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THE RIGHT TO DARKNESS: A CASE FOR THE RECOGNITION OF LIGHT POLLUTION UNDER INTERNATIONAL ENVIRONMENTAL LAW

- Prof. (Dr.) Ashish Virk*

-Arshita Sharma**

ABSTRACT

Artificial light at night (ALAN) has become a major environmental threat of modern times, and one that has been poorly studied on a systematic basis. Light pollution is conspicuously absent from the framework of international environmental law given the well documented impacts that this has on biodiversity, migratory species, marine ecosystems, human health and the preservation of natural nightscapes. Although certain current treaty provisions are sufficiently wide to possibly include specific aspects of light pollution, no global environmental treaty explicitly and fully controls ALAN as a stand-alone category of pollution. Conventionally, artificial light is not a type of pollution that is recognised in any international scale agreement and treaty, thus presenting a critical regulatory gap that is hindering global coordinated action. This paper will consider the issue of light pollution and the transboundary ecological and non-ecological impacts of light pollution, and show that light pollution is a recognisable environmental pollution and should be legally recognised as such. The study analyses existing international environmental law instruments, such as the Convention on Biological Diversity (1992), the Convention on Migratory Species (1979), the Paris Agreement (2015), UNCLOS and the Rio Declaration and examines their shortcomings and omissions in the field of light pollution. It also examines three legal strategies that could lead to the progressive interpretation or reform of international environmental law for the regulation of ALAN, namely: principle-based, species-based, and ecosystem-based approaches. The paper ultimately calls for the formal recognition of light pollution as an international environmental issue and suggests specific actions to safeguard the nocturnal environment for current and future generations as an aspect of environmental integrity which international law cannot afford to ignore.

Keywords: International Environmental Law, Light Pollution, Artificial Light at Night, Transboundary Harm, Right to Darkness.

I. INTRODUCTION

‘There are two kinds of light - the glow that illuminates, and the glare that obscures.’

-James Thurber, *Lanterns and Lances* (1961)

Light has its own story and that’s the story of humanity. Being able to illuminate the night has been an important measure of human achievement, from the first controlled fire to the electric

* Director & Professor of Laws, University Institute of Laws, Panjab University Regional Centre, Ludhiana

** Research Scholar (Law), Department of Laws, Panjab University, Chandigarh

bulb. But in the 21st century the triumph over darkness has given rise to an unwanted and increasing issue: light pollution. Although originally considered as a nuisance for astronomers, light pollution has emerged as an important environmental issue that impacts biodiversity, human health and energy systems, and has far-reaching effects on the quality of the night sky as a whole, including those of both the scientific and the legal community.¹

Light pollution is the alteration of the natural darkness due to artificial light, which has negative impacts on human beings, wildlife, electricity demand, and night sky visibility, usually caused by streetlights, advertising boards, commercial buildings, and vehicles.² According to the Convention on the Conservation of Migratory Species of Wild Animals (CMS), 1979, it is artificial illumination which disrupts the natural light/dark cycles of ecosystems and affects the behaviour and biological cycles of nocturnal animals.³ There are several different types of it: skyglow, glare, light trespass, clutter and over-illumination, all with unique environmental and social concerns.⁴ The legal significance of the problem lies not merely in the existence of artificial light but in the absence of any coherent international law framework.

The situation is truly overwhelming. A recent paper by Falchi (2016) showed that more than 80% of the world's population now lives in light-polluted nightscapes, reaching 99% for Europe and North America.⁵ The spread of artificial, skyglow is making Milky Way, a universal natural heritage, invisible to more than one-third of humanity. Satellite data from Kyba (2017) published in Science Advances showed that the Earth's artificially illuminated surface area is increasing at 2.2% per year and its radiance is growing at 1.7%. This is largely due to the spread of LED technology around the globe.⁶ More than just an aesthetic issue, these numbers provide an indicator of a systemic change in the night-time environment that is not being caught up by legal and regulatory measures.⁷

Artificial Light at Night (ALAN) has had a widespread impact on the lighting of night-time environments around the world, impacting on circadian rhythms, on biological processes and

¹ Mike Ramon, *Light Pollution* (1st edn, Chelsea House Publishers 2010).

² Rasna Rajkhowa, 'Light Pollution and Impact of Light Pollution' (2014) 3 International Journal of Scientific Research 862.

³ Convention on the Conservation of Migratory Species of Wild Animals, CMS International Light Pollution Guidelines for Migratory Species (CMS 1979) <https://www.cms.int/sites/default/files/document/cms_cop14_res.13.5_rev.cop14_cms-international-light-pollution-guidelines_e.pdf> accessed 21 June 2026.

⁴ Komal Kaushik, Soumya Nair and Arif Ahamad, 'Studying Light Pollution as an Emerging Environmental Concern in India' (2022) 11(3) Journal of Urban Management 392.

⁵ Fabio Falchi and others, 'The New World Atlas of Artificial Night Sky Brightness' (2016) 2(6) Science Advances e1600377.

⁶ Christopher C M Kyba and others, 'Artificially Lit Surface of Earth at Night Increasing in Radiance and Extent' (2017) 3(11) Science Advances e1701528.

