitable manner for the period between the date of expropriation or nationalization and the date of actual payment of compensation.'

India's BIT with Germany has used the phrase 'the effects of the measure' as a basis for expropriation, not the intention. Therefore, the above clause in the BIT between India and Germany suggest legitimate

[116] Carlos Correa, *Intellectual Property Rights as an Investment: Options for Developing Countries*, 2 TRANSNATIONAL DISPUTE MANAGEMENT (2009).
[117] *Ruse-Khan, supra* note 47, 10.
[118] Rosa Castro Bernieri, *Compulsory Licensing and Public Health: TRIPS-Plus Standards in Investment Agreements*, 2 TRANSNATIONAL DISPUTE MANAGEMENT (2009).
[119] Julian Davis Mortenson, *Intellectual Property as Transnational Investment: Some Preliminary Observations*, 2 TRANSNATIONAL DISPUTE MANAGEMENT (2009).

objectives behind issuing a compulsory license. However, the arbitral tribunals, irrespective of the intent behind the measure, may favor foreign investors if the economic loss is substantial. This is corroborated by the opinion in the Siemens v. Argentina case,[120] in which the tribunal held that the BIT refers to measures that have the effect of expropriation, not the intent of the state to expropriate. Although it is up to the foreign investors to resort to the extreme action of challenging the compulsory license issuance as expropriation, the broad phrase in the BIT between India and Germany has opened such possibilities.

In the context of compulsory license, the increasing significance of the IP, combined with the unqualified definition and in the absence of a general or specific exception, opens possibilities for expropriation.[121] If such a situation occurs, on merits, the tribunal may decide a case in favor of foreign investors, which can cause a long-term chilling effect on public health. Therefore, the threat of 'expropriation' looms over the issuance of a compulsory license.[122] In light of this, states should review their existing BITs to protect themselves from expropriation claims by foreign investors.

By providing express and specific exceptions to the compulsory license issuance, the India-Singapore Comprehensive Economic Cooperation Agreement, to some extent, resolves this perplexing issue.[123] It states that 'This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights to the extent that such issuance, revocation, limitation or creation is consistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.'

Significantly, this exception to the issuance of compulsory licenses in BIT diminishes the possibility of expropriation claims. Beyond compulsory licenses, it also covers creation, and revocation measures compatible with the TRIPS agreement.[124] This exception is an excellent example of maintaining a regulatory space to issue or exercise flexibility stipulated in the TRIPS agreement without worrying that states' actions may amount to expropriation.[125] Having said that such an exception only applies if it is explicitly included in all state's BITs. Otherwise, a foreign investor could invoke a broadly worded MFN clause to borrow a more beneficial provision from another BIT that does not provide an adequate exception to a compulsory license or other flexibilities.[126] In effect, the MFN clause can neutralize the

[120] Siemens v. Argentina ICSID CASE No.ARB/02/8.
[121] *Gibson, supra* note 88, 360.
[122] Bayer Corporation v. Union of India Special Leave to Appeal (C) NO(S). 30145/2014: The Supreme Court of India upholds the grant of compulsory license to NATCO for the anti-cancer drug – sorafenibtosylate which neither fulfills reasonable requirement nor sufficiently work in India.
[123] Similarly, the India–Colombian BIT (2009), the India–Japan FTA (2011), the India–Malaysia FTA (2011) and the India–ASEAN Agreement (2014), exempt the issuance of compulsory licenses from the scope of expropriation.
[124] *Ranjan*, *supra* note 12, at 97.
[125] *Ranjan*, *supra* note 12, at 97.
[126] Foreign investors are often using the MFN clause to borrow beneficial provisions from other BITs. *See White Industries Australia Limited v. The Republic of India* (2010)

exception to expropriation in the first BIT.[127] Therefore, states should ensure that an explicit exception should be present in all BITs. Otherwise, they are susceptible to investment-related claims for breaching BIT as their mandate goes beyond the IP standard outlined in the WTO. The above-discussed vulnerability of possible breach of the BIT standard in the case of issuance of a compulsory license has brought the competing legal regimes of international investment law and intellectual property law into stark focus.[128]

Although many tribunals have focused on the effects or substantial deprivation tests to determine expropriation, some have also developed two more tests - the police powers test and the proportionality test to determine expropriation. On the police power test, tribunals held that a State has an inherent right to safeguard the public interest if policies or measures have been enacted in a manner that is bona fide, non-discriminatory, proportionate, and in accordance with due process.[129] In WNC Factoring Limited v Czech Republic, the claimant alleged that freezing the company's accounts (later causing insolvency) indirectly expropriated its investment in a state-owned company.[130] However, the tribunal held that the Central Bank's decision was a legitimate exercise of police powers to curb money laundering.[131] It concluded that the host State had exercised its powers in good faith, for a public purpose, and in a proportionate and non-discriminatory manner.[132]

On proportionality, some tribunals maintained that the police powers doctrine applies only to measures that have a proportionate impact on investors. In PL Holdings v Poland, the tribunal held that measures adopted by the banking regulator amounted to indirect expropriation.[133] It concluded that by prohibiting the investor from exercising shareholder-voting rights and disposing of their investment without restriction, the banking regulator has restricted the right of ownership of the investor.[134] Thus, the measures constitute an expropriation.[135] The tribunal noted that broadly, the principle of proportionality is similar across jurisdictions.[136] Therefore, any measure must be (a) suitable by nature for achieving a legitimate public purpose, (b) necessary for achieving that purpose in that no less burdensome measure

[127] *Correa*, *supra* note 20, 11.
[128] *Gibson, supra* note 88.
[129] Methanex Corporation v. United States of America, NAFTA-UNCITRAL, Award (3 August 2005): The tribunal held that: As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.
[130] WNC Factoring Ltd (WNC) v. The Czech Republic (PCA Case No. 2014-34), Award, 22 February 2017.
[131] *Id.*
[132] *Id.*
[133] PL Holdings S.a.r.l. v. Poland (SCC Case No. 2014/163), Partial Award, 28 June 2017.
[134] *Id.*
[135] *Id.*
[136] *PL Holdings, supra* note 132.

would suffice and (c) not be excessive in that its advantages are outweighed by its disadvantages.[137] After applying these criteria, the tribunal held that the host State's measures were not suitable, necessary, or proportionate and, therefore, had a similar effect to an expropriation.[138]

Cumulatively, applying the police power and proportionality tests, even issuing a compulsory license, which results in a substantial deprivation of investment, may not be considered an expropriation. Therefore, tribunals must strive to use police power and proportionality tests instead of effect or substantial deprivation tests to shield the host state from issuing a compulsory license.

ii. Parallel Import

Parallel import is a principle based on the 'doctrine of exhaustion,' which states that once the authorized sale of the IP occurs, the owner or holder loses their exclusive rights.[139] It implies that when an authorized sale occurs, the IP holder cannot control its exploitation, use, resale, and re-distribution.[140] In other words, as soon as the rights holder licenses IP in the market, the right holder can no longer control its exploitation, use, resale, and re-distribution due to exhaustion of rights over it.[141] However, it must be lawfully acquired and permitted for sale. Otherwise, it will be considered an IP infringement.[142]

The natural corollary of exhaustion of IP rights is parallel import,[143] which allows the import of IP products from one market to another without the authorization of the rights holder.[144] In other words, parallel import refers to a form of trade where authorized IP products are produced, sold, and exported[145] subject to the laws preventing parallel import.[146] For instance, India follows international exhaustion, which means that if an authorized sale takes place in any part of the world, rights over that product are exhausted, and it can be legally imported without authorization.[147] However, other countries, such as