⁷ Kyba and others (n 6).

on destabilising the ecological relationships which have developed over millennia in conditions of natural darkness.⁸ Light pollution works without direct contact with the organism, but has equally measurable and documented harmful impacts, which are external to the body, unlike conventional pollutants which enter organisms through the air or water. Recent literature has highlighted the transboundary nature of this challenge, such as in the work of Yakushina (2025), which shows that artificial light spreads beyond local or national boundaries into the atmosphere and across political lines, thus becoming a global issue that requires addressing by international law.⁹

Despite the growing scientific evidence, light pollution is a unique type of pollution in international environmental law which it is not directly regulated by any binding multilateral instrument or expressly recognised as a pollutive agent. Traditional pollutants like air and water pollution and hazardous waste are the subject of detailed international conventions, such as the Convention for the Protection of the Marine Environment in the North-Eastern Atlantic and its adjacent seas (UNECE CLRTAP 1979)¹⁰, the Basel Convention (1989)¹¹ and UNCLOS (1982)¹². Light pollution, however, has all the characteristics of an environmental pollutant, and has not yet been treated legally on an equal level.¹³ There is an absence of the formal recognition of this in international environmental law, which needs to be addressed.

In this context lies the present paper. The paper begins with an examination of light pollution and its character as an environmental pollution and then explores the ability of the existing international legal instruments and principles to tackle the negative impacts of light pollution. It finally calls for the formal incorporation of light pollution in the international legal framework as a new and specific environmental issue.

1.2 Research Problem

In recent decades, the widespread use of artificial light at night has emerged as a growing environmental concern. Increased artificial lighting has been proven to impact biodiversity, migratory species, ecosystems, human health and the loss of natural nightscapes through

⁸ Najmaldin Ezaldin Hassan, 'Light Pollution and Its Effects on Human Health and the Environment: A Review' (2024) 23(10) Asian Journal of Environment and Ecology 96.

⁹ Yana Yakushina, 'The Endangered Night: The Challenge of Light Pollution within the International Environmental Legal Context' (2025) 37(3) Journal of Environmental Law 467.

¹⁰ Convention on Long-range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217.

¹¹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57.

¹² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

¹³ United Nations Convention on the Law of the Sea (n 12).

scientific research.¹⁴ Light pollution has not been given much attention in international environmental law, despite the negative impacts. It is not specifically identified as a type of environmental pollution in the current international legal instruments that deal with air, water or noise pollution. Such an under-recognised issue is a severe regulatory deficit that makes it hard to handle the environmental consequences of artificial light by coordinated international action. Moreover, there are no legal parameters, which creates a significant problem from the point of view of protection of the nocturnal environment and preservation of natural darkness for the present and future generations. It is therefore important to understand whether the current principles and instruments of international environmental law are sufficient to respond to the light pollution issue and whether there is a need for it to be more recognised in the law.

1.3 Research Objectives

The present study is guided by the following objectives:

1. To examine the concept of light pollution and its multi-dimensional impact on the environment.
2. To critically analyse whether light pollution can be adequately addressed under the existing principles and instruments of international environmental law, including the CBD (1992), CMS (1979), the Paris Agreement (2015), UNCLOS (1982), and the Rio Declaration (1992).
3. To examine the need for the formal recognition of light pollution as a distinct environmental concern within international environmental law.

1.4 Methodology

The study adopts a doctrinal method, in the sense that the approach followed is basically doctrinal or legal research using only the rules. It focuses on relevant international legal instruments such as the multilateral environmental agreements, provisions of the treaties, decisions of international institutions and principles of international environmental law. The study also examines the relevant soft-law instruments, guidelines and technical standards and clarifies the difference between norms and legal obligations under binding treaty. The factual and interdisciplinary background of the legal analysis is provided by the secondary sources, such as scholarly literature and scientific studies, that address the ecological, health and energy impacts of artificial light at night. A comparative approach is also used to explore some national

¹⁴ Kakuli Chowdhury, 'Light Pollution Effects on Wildlife, Humans and Ecosystems' (2020) 3(4) International Journal of Advanced Research in Commerce, Management & Social Science 6.

and regional responses to light pollution. The analysis is therefore focussed not on the need to establish a new scientific definition of light pollution, but on the need to consider the suitability, utility and potential for the existing legal frameworks.

1.5 Original Contribution of the Study

While light pollution has been recognised as an emerging issue in the field of environmental protection and pollution law, certain questions regarding its place in international environmental law have not been fully developed. Yakushina's analysis is an important consideration of the international environmental legal context of light pollution, Kandadai and Das' analysis looks at the environmental implications of light pollution, and Stone's analysis looks at the framing of light pollution as an environmental problem. It expands that scholarship by proposing a specifically legal framework through three complementary pathways - principle-based, species-based and ecosystem-based – and five institutional and regulatory proposals. It also explores the possibility of the interplay of unresolved treaty obligations, soft-law instruments, technical standards, human-rights principles and new domestic regulation. Yet the contribution of the article is not that international law already establishes a standalone Right to Darkness, but rather that it provides a number of legal entry points, which could be developed in the course of time.

II. LIGHT POLLUTION: A FORM OF ENVIRONMENTAL POLLUTION

The light is a most significant aspect of the modern world. Light has revolutionised economies, extended productive working hours and helped us to do more throughout the day. However, the same light that is used to light streets and streetside structures is the primary cause of light pollution, and has totally transformed the night environment, a phenomenon now known as artificial light at night or artificial light pollution (ALAN).¹⁵

2.1 Ecological Consequences

Light pollution's ecological footprint spans multiple dimensions of the natural world, from individual species behaviour to entire ecosystem functioning. The alteration of natural light-dark cycles which have governed biological life on Earth for billions of years through artificial illumination disrupts the intricate web of relationships that nocturnal and diurnal ecosystems depend upon. Two primary ecological consequences merit detailed examination: the disruption

¹⁵ Johan Eklöf, *The Darkness Manifesto: How Light Pollution Threatens the Ancient Rhythms of Life* (The Bodley Head 2022).

of wildlife, particularly nocturnal and migratory species, and the degradation of natural nightscapes through skyglow.¹⁶

2.1.1 Disruption of Wildlife and Migratory Species

The most immediate and well documented effects of ALAN are its effects on wildlife, especially on those species that rely on natural darkness for their survival.¹⁷ Darkness is essential for nocturnal creature's foraging, predator avoidance, reproduction, and navigation. For migratory species, stars, the moon and the polarisation of natural light are key to helping them navigate across continents and oceans. Artificial lighting in these ecological environments causes disorientation, behavioural changes and even death in many instances documented.¹⁸

The effects on migratory birds have been studied more than any other. Birds become attracted and confused by artificial light at night in urban areas, leading to collisions with lit buildings and death.¹⁹ In the U.S. alone, more than one million migratory birds die each year directly from the effects of artificial lights. The study, published in *Trends in Ecology and Evolution* by Carolyn S. Burt, Jeffrey F. Kelly, proves that light pollution at the same time attracts and repels wildlife, impacts migration timing (phenology), lowers hormone levels and interferes with key behaviours such as foraging and reproduction.²⁰ Disruptions have a local, regional and continental scale with compounding effects on species requiring a predictable light-dark cycle for physiological regulation.²¹

The same is true for marine species. Beachfront artificial lights that move inwards instead of seaward, systematically misdirect sea turtle hatchlings, leading to widespread mortality.²² An effect documented in other nocturnal insects, fish, bats and moths, has cascading consequences that affect plant reproduction and ecosystem health, as observed in moths pollinators.²³

2.1.2 Loss of Natural Nightscapes and Skyglow

¹⁶ Eklöf (n 15).

¹⁷ National Institute of Environmental Health Sciences, 'The Impact of Artificial Lighting on Nocturnal Wildlife' <<https://www.niehs.nih.gov/health/kids/topics/natural-world/wildlife/ecology/lighting>> accessed 20 June 2026.

¹⁸ National Institute of Environmental Health Sciences (n 17).

¹⁹ Jessica Damiano, 'Outside Lights Are Deadly to Birds, Especially This Time of Year' *Phys.org* (1 October 2024)< <https://phys.org/news/2024-10-deadly-birds-year.html>> accessed 22 June 2026.

²⁰ Carolyn S Burt and others, 'The Effects of Light Pollution on Migratory Animal Behaviour' (2023) 38(10) *Trends in Ecology & Evolution* 920.

²¹ Burt and others (n 20).

²² Divya Karnad and others, 'Lighting the Way: Towards Reducing Misorientation of Olive Ridley Hatchlings due to Artificial Lighting at Rushikulya, India' (2009) 142(10) *Biological Conservation* 2083.

²³ Karnad and others (n 22).

The effects of light pollution extend beyond the impacts on individual species and to the quality of the natural night landscape as an ecological and environmental resource. The combined effect of skyglow over urban areas suppresses the contrast between objects in the sky and the background brightness of the sky, which is an environmental condition that is among the most ancient and ecologically important on earth: natural darkness.²⁴

Skyglow is not just an aesthetic issue but also has impacts on the ecology.²⁵ In plants, that are sensitive to photoperiod, natural darkness controls the process of photosynthesis in the dark, in nocturnal animals it regulates reproductive cycles and in nocturnal ecosystems, it maintains the cycle of predators and prey. It has disruptive effects that can be passed through trophic levels and are hard to reverse. The expansion of artificial illumination also affects astronomical observation and contributes to ecological changes at broader spatial scales.

2.2 Non-Ecological Consequences

While the ecological impacts of light pollution are significant, its consequences extend well beyond the natural environment to encompass human health and broader socio-environmental concerns. These non-ecological dimensions are equally deserving of legal attention and have been increasingly recognised in scientific and public health discourse.

2.2.1 Impact on Human Health

Like other organisms, the human body operates under the control of internal biological clocks, called circadian rhythms, that coordinate sleep, hormone release, metabolism and immune function with the natural light-dark cycle.²⁶ In human brain, the master circadian pacemaker is the suprachiasmatic nucleus which is very sensitive to light exposure in the hypothalamus. This system is disrupted by intrusion of artificial light, especially in the evening and night, which leads to decreased levels of melatonin, a hormone essential for sleep regulation and antioxidant activity.²⁷

The body of scientific evidence demonstrating the link between ALAN and harmful health effects on humans is increasingly large. The study 'Shedding Light on Light: A Review on the Effects on Mental Health of Exposure to Optical Radiation' published in the International

²⁴ Dark Sky Texas, 'What Is Skyglow- How Is It Affecting Our Night Sky?' <<https://darkskytexas.org/what-is-skyglow/>> accessed 22 June 2026.

²⁵ Kevin J Gaston, Jonathan Bennie, Thomas W Davies and John Hopkins, 'The Ecological Impacts of Night-time Light Pollution: A Mechanistic Appraisal' (2013) 88(4) *Biological Reviews* 912.

²⁶ American Medical Association, Council on Science and Public Health, *Light Pollution: Adverse Health Effects of Night-time Lighting* (Report 4-A-12, 2012).