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[137] *PL Holdings, supra* note 132.
[138] *PL Holdings, supra* note 132.
[139] Shamnad Basheer & Mrinalini Kochupillai, '*Exhausting' Patent Rights in India: Parallel Imports and TRIPS Compliance,* 13 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS (2008).
[140] *Id.*at 486.
[141] *Correa*, *supra* note 20, 13.
[142] *Correa*, *supra* note 20, 13.
[143] *Basheer*, *supra* note 138, at 487.
[144] Keith E. Maskus, *Parallel Imports in Pharmaceuticals: Implications for Competition and Prices in Developing Countries,* World Intellectual Property Organization (2001) https://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/ssa_maskus_pi.pdf.
[145] Christopher Heath, *Parallel Imports and International Trade*, International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) Annual Meeting, World Intellectual Property Organization (1999) https://www.wipo.int/meetings/en/details.jsp?meeting_id=3794.
[146]*Maskus*, *supra* note 143, at 2.
[147] *Basheer*, *supra* note 138, at 488.

the United States and China, do not recognize international exhaustion.[148] The European Union recognizes regional exhaustion in virtually all products but not international exhaustion.[149]

Article 6 of the TRIPS agreement recognizes that states are free to authorize parallel imports. It states that 'for the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4, nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.' Apart from that, the TRIPS agreement gives deference to the member states to establish the exhaustion of rights.[150] It means that the states can choose to allow or forbid parallel imports.[151] To protect and safeguard research-intensive industries such as pharmaceuticals, developed countries advocate for strong IP protection and do not generally support international exhaustion or parallel imports. In contrast, developing countries, importers of IP, generally support international exhaustion and parallel importation because they help lower consumer prices and increase market competition.[152]

The above incompatible perspectives on parallel import have created disharmony in the global trading order. Therefore, foreign investors may challenge parallel imports on the grounds of loss of revenue and market share due to exhaustion of rights. In such a case, whether erosion in the economic value of IP due to parallel import can be challenged as expropriation.[153] To a great extent, this depends on what constitutes an investment. As discussed in reference to a compulsory license, if parallel import substantially diminishes foreign investors' investment's economic value or profits, the possibility of an expropriation claim cannot be ruled out. In such circumstances, whether the parallel import complies with the TRIPS Agreement is irrelevant.

To shield from expropriation claims arising from parallel imports, the states should carve out parallel import provisions from BITs on the lines of Japan-Vietnam BIT. Concerning IP protection, the Japan-Vietnam BIT explicitly states that its provisions should not be construed to derogate from the rights and obligations under multilateral agreements.[154] Alternatively, providing regulatory space for preventing parallel importation as contained in the US FTAs with Australia, Morocco, and Singapore could be

[148] *Basheer*, *supra* note 138, at 488.
[149] *Maskus*, *supra* note 143, at 2.
[150] Part B of the TRIPS Article 6 states that Interpretation and Application of Article 6With respect to the exhaustion of intellectual property rights, paragraph 5(d) of the Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001, reads as follows "The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Article 3 and 4".
[151] Lahra Liberti, *Intellectual Property Rights in International Investment Agreements: An Overview,* OECD Working Papers on International Investment 11 (2010).
[152] Christopher J. Clugston, *International Exhaustion, Parallel Imports, and the Conflict between the Patent and Copyright Laws of the United States*, 4 BEIJING LAW REVIEW (2013).
[153] *Correa*, *supra* note 20, 13.
[154] *Liberti, supra* note 150, at 8.

explored. Otherwise, any substantial loss in the value of IP attributable to parallel import could be construed as expropriation.[155]

During TRIPS negotiations, developing countries protested against the rigid procedural formalities and obligations in the implementation of TRIPS flexibilities.[156] For example, they made reservations about the fulfillment of stringent procedural safeguards for the issuance of a compulsory license, which can unduly restrict their ability to give effect to public health goals.[157] However, taking into account the sheer number of BITs signed and ratified,[158] the developing countries that supported the broad TRIPS agreement willingly conceded sovereign regulatory powers to the BITs.[159] This concession of regulatory power to BITs endangered public health objectives. Thus, BIT commitments have diluted flexibilities under the TRIPS, and it would be difficult to implement TRIPS flexibilities without facing legal challenges from foreign investors.[160]

Nonetheless, the recent arbitration experience with BITs has prompted countries such as Bolivia, Brazil, Ecuador, India, South Africa, Pakistan, Venezuela, and Indonesia to review, terminate, or allow them to lapse without renewal.[161] Parallelly, other OECD countries-initiated re-drafting model BITs in a manner that included more safeguards for their regulatory autonomy. This suggests that countries are beginning to understand potential negative impact of BITs on the economy and other public policies.[162] Overall, the recent experience with unqualified BITs has shown that countries need to be careful about signing and ratifying BITs because the threat of arbitration is not artificial but real.[163]

IV. Philips Morris and Eli Lilly Cases: Is Regulatory Chill Dwindling?

IP is a driving engine of the modern economy that enables a knowledge-sharing system.[164] To 'enforce IP efficiently' and to mitigate 'differential treatment', foreign investors often protect their IP investment

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[155] *Liberti, supra* note 150, at 10.
[156] Thomas Cottier, *Working together towards TRIPS*, in THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS (Jayashree Watal & Antony Taubman eds., 2015).
[157] Sara M. Ford, *Compulsory Licensing Provisions Under the TRIPs Agreement: Balancing Pills and Patents*, 15 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW (2000).
[158] Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, in GLOBALIZATION AND INTERNATIONAL INVESTMENT (Fiona Beveridge ed., 2005).
[159] *Raju*, *supra* note 21, at 214.
[160] *Ford, supra* note 156.
[161] Philip Nel, *The Rise and Fall of BITs*, https://www.otago.ac.nz/politics/otago061036.pdf.
[162] Prabhash Ranjan, *India and Bilateral Investment Treaties: A Changing Landscape,* 29 ICSID REVIEW: FOREIGN INVESTMENT LAW JOURNAL (2014).
[163] *Id.*
[164] Tobias Boyd, *Innovation and economic growth: the bottom line*, 6 WIPO MAGAZINE (2015), https://www.wipo.int/wipo_magazine/en/2015/06/article_0004.html.

through BIT, which provides a legal framework that is independent of the national system of the host state.[165] However, the presence of IP as an investment in BITs has generated a 'regulatory chill' for public health because they can erode the flexibilities built into the TRIPS agreement.

As discussed earlier, BIT frameworks can prevent countries from taking necessary steps to protect public health. For instance, the legal battle over graphic warnings on cigarette packets in Philip Morris v Uruguay[166] raised concerns for public health. In this case, Philip Morris invoked the BIT between Uruguay and Switzerland to challenge the 'Framework Convention on Tobacco Control (FCTC)[167] complied plain packaging measure on the ground that such requirements diminish its trademark, thus in breach of the BIT obligation. The tribunal ruled in favor of Uruguay and stated that 'the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder can use the trademark in commerce, subject to the state's regulatory power.'[168] On the positive side, by giving policy deference, the arbitral tribunal has recognized the host states' regulatory authority in relation to public health.[169] However, Philip Morris's strategy was to delay, preempt, and weaken anti-smoking regulations,[170] the only binding multilateral convention on an aspect of public health.[171]

In the case of Eli Lilly and Company v The Government of Canada,[172] Eli Lilly – a pharmaceutical company, filed a claim against Canada under NAFTA, claiming compensation for the invalidation of patents by the Canadian court, showing that BITs can be used to challenge multilateral agreements. In this case, Eli Lilly argued that the invalidation of patents amounted to an expropriation of its investment by Canada in violation of NAFTA guarantees.[173] Owing to the lack of adequate evidence, although Eli Lilly lost the case, it has opened the possibility of foreign investors challenging IP under BITs, even if those are consistent with TRIPS, NAFTA, or other multilateral treaties or agreements.[174]