²⁷ Najmaldin Ezaldin Hassan, 'Light Pollution and Its Effects on Human Health and the Environment: A Review' (2024) 23(10) *Asian Journal of Environment & Ecology* 96.

Journal of Environmental Research and Public Health (2021) is finding that night-time light exposure is causing sleep disturbances, depression, anxiety and an increased risk of cardiovascular disease.²⁸ Prof Shanthakumar Wilson Rajaratnam at Monash University has recorded that artificial light in the evening disrupts the body's natural biological oscillation and circadian timing, leading to higher chances of diabetes, obesity, reproductive issues, cardiovascular disease, cancer, and immunity loss.²⁹ Most importantly, these effects do not just affect the brain, as circadian clocks in nearly all organ systems of the human body exist, and disruption of these clocks by artificial light has systemic health repercussions.³⁰ Although these advances have been made, few national and international laws and legal instruments have adopted light pollution as a legal goal for human health protection.

2.2.2 Energy Consumption and Indirect Environmental Impact

Another non-ecological effect of light pollution is the wasted energy resulting from over-illuminating and sending light in the wrong direction. When light is wasted, it goes up into the sky, into unoccupied areas, or into hours that are not needed, it is a direct and measurable environmental cost. The International Dark-Sky Association (IDA) estimated that in the USA alone about 30% of all outdoor illumination is wasted, resulting in almost 21 million tonnes of carbon dioxide emissions per year.³¹ Electricity generation in most countries is still significantly relying on fossil fuels, and this unnecessary lighting is thus an indirect contributor to greenhouse gas emissions, climate change and even to the overall degradation of the environment to which international environmental law is directed.

2.3 Why Light Pollution Qualifies as an Environmental Pollutant: The Transboundary Dimension

Artificial light at night (ALAN) is a type of environmental pollution because of its human origin and some documented impacts on ecosystems, biodiversity and human health.³² Pollution is defined as the introduction of substances or energy into the environment at a level that causes harm to the environment' which is a definition that is recognised within

²⁸ Davide Elia Bertani and others, 'Shedding Light on Light: A Review on the Effects on Mental Health of Exposure to Optical Radiation' (2021) 18(4) International Journal of Environmental Research and Public Health 1670.

²⁹ Shanthakumar Wilson Rajaratnam, 'Bright Light Disrupts Circadian Rhythm' Down To Earth (9 November 2024) <<https://www.downtoearth.org.in/pollution/bright-light-disrupts-circadian-rhythm>> accessed 3 June 2026.

³⁰ Rajaratnam (n 29).

³¹ Dark Sky International, 'Light Pollution Wastes Energy and Money and Damages the Climate' <<https://darksky.org/resources/what-is-light-pollution/effects/energy-climate/>> accessed 3 July 2026.

³² Patrizia Caraveo, *Saving the Starry Night: Light Pollution and Its Effects on Science, Culture and Nature* (Springer Nature Switzerland AG 2021).

international environmental law and which would cover the use of artificial light. The relevance of light pollution under international environmental law is further enhanced by its transboundary character, including the spread of skyglow across international borders.³³

The no-harm principle has been applied to States to prevent harmful effects arising from activities under their jurisdiction which occur beyond their jurisdiction. The precautionary principle is therefore also to take action before scientific certainty in situations where there is cause for concern based on credible scientific evidence of environmental harm. These principles help to offer a solid basis to tackle light pollution within the current international environmental legal framework. There is no international agreement to address light pollution, but interpretation and evolution of the environmental principles of international law offers opportunities for light pollution regulation. There is thus no lack of legal responsibility but a lack of express legal framework.

III. THE GAP IN INTERNATIONAL ENVIRONMENTAL LAW

3.1 International Environmental Law and the Problem of Light Pollution

The international environmental law has evolved considerably through treaties, customary law and soft law measures in response to environmental problems such as air pollution, marine pollution, climate change and biodiversity loss. Although progress has been made in the last ten years, light pollution remains largely overlooked in the international legal framework. Although the adverse effects of artificial light at night (ALAN) on human health, biodiversity and the night environment are well known, there is no legally binding international agreement that addresses ALAN or prescribes measures to prevent or reduce its impacts.³⁴ In order to determine their applicability to light pollution, the study looks at the main international environmental agreements. It indicates that while some of the existing instruments contain provisions that are broad enough to encompass light pollution, they have not been interpreted or applied to address light pollution issues. The gap is therefore legal and regulatory in nature and not conceptual.

3.1.1 Sources and Legal Status of Relevant International Instruments

This study does not examine legal materials which have the same legal status. The Convention on Biological Diversity (CBD), the Convention on the Conservation of Migratory Species of

³³ Stephen Aitken, *Saving the Night: How Light Pollution Is Harming Life on Earth* (Orca Book Publishers 2023).

³⁴ Komal Kaushik, Soumya Nair and Arif Ahamad, 'Studying Light Pollution as an Emerging Environmental Concern in India' (2022) 11(3) *Journal of Urban Management* 392.

Wild Animals (CMS), the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement and the United Nations Convention on the Law of the Sea (UNCLOS) are examples of the obligations of their respective Parties under the treaties. As compared to the latter, declarations like the Rio Declaration, decisions and resolutions of COPs, technical guidelines, and standards established by professional or technical organizations do not confer treaty obligations as great as those contained in a convention. Their legal meaning and value can however be derived from their interpretative, normative, technical or policy value and in some situations, from their role in the development or evidence of international practice. For this reason, the purpose of this article is not to equate guidelines or resolutions with binding rules of treaty but to consider them as tools that can be used for implementation, interpretation and progressive development of the international regulatory framework for light pollution.

3.2 The Convention on Biological Diversity (1992): Protecting Biodiversity but Silent on Light Pollution

The Convention on Biological Diversity (CBD) has been adopted in 1992 and is the main international law tool for the conservation of biodiversity, sustainable use of its components and fair and equitable sharing of the benefits derived from genetic resources.³⁵ While the Convention offers the broad framework that protects biodiversity, no reference is made to light pollution in the Convention even though there is increasing scientific evidence of the negative impact of light pollution on biodiversity and ecosystems.³⁶

Although the CBD does not explicitly mention artificial light at night, there are a number of provisions which could be used as a textual basis for considering its impacts on biodiversity. Parties shall, as far as possible, identify processes and activities which have or are likely to have significant adverse effects on the conservation and sustainable use of biological diversity, and monitor the impact of these processes and activities, in accordance with Article 7(c). Nocturnal species, habitats and ecological processes may therefore be included in this identification and monitoring framework, if they are significantly impacted by artificial lighting. As far as possible and as appropriate, Article 8 also mandates Parties to create protected areas, encourage the protection of ecosystems and natural habitats, and to regulate or manage activities that impact on biodiversity. The CBD therefore offers a possible legal basis

³⁵ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760.

³⁶ Aitken (n 33).

to consider the impacts of ALAN on biodiversity, although does not designate light pollution as a separate pollutant.³⁷

3.3 The Convention on the Conservation of Migratory Species of Wild Animals (1979)

The Convention on the Conservation of Migratory Species of Wild Animals (CMS), 1979, is the only global treaty dedicated to the conservation of migratory species and their habitats. Given the well-documented impacts of artificial light at night (ALAN) on migratory birds, sea turtles, bats and nocturnal insects, the CMS provides an important legal framework for addressing light pollution. At COP13 in 2020, the CMS first addressed light pollution through Resolution 13.5,³⁸ which recognised the adverse effects of artificial light on wildlife and migratory species. At COP14 in 2024,³⁹ the Parties adopted the CMS International Light Pollution Guidelines for Migratory Species, and the framework was subsequently revised at COP15 in 2026.

These resolutions, however, are merely recommendations and do not establish legal obligations, standards, compliance mechanisms. Light pollution is also not listed as a specific threat in the CMS Appendices that would require an action plan by range States. Because of this, the CMS acknowledges in theory the importance of light pollution, but lacks a practical light pollution control program.

3.4 Energy Without Consumption Governance: The Paris Agreement (2015) and the UNFCCC

The climate regime is not specific to light pollution, but rather relevant. Article 4 of the Paris Agreement states that every Party shall prepare, communicate and continue to enhance the implementation of its NDCs and shall implement its own mitigation measures, aiming at reaching the NDCs' targets. Parties shall, in accordance with the framework established in Article 13, provide information required for monitoring progress towards NDCs under an enhanced transparency framework. The provisions do not establish a special duty to regulate

³⁷ Convention on Biological Diversity (n 35) arts 7-8.

³⁸ Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals, CMS International Light Pollution Guidelines for Migratory Species (Resolution 13.5 (Rev.COP15), adopted at the Fifteenth Meeting of the Conference of the Parties, Campo Grande, Brazil, 29 March 2026) <https://www.cms.int/sites/default/files/document/cms_cop15_res.13.5_rev.cop15_cms-international-light-pollution-guidelines_e_0.pdf> accessed 3 June 2026.

³⁹ Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals, State of the World's Migratory Species (Resolution 14.4, adopted at the Fourteenth Meeting of the Conference of the Parties, Samarkand, Uzbekistan, 17 February 2024) <<https://www.cms.int/meeting/fourteenth-meeting-conference-parties-cms>> accessed 3 June 2026

artificial lighting, but do set up institutional arrangements that might be helpful for dealing with energy-efficiency and emissions-reduction aspects of outdoor lighting.⁴⁰

Even with this link, the UNFCCC and the Paris Agreement have no specific use of the term for artificial lighting as a category of energy use that needs to be regulated. Emission from outdoor lighting are included in indirect emissions in national GHG inventories but are not designated as a specific policy area for reporting or in a Nationally Determined Contribution. Similarly, the technology transfer and capacity-building elements of the Paris Agreement have been not used to encourage responsible lighting infrastructure. As a result, the climate regime is only concerned with decreasing emissions and enhancing energy efficiency without considering the ecological effects of artificial lighting, thus missing an important point of regulation.⁴¹

3.5 UN Convention on the Law of the Sea (UNCLOS) and Marine Light Pollution (MLP): An unexplored dimension

The key international legal instrument on marine environment protection and preservation is the 1982 United Nations Convention on the Law of the Sea (UNCLOS). According to Article 192,⁴² States have to protect and preserve the marine environment and according to Article 194, they have to prevent, reduce and control pollution from all sources.⁴³ This is important because Article 1(1)(4) defines marine pollution as the introduction of energy into the marine environment that causes harm. Because Article 1(1)(4) expressly includes ‘energy’ within the definition of pollution of the marine environment, artificial light may potentially fall within the material scope of marine pollution where it is introduced into the marine environment and causes, or is likely to cause, the deleterious effects identified by the provision.