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[165] James M. Hosking & Markus Perkams, *The Protection of Intellectual Property Rights Through International Investment Agreements: Only a Romance or True Love?*2 TRANSNATIONAL DISPUTE MANAGEMENT 17 (2009).
[166] Philip Morris v. Oriental Republic of Uruguay ICSID Case No.ARB/10/7.
[167] World Health Organisation Framework Convention on Tobacco Control (adopted 21 May 2003 and entered into force 27 February 2005)
[168] *Philip Morris, supra* note 165, at 76.
[169] Caroline E. Foster, *Respecting regulatory measures: Arbitral method and reasoning in the Philip Morris v Uruguay tobacco plain packaging case*, 26 RECIEL (2017).
[170] Sergio Puig, *The Internationalization of Tobacco Tactics,* 28 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW (2018).
[171] Cecilia Olivet and Alberto Villareal, *Who really won the legal battle between Philip Morris and Uruguay?,* The Guardian (July 28, 2016) https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts.
[172] *Eli Lilly*, *supra* note 65.
[173] Veronica Clamens, *Eli Lilly and Company v. The Government of Canada, Case No. UNCT/14/2*, Symposium on State-Owned Enterprises in China, 16 WORLD TRADE REVIEW (2017).
[174] Cynthia M. Ho, *TRIPS Flexibilities Under Threat From Investment Disputes: A Closer Look At Canada's "Win" Against Eli Lilly*, IP Watch (April 27, 2017) https://www.ip-watch.org/2017/04/27/trips-flexibilities-threat-investment-disputes-closer-look-canadas-win-eli-lilly/.

The impact of the Eli Lilly case would be that the BITs could be used to significantly impact the ability of developing countries to use TRIPS flexibilities.[175] The chilling effect generated by the case could be extended beyond the use of well-established TRIPS flexibilities to undermine legitimate regulatory law or policy that promotes access to medicines or public health.[176] In other words, the Eli Lilly case demonstrates that foreign investors can use BITs to claim compensation for regulatory changes, including its court's interpretation that affects the economic value of IP.[177] Although the Eli Lilly case was brought under NAFTA rather than a BIT, it has made states, especially developing countries, vulnerable to the potential claims of expropriation if they use, exploit, or implement TRIPS flexibilities or regulate IP law or policy in a manner that diminishes the value of IP investment. The foreign investors only have to produce cogent and credible evidence before the arbitral tribunal to win the case.

The Philip Morris and Eli Lilly cases have raised concerns in developing countries about the far-reaching impact of BITs on public policies. However, states should avoid the knee-jerk reaction against BITs, which would be detrimental to their reputation as favorable investment destinations. Though it might be debatable whether BITs bring FDI,[178] they give confidence to foreign investors that the host state is committed to protecting their investments and is a favorable place to conduct business. A better approach to restrict foreign investors from challenging the IP regulatory measure is to carve out critical policy areas from the purview of BITs[179] or introduce TRIPS or other treaty-based specific exceptions as found in the BIT between the US and Uruguay (2004).[180] Such exceptions not only safeguard public health-related flexibilities but also emphasize that IP is protected and governed by TRIPS standards, not by BITs.[181] However, if the state's measure is not consistent with TRIPS, foreign investors may still challenge it on the grounds of non-compliance.

One of the dangers of the BITs is that they can create a two-parallel system for protecting IP.[182] The emergence of BITs has added a layer of protection to IP. However, this additional protection comes at a cost, as it can make it more difficult for states to implement public policies that may affect the value

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[175] Cynthia M. Ho, *Investor-State Arbitration: A New Threat to Global Access to Affordable Medicine,* (2018) https://ssrn.com/abstract=3143243.
[176] *Id.*
[177] Daniel J. Gervais & Jared Doster, *Investment Treaties and Intellectual Property: Eli Lilly v. Canada and Phillip Morris v Uruguay*, Vanderbilt Law Research Paper No. 18-38 (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188745.
[178] *See* Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India,* 41 VIKALPA: THE JOURNAL FOR DECISION MAKERS (2016); Rashmi Banga*, Impact of government policies and investment agreements on FDI inflows,* WORKING PAPER NO. 116, Indian Council For Research On International Economic Relations (2003) http://www.icrier.org/pdf/WP116.PDF.
[179] *Puig, supra* note 169.
[180] Article 6(5) states that: This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.
[181] *Ruse-Khan, supra* note 47, 25.
[182] One is BITs and other is TRIPS agreement.

of IP investments.[183] As a result, foreign investors can challenge IP measures under the WTO dispute settlement system and investor arbitration in BIT. This raises the possibility that investor-state arbitration tribunals could act as supranational courts of appeal[184] that can review IP measures for TRIPS compatibility, which exclusively comes within the domain of the WTO dispute settlement system.[185] It is still ambiguous which system will prevail, but it would be challenging to harmonize such conflicting positions.

In terms of remedies available for expropriation, the WTO dispute settlement system requires an erring state to bring its measure, regulation, or policy in compliance with the WTO standards.[186] In contrast, BITs seek compensation for erosion in investment value or profit.[187] The fallout of these two systems is that the states may face a double whammy. If it violates its TRIPS obligation, the member states can initiate dispute resolution proceedings at the WTO's dispute settlement body. If the same breach also results in substantial economic loss to a foreign investor, it can launch investor-state arbitration for higher compensation. Since BIT falls outside of the WTO rules, it does not require expropriation claims to be settled by its dispute settlement mechanism.[188] Thus, foreign investors have multiple channels to pursue their claims and seek remedies against host states. For instance, if a state issues a compulsory license that substantially reduces investment, the foreign investor could concurrently initiate investor-state arbitration under the BIT and petition its own government to file a trade violation complaint against the host country in the WTO dispute settlement system.[189]

Having said that, foreign investors may prefer investor-state arbitration in BIT against the WTO dispute settlement primarily for two reasons: Firstly, the WTO system is designed to promote compliance with its rules instead of awarding compensation.[190] Therefore, in the WTO system, the possibility of getting monetary compensation is less in comparison to investor-state arbitration, which a foreign investor may not prefer. Secondly, states may be hesitant to initiate a trade violation complaint against host states in the WTO, especially if they are important allies or trading partners. Such actions can damage diplomatic and political relations. In such a situation, investors cannot solely rely on the home states to file a case

[183] *Raju*, *supra* note 21, at 215.
[184] Asaf Niemoj, *Investment Arbitrations: Do Tribunals Take the Role of a Supra-National Appellate Court above National Courts?* Kluwer Arbitration Blog (July 27, 2018) http://arbitrationblog.kluwerarbitration.com/2018/07/27/investment-arbitrations-tribunals-take-role-supra-national-appellate-court-national-courts/; *See* Michael D. Goldhaber, *The Rise of Arbitral Power Over Domestic Courts,* 1 STANFORD JOURNAL OF COMPLEX LITIGATION (2013) https://law.stanford.edu/wp-content/uploads/2018/05/goldhaber.pdf.
[185] *Ruse-Khan, supra* note 47, 25.
[186] Article 19.1 of the DSU provides in relevant part that: Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.
[187] *Gibson, supra* note 88, 417.
[188] *Liberti, supra* note 150.
[189] *Gibson, supra* note 88, 402.
[190] *Cynthia*, *supra* note 173, at 22.

against the erring host state in the WTO.[191] Instead, they may prefer to initiate investor-state arbitration proceedings directly in BIT. Additionally, one of the key differences between the WTO dispute settlement system and investor-state arbitration is that foreign investors have more control over the claims in investor-state arbitration. [192] As in the WTO system, individual investors cannot bring claims directly, foreign investors do not have control over claims, and may not receive compensation if the WTO awards a favorable ruling to their home state.[193]