Light pollution from coastal and offshore development harms marine life by disturbing spawning of fish, disorienting sea turtle hatchlings and disturbing marine food webs and biological processes. UNCLOS has a broad wording, but it does not recognize the concept of marine light pollution as it is not included in State practice or international court rulings, including by ITLOS. Unfortunately, despite the legal basis that UNCLOS offers for light pollution regulation in the marine environment, there are no specific legal and policy measures to be found, which is why the potential of UNCLOS is not fully realised.

⁴⁰ Dark Sky International, ‘Light Pollution Wastes Energy and Money, and Damages the Climate’ <<https://darksky.org/resources/what-is-light-pollution/effects/energy-climate/>> accessed 3 July 2026.

⁴¹ Dark Sky International (n 40).

⁴² United Nations Convention on the Law of the Sea (n 12) art 192.

⁴³ United Nations Convention on the Law of the Sea (n 12) art 194.

3.6 The Rio Declaration: Principles Without Application

The Rio Declaration on Environment and Development (1992) sets out the basic principles of contemporary international environmental law. It remains unofficial but has had an important impact on international environmental governance and the interpretation of international environmental treaties. The following principles are of special relevance to light pollution: the no-harm principle, the precautionary principle and the polluter pays principle. None of them has been specifically used to deal with light pollution internationally, although each offers a legal framework for light at night (ALAN) control.

No-Harm Principle: The no-harm principle calls on States to do their part to prevent activities under their control from causing environmental harm outside of their boundaries. Light pollution comes under this principle, because as light pollution spreads beyond political borders through skyglow and because it harms the environment, it can be considered as transboundary environmental harm.⁴⁴

Precautionary Principle: Principle 15 calls for precautionary measures where there is scientific uncertainty when there is a risk of serious or irreversible environmental damage.⁴⁵ The principle is relevant to lighting standards to minimise impacts on the environment and health and to early action on regulations, since the loss of dark-sky environments is irreversible and the impacts of ALAN are already documented. It, however, has not been explicitly quoted in the context of regulating light pollution.

Polluter Pays Principle: Principle 16 calls on the people responsible for environmental damage to be held accountable for preventing and fixing the damage.⁴⁶ It can be used in relation to light pollution to hold responsible parties accountable for excessive or misdirected artificial light, and for transboundary environmental damage. Its use is still very limited because of the diffuse light pollution and lack of monitoring and attributing systems. For this reason, although they are applicable and important, they are not widely applied in the control of light pollution.

IV. INTERNATIONAL LEGAL APPROACHES FOR ADDRESSING LIGHT POLLUTION

Having established the regulatory gap within existing international environmental law, it becomes necessary to examine the legal pathways through which light pollution may nonetheless be addressed within the current framework. Three complementary approaches

⁴⁴ Trail Smelter Arbitration (United States v Canada) (Award) (1941) 3 RIAA 1905.

⁴⁵ Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26 (Vol I), princ 15.

⁴⁶ Rio Declaration on Environment and Development (n 45) princ 16.

principle-based, species-based, and ecosystem-based offer viable mechanisms for engaging with light pollution without requiring the negotiation of an entirely new international treaty.⁴⁷

4.1 Principle-Based Approach

A principle-based approach provides an effective legal foundation for regulating light pollution under international environmental law. The no-harm, prevention, precautionary, and sustainable development principles collectively support State responsibility for preventing and mitigating the adverse impacts of artificial light at night (ALAN).⁴⁸

4.1.1 No-Harm and Prevention Principles: The no-harm principle, recognised in the *Trail Smelter Arbitration (1941)*⁴⁹ and reflected in Principle 21 of the Stockholm Declaration⁵⁰ and Principle 2 of the Rio Declaration⁵¹, requires States to prevent activities within their jurisdiction from causing environmental harm beyond their borders. The prevention principle complements this obligation by requiring proactive measures to avoid environmental damage. As artificial light disperses across borders through skyglow, these principles support environmental impact assessments, prior notification and responsible lighting standards for projects with transboundary effects.⁵²

4.1.2 Precautionary Principle: Principle 15 of the Rio Declaration⁵³ supports preventive action where there is a risk of serious or irreversible environmental harm despite scientific uncertainty. Given the documented impacts of ALAN on biodiversity and human health, this principle justifies early regulatory measures. Its practical relevance is illustrated by the Flemish Administrative Court (Belgium), which relied on the precautionary principle to annul a permit for lighting installations affecting protected habitats.

4.1.3 Sustainable Development Principle: The principle of sustainable development, articulated in the Brundtland Report (1987),⁵⁴ requires development that meets present needs without compromising future generations. In the context of light pollution, it supports the protection of natural darkness, intergenerational equity and the integration of responsible

⁴⁷ Yakushina (n 9).

⁴⁸ *Iron Rhine (Belgium v Netherlands)* (Award) (2005) 27 RIAA 35.

⁴⁹ *Trail Smelter Arbitration* (n 44).

⁵⁰ Stockholm Declaration on the Human Environment (adopted 16 June 1972) UN Doc A/CONF. 48/14, princ 21.

⁵¹ Stockholm Declaration on the Human Environment (n 50) princ 2.

⁵² Catherine Redgwell, 'Transboundary Pollution: Principles, Policy and Practice' in Shanmugam Jayakumar, Tommy Koh, Robert Beckman and Hao Duy Phan (eds), *Transboundary Pollution: Evolving Issues of International Law and Policy* (Edward Elgar Publishing 2015) 13.

⁵³ Rio Declaration on Environment and Development (n 45) princ 15.