To safeguard TRIPS flexibilities, states should carefully undertake the cost and benefit analysis of BITs before ratifying them to ensure protection from expropriation claims.[194] However, it should be done cautiously, as the primary objective of BITs is to promote and protect foreign investment. Accordingly, host states should not be rigid, excessively favoring their interest over foreign investors' profit-seeking goals, as such a scheme could discourage foreign investment.[195] Therefore, the challenge lies in constructing a BIT framework that is not too broad, restricting states from taking measures to affect public health and, at the same time does not give foreign investors too much leeway to bring expropriation claims against them.[196]

V. Conclusion

The present forms of BITs used by most states not only restrict their public policy space but also endanger carefully negotiated TRIPS and other multilateral flexibilities vital for public health. The broad and unqualified definition of IP as an investment in BITs gives foreign investors a platform to challenge the use of TRIPS flexibilities. Any dilution in IP investment that significantly deprives the foreign investors of its economic value or profits, irrespective of whether it is non-discriminatory or applied to achieve public health objectives, would be considered as expropriation.

Often, BITs contain provisions that expand the scope and obligations of IP. Therefore, even a legitimate exercise of TRIPS flexibilities adversely affecting an investment can be construed as expropriation and challenged in investor-state arbitration. The states cannot take the defense of the exercise of sovereign power to avoid paying compensation. To escape, they should limit the broad and unqualified investment definition as they give foreign investors ample scope to bring an action against states, even when the measures applied by them are TRIPS compliant or intended to give effect to public health.

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[191] *Gibson, supra* note 88, 407.
[192] *Gibson, supra* note 88, 408.
[193] *Hosking, supra* note 164.
[194]Alan M. Anderson & Bobak Razavi, *International Standards for Protection of Intellectual Property Rights Post-TRIPS: The Search for Consistency*, 2 TRANSNATIONAL DISPUTE MANAGEMENT (2009).
[195] Peter B. Rutledge, TRIPS and BITs: An Essay on Compulsory Licenses, Expropriation, and International Arbitration, 13 N.C. J. L. & TECH. ONLINE 149 (2012).
[196] *Id.* at 152.

To avoid unintended consequences impacting TRIPS flexibilities, states should carefully negotiate and draft BIT obligations by incorporating specific and explicit exceptions. Moreover, states should carve out separate exception clauses similar to the WTO system to maintain policy space. For instance, states could consider the Canada - US Model BIT approach, which provided that non-discriminatory measures taken to protect public welfare should not be considered as indirect expropriation. This approach helps maintain states' regulatory authority to pursue public policy objectives.

States have a fundamental duty to maintain the well-being of their people, and protecting public health is an intrinsic part of their sovereignty.[197] Therefore, in the cases of indirect expropriation, tribunals should carefully assess the nature of the interference, its negative impact on public health or public policy, and the limitations prescribed within TRIPS or other multilateral treaty obligations before annulling measures taken by states to ensure that both frameworks BIT and TRIPS remain the instruments of welfare.

[197] Valentina Sara Vadi, *Mapping Uncharted Waters: Intellectual Property Disputes With Public Health Elements in Investor-State Arbitration,* 2 TRANSNATIONAL DISPUTE MANAGEMENT (2009).

Dundee Student Law Review, Volume XI

DOI: https://doi.org/10.20933/100001430

To what extent does authoritarianism pose a threat to the legitimacy of international law?

Annie Scott[1]

Introduction

The period of domination within international law by Western liberal democracies is receding into the past rather quickly. Between America's disengagement with international law, the immense economic and political power garnered by China, and Russia's efforts to expand its influence and bolster its position as a counterbalance to Western hegemony, the global geopolitical landscape is undergoing a significant shift marked by diverging interest among major powers.[2] These shifting power dynamics have challenged the traditional narrative of international law.

Authoritarian regimes are well-familiarised with participation in regional organisations, however, they are now playing a larger role within international law institutions and its processes.[3]

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[2] U.S Department of State, 'On the U.S. Withdrawal from the Paris Agreement' (2019) <https://2017-2021.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> accessed 12 April 2022 see also Mike Pompeo, Secretary of State and Nikki Haley, U.S. Permanent Representative to the United Nations, 'Remarks On The UN Human Rights Council' (Treaty Room, Washington, DC June 19, 2018); Anthony H. Cordesman, 'China's Emergence as a Superpower : A Graphic Comparison of the United States, Russia, China, and Other Major Powers' (Centre for Strategic and International Studies, 2023) ; Vladimir Putin, "Address concerning the events in Ukraine" (Kremlin, Moscow, 21 February 2022)< http://kremlin.ru/events/president/news/67828> accessed 10 April 2024 see also Tucker Carlson, Interview with Vladimir Putin, President of Russia (Moscow, 8 February 2024) <https://www.youtube.com/watch?v=hYfByTcY49k> accessed 10 April 2024

[3] Jeffrey Feltman,'China's expanding influence at the United Nations—And how the United States should react.' (Brookings Institution, 2020) ; Philip Remler, 'Russia at the United Nations: Law Sovereignty, and Legitimacy,' (2020) 22 Carnegie Endowment for International Peace 1; 'The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law,' 25 June 2016, <www.mid.ru/en/foreign_policy/position_word_order//asset_publisher/6S4RuXfeYlKr/content/id/2331698.> accessed 10 April 2024

The increased participation in international law bodies and their structures provides a wider-reaching platform for authoritarian regimes to advocate their interests, approach governance, and influence global issues. This is encapsulated by the description of international law as both a 'shield and a sword' for authoritarianism, providing protection from attack and a tool with which authoritarians can further their aims.[4]

International law is predicated on principles typically associated with liberal democracies, such as the rule of law and the protection of human rights. Authoritarian regimes often flout these principles and engage in repression, censorship, as well as human rights abuses. The increased participation of authoritarian regimes in international law raises crucial questions about how the global legal framework will adapt.

This essay seeks to address whether authoritarianism represents a threat to the legitimacy of international law. It does so by identifying three aspects of authoritarianism in international law that could pose a threat to the legitimacy of international law, examining theoretical aspects such as competing norms, as well as the emergence of threats through procedural means. These are then assessed on how they affect legitimacy according to three different interpretations of legitimacy to reach a comprehensive and fair conclusion.

The first section of this essay will define authoritarianism and provide some necessary background information. This will be followed by a discussion on the conceptualisation of legitimacy, which will also set out the schools of thought that are used to measure legitimacy, which include: natural law, legal positivism, as well as input, throughput and output legitimacy. These aim to provide a thorough and balanced approach to measuring legitimacy in this context, utilising normative and descriptive based judgements.

The following section explores authoritarianism's influence on international law, focusing on how authoritarian regimes shape and utilise it. Firstly, it examines the experimentation with creating norms, such as the Shanghai Cooperation Organisation's (‘SCO’) 'three evils' doctrine. Secondly, it delves into the use of international law for illiberal purposes, citing examples like the UN General Assembly resolution on countering criminal uses of technology. Lastly, it discusses how authoritarians undermine international law institutions, as seen in China's influence over Cambodia's vote in the Association of Southeast Asian Nations (‘ASEAN’).

Once a consensus is reached on whether authoritarianism is a threat to the legitimacy of international law, the essay concludes with a discussion, touching on issues of interpretation, collaboration and the future of international law within a changing global context.