⁵⁴ World Commission on Environment and Development, *Our Common Future* (UN Doc A/42/427, 1987).

lighting practices into urban planning, infrastructure development and environmental impact assessment. The Starlight Declaration (2007)⁵⁵ and the La Laguna Declaration (1992)⁵⁶ further recognise the importance of preserving the night sky for future generations.

4.2 Species-Based Approach

4.2.1 Convention on Migratory Species (CMS) The CMS represents the most advanced international response to light pollution to date. Through Resolutions 13.5 (2020),⁵⁷ and 14.4 (2024),⁵⁸ the Convention has formally recognised ALAN as a significant threat to migratory species and issued International Light Pollution Guidelines recommending best lighting design practices, five-stage environmental impact assessment frameworks, and species-specific protective measures for marine turtles, seabirds, and bats. Convention on migratory species obliges parties to prevent, remove, or minimise activities that seriously impede migration a provision capable of encompassing artificial lighting that disrupts migratory corridors and navigation.⁵⁹

4.2.2 Biodiversity Conservation and Species Protection

Beyond the CMS, daughter agreements such as Agreement on conservation of population of European Bats (EUROBATS) have directly addressed ALAN, recommending that parties avoid or minimise artificial illumination in bat habitats.⁶⁰ The International Whaling Commission has similarly adopted resolutions recognising various pollutants as threats to whale conservation.⁶¹

4.3 Ecosystem-Based Approach

4.3.1 Convention on Biological Diversity (CBD)

⁵⁵ International Conference in Defence of the Quality of the Night Sky and the Right to Observe the Stars, Declaration in Defence of the Night Sky and the Right to Starlight (La Palma, Canary Islands, Spain, 20 April 2007) < <https://starlight2007.net/index.php?id=31&L=4> > accessed 3 June 2026.

⁵⁶ International Colloquium on Human Rights, La Laguna Declaration (UN Doc A/CONF.157/LACRM/7, 16 December 1992).

⁵⁷ CMS International Light Pollution Guidelines (n 38).

⁵⁸ 'State of the World's Migratory Species' (n 39).

⁵⁹ Convention on the Conservation of Migratory Species of Wild Animals (CMS), CMS International Light Pollution Guidelines for Migratory Species (CMS Secretariat 2024) <https://www.cms.int/sites/default/files/document/cms_cop14_res.13.5_rev.cop14_annex_cms-international-light-pollution-guidelines_e_0.pdf> accessed 6 June 2026.

⁶⁰ Agreement on the Conservation of Populations of European Bats (opened for signature 4 December 1991, entered into force 16 January 1994) 1863 UNTS 101.

⁶¹ International Whaling Commission, Environment < <https://iwc.int/management-and-conservation/environment> > accessed 13th June 2026.

The CBD's ecosystem-based approach to addressing light pollution, which views biodiversity conservation as the protection of the whole ecosystem and not just a single species, serves as a broad approach to light pollution. Article 8 calls for the creation of protected areas, control over activities that may be likely to lead to significant adverse effects on biological diversity and for environmental impact assessments of potentially harmful activities. The CBD's Subsidiary Body on Scientific, Technical and Technological Advice has clearly included light pollution as a pollution source that threatens biodiversity, and the Kunming-Montreal Global Biodiversity Framework (2022) has set a clear target for parties to reduce all form of pollution by 2030 implicitly including light pollution as part of this.

4.3.2 The Ramsar Convention and Wetland Protection

The Ramsar Convention on Wetlands (1971) obliges the parties to inform the international community of any alteration in the environmental character of a Wetland caused by human activities or pollution. Light pollution has been specifically identified by the Ramsar Global Wetland Outlook as a major cause of wetland degradation - more than one in five of the world's coastline is under the influence of high levels of light pollution. Lighting which breaks up wetland habitat, displaces nocturnal species and destroys insect populations is within the scope of Ramsar's responsibilities and also leads to an implicit obligation to prevent and report on such changes.

4.3.3 The UNCLOS and Marine Light Pollution

UNCLOS article 192 places a general duty on a state to protect and preserve the marine environment⁶² and article 1(1)(4) of UNCLOS defines marine pollution as the introduction of energy that has harmful effects on marine life.⁶³ Such provisions offer a textual context for dealing with coastal and offshore artificial lighting as a type of marine pollution, one that is underutilized in international legal practice, but has significant potential to protect marine species and ecosystems from the proven impacts of ALAN. All three of these strategies are not mutually exclusive, but complementary. Broad international action on light pollution will need to be taken at the same time on a number of principles and areas of protection which can reinforce each other to give the nocturnal environment the legal protection it is so desperately needed.

⁶² United Nations Convention on the Law of the Sea (n 12) art 192.

⁶³ United Nations Convention on the Law of the Sea (n 12) art 1(1)(4).

4.4 The emerging legal basis of a Right to Darkness

The term 'Right to Darkness' is employed in this article as a formulation that can be used in law, but it is not yet a separate right recognized under international law. Potential legal foundations include environmental protection principles and human-rights principles. Resolution 76/300 (2022) of the United Nations General Assembly acknowledged the human right to a 'clean, healthy and sustainable environment. The Resolution does not explicitly mention a right to darkness, but it offers a wider context in which the effects of the overabundance of artificial light on the environment and health can be taken into account. The proposed Right to Darkness can therefore be seen as a specific environmental aspect of the Right to a Clean, Healthy and Sustainable Environment, specifically in the context of artificial light posing a tangible danger to human health, biodiversity or ecological integrity. The proposed right would be subject to neither full darkness nor prevent lights from being used as necessary. It would refer to any artificial illumination that is not necessary, excessive, misdirected or harmful to the ecology, and subject to appropriate considerations of safety and accessibility.