[4] Tom Ginsburg, ‘How Authoritarians Use International Law’ (2020) 31 JD 44

Clarifying Authoritarianism

As a preliminary matter, a definition of authoritarianism should be established for the purposes of this essay. Definitions of authoritarianism typically focus more on what authoritarianism is not, or what it opposes. This does have some logic, as there is a great deal of variation among authoritarian regimes. In the present day, there are authoritarian governments which could be categorised as absolute monarchies, military regimes, and ideologically based systems of government.[5] These governments are not uniform, but all feature low levels of civil liberties, political participation, electoral freedom and integrity, and political participation.[6] This is the approach that will be taken when characterising a country's government as 'authoritarian.'

Based on this criteria, multiple indexes indicate a dramatic decline in the number of fully democratic countries over the last twenty years.[7] If this trend continues, fewer than 5% of the global population will reside in full democracies by 2026.[8] Therefore, the increased participation of authoritarian governments in international law is unsurprising and expected to grow further. Authoritarian governments are known to be more prone to conflict with each other, spread disinformation, and engage in cross-border cyber-attacks.[9] This underscores the importance of international law as a mechanism to address these cross-border issues, which are likely to become more frequent in a future marked by increased authoritarianism.

Interestingly, few nations self-identify as authoritarian regimes and often utilise the 'institutional trappings' of democracy, including constitutions.[10] Yet these mimicked institutions, processes and elements of democratic governance often lack proper autonomy and credibility, leading to concerns over how authoritarian regimes will respond to similar features of international legal processes.

Authoritarian governments are not wholly new to international law, although historically they were viewed more as a cause for suspicion than as active participants. The exclusion of the Soviet Union from NATO during the Cold War era reflects the legal and political division rooted in ideological differences between Western democracies and the Soviet Bloc.[11] Similarly, the exclusion of the People's

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[5] Economist Intelligence Unit,'Democracy Index 2023' (The Economist Group, 2024); for an example of each: Saudi Arabia, Myanmar, and North Korea

[6] ibid

[7] Economist Intelligence Unit,'Democracy Index 2023' (The Economist Group, 2024); Freedom House, 'Freedom In The World 2022' (2022)

[8] Nic Cheeseman and others, 'The rise of authoritarianism is misunderstood – and it matters' [2023] The Centre for Elections, Democracy, Accountability and Representation

[9] ibid

[10] Michael Albertus and Victor Menaldo, 'The Political Economy of Autocratic Constitutions', in Constitutions in Authoritarian Regimes (eds. Tom Ginsburg & Alberto Simpser: Cambridge University Press, 2014), 80

[11] Geoffrey Roberts, 'Molotov's Proposal that the USSR Join NATO, March 1954' 27 CWIHP

Republic from the United Nations until 1971 highlights the tensions between the Western-dominated international order and the communist ideology espoused by the Chinese government.[12] In this sense, the highly politicised nature of international law at the time made it an inhospitable environment for authoritarian regimes.

The Warsaw Pact, established in response to NATO, serves as an example of rudimentary authoritarian international law. Notably, the treaty's first line affirms the importance of a collective security regime 'irrespective of social and political systems.'[13] Unlike NATO, it lacked mechanisms for domestic legislative approval, indicating reliance on Soviet power for enforcement rather than democratic processes. While espousing principles of state sovereignty, its actions, such as the invasion of Hungary in 1956, reflected a regime geared towards extending authoritarian rule rather than upholding international legal norms.[14]

When assessing the legitimacy of authoritarian international law, such as the Warsaw Pact, questions arise regarding the appropriateness of applying democratic benchmarks as metrics of legitimacy. The idea of legitimacy in the context of international law will be further explored in the following section to enable a more comprehensive understanding of such questions.

Conceptualising Legitimacy

As a definition of authoritarianism has been clarified, the next step is understanding 'legitimacy' in this context. Whether a law is legitimate depends on the beliefs of the respondent, a topic of ongoing debate in legal academia. Characterising legitimacy presents challenges, however, it is crucial given its centrality to this topic. It typically refers to the perceived validity, authority, or acceptance of legal norms, institutions, or practices within a legal system or society. It is worth noting that this essay operates under the assumption that international law can be legitimate, a notion that has been debated by scholars.[15] Three theories of legitimacy will be utilised to assess the threat posed by authoritarianism: legal positivism, natural law, as well as the input, throughput, and output models.

[12] United Nations, General Assembly Resolution 2758

[13] Treaty of Friendship, Cooperation and Mutual Assistance Between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Romanian People's Republic, the Union of Soviet Socialist Republics, and the Czechoslovak Republic (14 May 1955)

[14] Treaty of Friendship, Cooperation and Mutual Assistance art 8; Office of the Historian, 'Soviet Invasion of Czechoslovakia, 1968' (United States Department of State) < https://history.state.gov/milestones/1961-1968/soviet-invasion-czechoslavkia> accessed 12 April 2024

[15] For example Anthony d'Amato, 'Is International Law Really Law' (1984) 79 Nw UL Rev 1293

Legal positivism, a theory in jurisprudence, holds that law's legitimacy stems from social facts rather than moral considerations.[16] According to legal positivism, laws are rules established by human authority, like legislatures or courts, with legitimacy based on their source rather than content.[17] Within legal positivism, theories differ on the social facts underpinning legitimacy. HLA Hart, in 'The Concept of Law,' posits that law's legitimacy hinges on adherence to proper legal procedures.[18] He distinguishes primary rules, governing behaviour directly, from secondary rules, regulating the creation, modification, and enforcement of primary rules.[19] Emphasising secondary rules, especially the rule of recognition, Hart contends that legal norms are legitimate if they comply with these rules.[20] While Hart denied that international law forms a complete legal system due to a lack of the rule of recognition, some scholars interpret international law through a Hartian perspective.[21] Identifying the rule of recognition within international law poses many challenges due to a lack of centralised judicial authority issuing binding decisions and various theories exist regarding its source. Another legal positivist, Joseph Raz, underscores the role of authority in legitimising law, highlighting prerequisites like publicly available rules enforced by competent officials.[22] He elaborated on the rule of law concept, highlighting the significance of legal certainty, predictability, accessibility, non-retroactivity, stability, fair hearings, and administration by an independent judiciary ensuring law's legitimacy[23]. According to Raz, a legal system adhering to the rule of law principles is more likely to be perceived as legitimate by its subjects.[24]

Legal positivism adopts a descriptive approach rather than a normative one. This perspective influences how legal positivists perceive the risk of authoritarians to the legitimacy of international law. Positivists are primarily concerned with how law operates in practice rather than prescribing how it should be. Therefore, they may be less concerned with the moral implications of an authoritarian regimes' increased participation in international law. Adherents of Hart's belief system may challenge the legitimacy of international law, especially where authoritarian regimes do not adhere to correct internal processes. Raz, with his emphasis on the rule of law principles, might adopt a more critical stance toward authoritarian regimes in international law. If authoritarian regimes transplant governance styles characterised by concentration of power, weakening of independent judiciaries, and secrecy, this could undermine the rule of law in the international legal system and erode the overall legitimacy of international law.

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[16] David Lyons, 'Founders and Foundations of Legal Positivism' (1983) 82 Michigan Law Review 722
[17] ibid
[18] HLA Hart, The Concept of Law (3rd edn, Oxford University Press, 1961)
[19] ibid
[20] ibid
[21] Anthony Green, 'The Precarious Rationality of International Law: Critiquing the International Rule of Recognition' (2021) 22(8) GLJ1613
[22] Joseph Raz, The Authority of Law: Essays on Law and Morality (2nd edn, Oxford University Press, 2009)
[23] ibid
[24] ibid

Legal positivism contrasts with natural law theory, which asserts that universal moral principles inherent in nature determine law's legitimacy.[25] According to natural law, human-made laws are legitimate when aligned with these moral principles, which include fundamental rights and duties inherent to human beings regardless of societal laws.[26] Thomas Aquinas, a prominent medieval philosopher and theologian, is closely associated with natural law theory. His theory, rooted in reason and divine law, views natural law as an objective set of principles derived from human nature and accessible to human reason.[27] Aquinas saw natural law as a way of guiding human conduct and assessing the morality of laws, endorsing rights such as life, liberty, property, and religious freedom.[28] John Finnis, a contemporary legal philosopher, offers a modern interpretation of natural law, emphasizing the intrinsic value of human goods and practical reason.[29] According to Finnis, laws should promote these goods and be evaluated based on their alignment with natural law principles.[30] He identifies rights emerging from fundamental human goods, such as life, knowledge, friendship and religion; endorsing rights like freedom of thought and expression as part of natural law.[31] Finnis contends that these rights are essential for individuals to pursue fulfilling lives.[32]

Authoritarian regimes may engage in behaviour undermining natural law principles in international law. Aquinas might argue that authoritarian regimes threaten international law's legitimacy by enacting laws that violate natural law principles like preserving life and promoting justice. He would stress that adherence to natural law is crucial for the legitimacy of both domestic and international legal systems. Similarly, Finnis would prioritise the well-being of mankind and rights protection in international law, considering laws or actions by authoritarian regimes contrary to these principles incompatible with its legitimacy.

The final approach to be utilised integrates both descriptive and normative elements of assessment, utilising the input, throughput, and output model of legitimacy developed by Fritz Scharpf and Viviane Schmidt.[33] By conceptualising governance as a process that involves inputs (such as societal demands and preferences), throughputs (the mechanisms and processes of decision-making and implementation), and outputs (the results and consequences of governance actions), a framework for analysing the

[25] A G Chloros, 'What Is Natural Law?' (1958) 21(6) MLR 609
[26] ibid
[27] Tim Murphy, 'St Thomas Aquinas and the Natural Law Tradition' in *Western Jurisprudence* (Thomson Round Hall, 2004)
[28] ibid
[29] John Finnis, Natural Law and Natural Rights (Oxford University Press, 2011)
[30] ibid
[31] ibid
[32] ibid
[33] Fritz W Scharpf, Governing in Europe: Effective and Democratic? (Oxford University Press 1999) and Viviane A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output, and ‘Throughput’' (2013) 61 PS 2

functioning and legitimacy of governance systems is established. The model highlights the interplay between institutional design, decision-making processes, and the outcomes of governance systems. These criteria provide a framework for evaluating the legitimacy of legal systems, considering both procedural fairness and the practical outcomes of legal decision-making. The focus here is to uncover the nuances of how authoritarianism impacts international law institutions procedurally, moving beyond broad evaluative judgments.

A proponent of the input, throughput, output model would likely view authoritarianism as a major challenge to the legitimacy of international law if it imports aspects of its domestic system into global forums. Authoritarian regimes typically prioritise centralised control over accommodating societal needs and tend to stifle diverse voices and dissent in decision-making processes. Consequently, the outcomes of governance actions frequently fail to align with societal interests and well-being. When authoritarian practices permeate international legal institutions or decision-making processes, they can erode the principles of transparency, accountability, and inclusivity that are central to input, throughput, and output legitimacy.

The following sections aim to investigate the validity of these preliminary conclusions by further examining the impact of authoritarianism on international law. These sections will endeavour to tie examples to broader themes of how authoritarianism is impacting international law to gain a more comprehensive and enduring assessment on whether authoritarianism represents a threat to international law's legitimacy.

Norm Experimentation and Dispersion

Authoritarian governments are experimenting with the creation or dispersion of norms which align with their ideological preferences and approach to governance on the international stage. A notable example is the SCO's 'three evils' of terrorism, separatism, and extremism.[34] The SCO is a Eurasian political, economic, international security and defence organization established in 2001 by China and Russia.[35] The 2001 SCO convention refined the definitions of terrorism, separatism, and extremism.[36] While terrorism aligns with established definitions in international law, separatism and extremism are newer concepts. Separatism refers to actions aimed at breaching territorial integrity or facilitating state disintegration.[37] The territorial aspect is intriguing, particularly given Russia's recent invasion of

[34] Shanghai Cooperation Organisation, Convention on Combating Terrorism, Separatism, and Extremism <https://eng.sco-russia2020.ru/images/17/25/172503.pdf> accessed 13 April 2024
[35] Shanghai Cooperation Organisation, 'About SCO' (Shanghai Cooperation Organisation, 28 October 2017) <http://www.sectsco.org/> accessed 13 April 2024
[36] ibid
[37] Shanghai Cooperation Organisation, Convention on Combating Terrorism, Separatism, and Extremism, Article 1(2)

Ukraine. While separatism typically implies respect for territorial integrity, Russia's invocation of historical imperialist ideology to justify the invasion prompts the question of whether separatism is being exploited as a pretext for territorial expansion.

'Extremism' fills a gap not covered by terrorism and separatism, defined as acts aimed at seizing or maintaining power through violence or forcibly altering a state's constitutional regime, as well as violent threats to public security for such purposes.[38] It goes beyond conventional terrorism by focusing on seizing power which implies a narrow focus on violent political actions directed at state authorities. This aligns with the centrality of 'regime survival' to authoritarianism. Actions which could take power away from the regime represent a significant threat to its survival. While adding 'violent' may allay concerns in general contexts, its use in authoritarian settings is cause for alarm. This could lead to the targeting of peaceful protests and political mobilisation under the pretext of combating extremism, as seen in Hong Kong.[39]

The norm-building process within the SCO often follows a sequential pattern, progressing from a conceptual framework to a specific program and then a detailed plan, with each iteration demanding increased cooperation.[40] These instruments frequently cite UN documents, including General Assembly Resolutions, indicating a strategic effort by prominent authoritarian nations to interact with the UN apparatus.[41] This strategy extends to other international bodies like the Commonwealth of Independent States, as leading authoritarian nations seek to project regional norms onto a wider international stage, thereby influencing global normative development.

The emerging norms aim to prevent member nations from sheltering dissidents, promoting collaboration for security. SCO members exchange intelligence on opposition groups, using extradition and asylum refusal for political prosecution.[42] This implicates the political offence exception in extradition law, which historically aimed to avoid political entanglement. Initially seen as safeguarding political expression, this norm shifted with exclusions like genocide and war crimes. SCO treaties exploit these exclusions, enabling extradition for vaguely defined offences like separatism and extremism[43] This challenges the established norms of international cooperation in extradition matters and raises questions about the extent to which multilateral treaties can supersede or modify customary

[38] Shanghai Cooperation Organisation, Convention on Combating Terrorism, Separatism, and Extremism, Article 1(3)
[39] 'China's New Cybersecurity Rules: Foreign Companies in the Crossfire?' (BBC News, 15 August 2019) https://www.bbc.co.uk/news/world-asia-china-49348462 accessed 14 April 2024
[40] Tom Ginsburg, 'Authoritarian International Law?' (2020) 114(2) AJIL 221
[41] ibid
[42] See the examples in International Federation for Human Rights, 'Shanghai Cooperation Organisation: A Vehicle for Human Rights Violations' (2009) <https://www.fidh.org/IMG/pdf/sco_report.pdf> accessed 14 April 2024
[43] Shanghai Cooperation Organisation, Agreement on Cooperation in Combating Crime (2004)

international law. Customary international law evolves over time through state practice so the SCO's actions may contribute to this evolution in extradition practices.

According to a legal positivist, the experimentation with the creation and dispersion of norms by authoritarian regimes may be perceived as a legitimate aspect of the evolving international legal landscape. Legal positivists might argue that the SCO's engagement with international law demonstrates a constructive effort toward legal cooperation, albeit with potential concerns regarding the selective application of norms. Further concerns may arise if these actions lack widespread acknowledgement from the international community. The actions taken by SCO members, such as exchanging intelligence and extraditing individuals accused of certain offences, would be seen as lawful and legitimate because they are in accordance with regional treaties and agreements.

For a natural lawyer, the SCO's formulation of new norms poses significant moral challenges. The SCO's dissemination of norms which suppress dissent and restrict individual freedoms to the international law fora would likely be viewed as undermining the legitimacy of international law from a natural law perspective because it prioritises state sovereignty over the right to expression, the right to protest and potentially others depending on the enforcement of the rights. The use of extradition and asylum refusal for political prosecution and suppression could be seen as violations of the right to political expression and asylum. According to natural law, the erosion of human rights is incompatible with the inherent moral values that should guide legal norms. The legitimacy of international law is jeopardized when these norms are transplanted onto the global stage.

Regarding the input, output, throughput legitimacy model; when norm-building activities are conducted transparently, allowing for meaningful participation and oversight, the legitimacy of the throughput component is upheld. The legitimacy of the output component is contingent on the effectiveness and legitimacy of these norms in addressing societal needs and promoting collective well-being. If the norms produced through norm-building activities are perceived as legitimate and beneficial by member nations and other stakeholders, the legitimacy of the output component is strengthened. Though the norms could contribute to regional cooperation and stability, they conflict with human rights which underpin the aims of the foremost multilateral international institutions.

Utilisation of International Law for Illiberal Purposes

Authoritarian regimes exploit international legal structures for illiberal purposes. In November 2019, the United Nations General Assembly passed the resolution ‘Countering the Use of Information and Communications Technologies for Criminal Purposes’ with 88 votes in favour, 58 against, and 34

abstentions.[44] Proponents, including Cambodia, China, Iran, Myanmar, Nicaragua, Syria, and Venezuela, drew criticism from Western liberal democracies for provisions enabling online censorship, restricting human rights, and emphasising state authority with regard to internet governance.[45] Additionally, concerns arose from the formation of an expert group tasked with drafting a new cybercrime treaty, scheduled to convene in August 2020.[46] This initiative has sparked a diplomatic confrontation between democracies and authoritarian states, with Russia proposing the treaty as an 'alternative' to the Budapest Convention.[47] Critics fear that the proposed treaty could criminalise lawful online activities protected under international human rights law, signalling a broader pattern of authoritarian regimes manipulating multilateral platforms to advance their agendas.[48] If authoritarian governments shape the treaty's terms, it could empower them to extend state control over digital spaces and restrict freedom of expression, potentially undermining global legal frameworks. The prevailing viewpoint in international relations posits that multilateral diplomacy inherently aligns with liberal democracy, implying that liberal democracies hold a structural advantage in multilateral negotiations. However, the recent passage of illiberal legislation indicates a shift, suggesting that authoritarian regimes are becoming increasingly adept at manoeuvring within multilateral institutions and leveraging them to implement illiberal measures.

From a legal positivist standpoint, the legitimacy of international law in this scenario would be intact. The United Nations General Assembly adopted the resolution, which means it followed the proper procedure and holds legal validity according to positivist principles. Conversely, the utilisation of international law frameworks to introduce legislation which enables censorship and restricts freedom of expression is contrary to natural law principles. According to natural law, the use of international law structures for illiberal purposes could lead to a critique of the legitimacy of international law itself, particularly if it fails to protect human rights as a result.

The input of this model includes the formation of an expert group tasked with drafting a new cybercrime treaty. Throughput involves the negotiations, discussions, and diplomatic processes surrounding these actions. The output is the passage of legislation that reflects the interests of authoritarian regimes and potentially undermines liberal democratic principles. The model may highlight the flaws in the input process by the inclusion of authoritarian nations, in this case in an expert group. From this perspective,

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[44] United Nations General Assembly, 'Countering the use of information and communications technologies for criminal purposes' (25 November 2019) UN Doc A/74/401

[45] Jason Mack, 'Statement on Agenda Item 107 "Countering the use of information and communications technologies for criminal purposes"' (U.S. Mission to the United Nations, 18 November 2019)

[46] United Nations General Assembly, Resolution 74/247, 'Countering the use of information and communications technologies for criminal purposes' (27 December 2019) A/RES/74/247,

[47] Joyce Hakmeh and Allison Peters, 'A New UN Cybercrime Treaty? The Way Forward for Supporters of an Open, Free, and Secure Internet' (Council on Foreign Relations, 13 January 2020) <https://www.cfr.org/blog/new-un-cybercrime-treaty-way-forward-supporters-open-free-and-secure-internet> accessed 15 April 2024

[48] ibid

the legitimacy of international law might be seen as compromised due to the output not aligning with international law values, namely the centrality of human rights and democracy to the UN's duties.

Manipulation of Multilateral Forums

The final area this essay will focus on are the deliberate attempts by authoritarian regimes to undermine multilateral forums, including those intended for liberal or democratic promotion. This point entails the weakening of the effectiveness of multilateral structures for liberal aims, as well as the deliberate undermining of consensus-based approaches in international law. The former is exemplified by the manipulation of the Human Rights Council, where authoritarian states have successfully weakened the requirement for strong human rights records, allowing the administrations of Bahrain, Cuba, Qatar, and Saudi Arabia to serve on the council.[49] This entails a consideration of whether the inclusiveness of international law processes should be prioritised over, in this case, maintaining standards on human rights. The presence of authoritarian countries on the council has had the effect of neutralising it as instrumental for human rights promotion, underscoring the need for multilateral organisations to prioritise their central objectives over peripheral considerations.

Moreover, authoritarian tactics extend to stalling institution-building and blocking collective actions within regional organizations. For instance, it is alleged that China has 'bought' Cambodia's vote in ASEAN and has used this influence to hinder the organization's ability to address issues like the South China Sea dispute.[50] Similarly, Hungary's questionable obstructionism within the EU has prevented the adoption of anti-China resolutions.[51] Sovereign equality may not be the best path forward in regional organisations where it can be manipulated by wealthy participants or outside actors, particularly where those organisations operate by consensus, and every member state has a veto.

From a legal positivist perspective, the actions of authoritarian regimes in undermining multilateral forums intended for promoting liberal or democratic values could raise questions about the legitimacy of international law. Raz's work emphasises the authority of the entities that promulgate laws, and if these entities are manipulated by authoritarian tactics, it undermines the perceived legitimacy of the

[49] Office of the United Nations High Commissioner for Human Rights, 'Membership of the Human Rights Council' <https://www.ohchr.org/en/hr-bodies/hrc/membership> accessed 15 April 2024; Economist Intelligence Unit, 'Democracy Index 2023' (The Economist Group, 2024)
[50] Kheang Un, 'Cambodia is China's Leverage Point on ASEAN' (East Asia Forum, 15 December 2021) <https://eastasiaforum.org/2021/12/15/cambodia-is-chinas-leverage-point-on-asean/> accessed 15 April 2024
[51] Stuart Lau, 'German Foreign Minister Slams Hungary for Blocking Hong Kong Conclusions' Politico (16 July 2020) <https://www.politico.eu/article/german-foreign-minister-slams-hungary-for-blocking-hong-kong-conclusions/> accessed 15 April 2024; François Venne, 'China in Hungary: Real Threat or False Alarm?' (CEPA, 2022)

resulting legal decisions and structures. Moreover, the consent of states is important to positivist conceptions of sovereignty.[52] If this consent is compromised, this could implicate legitimacy.

For a natural lawyer, the deliberate undermining of multilateral forums and consensus-based approaches in international law by authoritarian regimes could be seen as contrary to the principles of justice and morality that underpin natural law theory. If consent is manipulated to suppress dissent or silence opposition within member states, it can result in violations of freedom of speech, assembly, and association. This conflicts with Finnis's view that these rights are important for the pursuit of fulfilment in harmony with natural law principles. From this perspective, the legitimacy of international law may be questioned or denied if it fails to uphold fundamental principles of human rights in the face of authoritarian manipulation.

In the context of the input throughput output model of legitimacy, the deliberate attempts by authoritarian regimes to undermine multilateral forums can be seen as a disruption in the normal processes of international law. The input, which involves the formation and operation of these forums, may be distorted by authoritarian interference and participation, leading to outputs that deviate from the intended goals of promoting human rights. Buying votes or blocking decisions amounts to manipulating the input process, thus undermining the consent and participation of other member states. Manipulating consent can also diminish accountability and transparency within regional organisations. This can weaken the perceived legitimacy of international law as it fails to effectively achieve its central aims due to authoritarian manipulation.

Navigating Authoritarianism and International Law: Challenges and Opportunities

As this exploration nears its conclusion, the question of legitimacy of international law in the face of authoritarianism has been addressed, yet several areas warrant further consideration.

It is important to note the subjectivity of interpretation of key terms involved in this discussion, such as democracy and human rights, which can vary greatly depending on cultural, historical, and political contexts. This essay aims for a balanced view of the legitimacy of authoritarianism within international law, yet it acknowledges the diversity of interpretations. While a liberal democratic perspective is taken on concepts like rights and democracy, other perspectives, such as China's results-based view of

[52] Richard Collins, 'Classical Legal Positivism in International Law Revisited' in J d'Aspremont and others (eds) *International Legal Positivism in a Post-Modern World* (CUP, 2013)

democracy or Russia's relativised approach to rights, exist.[53] Recognising these differences is crucial for understanding the complexities of legitimacy in international law and fostering meaningful dialogue and cooperation among diverse global actors. The evolving landscape may blur the lines between authoritarianism and democracy, as authoritarian countries advocate their versions of democracy internationally, and former liberal democratic strongholds edge closer to hybrid systems. The rise of populist rhetoric and emphasis on sovereignty in the UK and USA are particularly noteworthy, as issues like immigration prompt relativised human rights approaches.[54]

Looking ahead, the idea of collaboration will be crucial, given the increasing cooperation among authoritarian regimes in international law. This is highly significant, demonstrating that authoritarian regimes are not being obstructed by their differences, and can utilise their majority for increased influence on the international stage. The alignment between regimes like Russia and China highlights significant agreement in their perspectives. Their joint Declaration on the Promotion of International Law emphasises sovereignty and non-intervention, along with consent and good faith in dispute resolution.[55] Scholars suggest this could lead to a new phase of international law, one which Ginsburg has characterised as 'Eastphalian', resembling classical Westphalian principles with a focus on sovereignty while relegating individual human rights to a secondary concern and limited international integration.[56]

When assessing the threat of authoritarian regimes to international law's legitimacy, it's important to retain a degree of scepticism. Particularly in discussions around norm experimentation, several of the examples in this essay concern regional institutions. The 'Eastphalian' approach is less concerned with transplanting their ideology and governance approach abroad than liberal democracy. This makes it more likely that the norms may be regionally contained. It could potentially emerge as just one component operating within the wider international legal framework. Moreover, international lawyers must consider if a countering force to liberal international law could be beneficial or at least fair, acknowledging the stimulative nature of disagreement in legal processes. Embracing diverse governance styles and perspectives on international law can enrich global discourse, fostering

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[53] The State Council Information Office of the People's Republic of China, 'China: Democracy That Works' (2021) 1, 48; Dmitry Shlapentokh, 'Universalization of the Rejection of Human Rights: Russia's Case' in Lynda S. Bell and others (eds) *Negotiating Culture and Human Rights* (CUP, 2001)

[54] 'The Republican Party has lurched towards populism and illiberalism' *The Economist* (Oct 31 2020) <https://www.economist.com/graphic-detail/2020/10/31/the-republican-party-has-lurched-towards-populism-and-illiberalism> accessed 16 April 2024; Russell Foster and Matthew Feldman, 'From 'Brexhaustion' to 'Covidiots': The United Kingdom and the Populist Future' (2021) 17(2) JCER 116

[55] The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law (Beijing, 2016)

[56] Tom Ginsburg, 'Democracies and International Law: The Trials of Liberalism' (Hersch Lauterpacht Memorial Lectures Part 3, Cambridge, 14 March 2019) <https://upload.sms.csx.cam.ac.uk/media/2939251> accessed 14 April 2024

community and constructive outcomes, as argued by Hakimi.[57] Conflict and debate contribute to the evolution of global governance structures, promoting shared purpose and collaboration among participants. Beyond this, it is possible that authoritarian influence in international law could offer some strengths. The track record of liberal hegemony, often led by the USA, has been mixed, marked by inconsistent humanitarian interventions and regime-change efforts. Non-interventionism and consensus-based approaches promoted by authoritarian regimes could lead to a more peaceful international landscape.

Conclusion

In this study of authoritarianism's impact on international law, the landscape traversed has been marked by intricate legal frameworks, diverse ideological perspectives, and evolving power dynamics. At the heart of this inquiry lies the concept of legitimacy, which serves as a lens through which to assess the validity, authority, and acceptance of legal norms and institutions within a global context.

Authoritarian regimes are actively shaping international legal frameworks to align with their ideological preferences and governance style. Examining authoritarian practices within international law reveals concerning trends. This examination has identified three notable areas of impact. Norm-building efforts that suppress dissent, the use of legal structures for illiberal purposes, and the manipulation of multilateral institutions. Examples such as the SCO's formulation of new norms and the adoption of contentious resolutions at the UN General Assembly underscore the complexities of balancing competing interests and values while retaining legitimacy within the international legal landscape.

Legal positivism prioritises the role of social facts and authority in determining the legitimacy of legal norms. While legal positivists may focus on the operation of law rather than its moral implications, the undermining of legal institutions and processes in international law could give rise to legitimacy concerns.

Natural law theory, rooted in universal moral principles, presents a different perspective, emphasising the alignment of legal norms with ethical standards. For natural lawyers, in particular, authoritarian regimes' use of international law for illiberal purposes and creation of norms which counteract human rights pose significant challenges to legitimacy.

The input, throughput, output model provides a comprehensive framework for evaluating legitimacy at all stages of legal and political processes, considering procedural fairness and practical outcomes. While the implications of norm entrepreneurship for legitimacy under this model are not as conclusive, the manipulation of multilateral institutions interferes with input legitimacy, while leading to outputs that

[57] Monica Hakimi, 'Constructing an International Community.' (2017) 111.2 AJIL 317

deviate from the intended goals of the institutions. The use of international legal structures for illiberal purposes could compromise output where it no longer aligns with the values central to the institution. Overall, authoritarian influence leads to less transparency and accountability in international law processes.

So, does authoritarianism represent a threat to the legitimacy of international law? This investigation suggests that it does. While acknowledging the complexity of the issue, this conclusion is supported by three distinct and sometimes conflicting schools of thought: legal positivism, natural law, and input, throughput, output model. Each of these perspectives indicates that authoritarianism undermines the legitimacy of international law in various respects.

By critically examining the implications of authoritarian influence on legal norms and institutions, we can better address the challenges posed to the legitimacy and effectiveness of international law. This may involve strengthening mechanisms for accountability, increased selectiveness in international law institutions, promoting transparency in decision-making processes, and stronger upholding universal principles of justice, human rights, and democratic governance. Doing so could ensure that international law strives to serve the interests of all humanity and remains a cornerstone of global stability and cooperation.