4.5 Comparative Domestic and Regional Developments

Comparative developments confirm that the light pollution regulation is taken in different approaches in different jurisdictions. The Arrêté of 27 December 2018 establishes the timing and technical features of the outdoor lighting, as well as the effects on persons, fauna, flora, ecosystems, energy use and the night sky, in the French context. The new national standard for lighting in Chile applies to the entire country and specifically preserves astronomical skies, human health, and biodiversity; it has more stringent requirements for designation of protection zones. Croatia has also created a special regulatory system to address the impact of light pollution on human health, nature, protected areas, energy consumption and the night sky. The Czech Republic, on the contrary, is an example of less comprehensive approach, since there is no dedicated light pollution element in the existing air-protection legislation in the country. The examples are not indicative of a common international norm; however they illustrate the possibility of regulatory methods including emission limits, curfews, spectral controls, protected areas and technical standards, which can be used to inform the development of coordinated international approaches.

4.6 Human Rights and Environmental Protection

As the Human Rights Council and the General Assembly of the UN have recognised the human right to a clean, healthy and sustainable environment, the human rights aspect of light pollution is becoming more relevant. Human Rights Council Resolution 48/13 of 2021 and General Assembly Resolution 76/300 of 2022 recognise this right at the international level. Resolution 76/300 also acknowledges that environmental degradation may impact on the enjoyment of human rights. Although it does not create an international "right to darkness" per se, it does lay an important normative groundwork for thinking about environmental conditions that are related to the over-illumination of the night, but not necessarily darkness.

V. CONCLUSION AND SUGGESTIONS

5.1 Conclusion

Once the unmissable part of the natural world that guided sailors across oceans, inspired scientific inquiry and regulated the biological cycles of countless species is that the night sky is vanishing.⁶⁴ Unregulated and misdirected artificial light at night has become one of the most widespread, yet unregulated, environmental issues of our times. The aim of this study has been to show that this neglect is not scientifically warranted and legally defensible.⁶⁵

The foregoing analysis has confirmed that light pollution is a cognisable environmental pollutant under international law that meets the requirements of international environmental law, namely having a transboundary nature and the three substance requirements of causing damage to biodiversity, human health and ecological integrity.⁶⁶ However, there is no multilateral legally binding instrument that specifically identifies Artificial Light at Night as a unique environmental harm. The study has also shown that this deficit does not have to wait until a completely new treaty is negotiated to be resolved. The no harm principle, prevention and precautionary principle have direct implications on transboundary light pollution. The Convention on Migratory Species has already formally recognised Artificial Light at Night as a conservation threat, through species-based frameworks. The nocturnal environment falls within the scope of those ecosystem-based approaches which are broad in scope, such as under the CBD, the Ramsar Convention and UNCLOS, which can be purposively interpreted to

⁶⁴ Syamala Kandadai and Dipendu Das, 'Illuminating the Path to Sustainable Skies: A Study on Light Pollution and Environmental Impacts' (2022) 3 HPNLU Law Journal 101, 115

⁶⁵ Kandadai and Das (n 64).

⁶⁶ Taylor Stone, 'Light Pollution: A Case Study in Framing an Environmental Problem' (2017) 20(3) Ethics, Policy & Environment 279.

include the protection of the night-time environment. The legal instruments are in place, but the desire to use them is lacking.

The overall purpose of this research is to determine that it is not only desirable but essential for international environmental law to formally recognise light pollution. The right of darkness is a new aspect of the right to a clean and healthy environment that the international community is no longer able to neglect.⁶⁷ Therefore, the Right to Darkness is presented in this article as a normative legal framework that can integrate current environmental and human rights protections against damaging artificial light at night rather than as a claim that an autonomous customary international right has already crystallized.

5.2 Suggestions

In light of the foregoing analysis, the following measures are proposed:

First, the United Nations Environment Programme (UNEP) should adopt a resolution formally recognising light pollution as a distinct form of environmental pollution, providing the normative impetus necessary to activate the latent capacity of existing treaty regimes to address ALAN. Such a resolution would initially have normative rather than treaty-level binding force. Its implementation could include development of model national legislation, technical guidance, common definitions and reporting indicators, with UNEP serving primarily as a coordinating and standard-setting institution rather than as a direct enforcement body.

Second, the Convention on Biological Diversity should integrate light pollution into National Biodiversity Strategies and Action Plans, environmental impact assessment procedures, and protected area management frameworks, in fulfilment of the Kunming-Montreal Global Biodiversity Framework's commitment to reducing pollution from all sources by 2030.⁶⁸ Implementation could occur through national biodiversity planning, protected-area management and environmental impact assessment, with national biodiversity authorities responsible for identifying ecologically sensitive lighting impacts and incorporating mitigation measures into relevant plans and projects.

Third, the Convention on Migratory Species should develop legally binding provisions specifically addressing Artificial Light at Night (ALAN) as a threat to listed species, building upon its existing non-binding Resolutions and Guidelines. A practical pathway could involve the adoption of additional CMS decisions, species-specific guidance and, where appropriate,

⁶⁷ Ramsi M, 'Right to Darkness: Light Pollution as a Violation of the Right to Life under Article 21 of the Constitution of India' (2026) 4 International Journal for Legal Research and Analysis.

⁶⁸ Conference of the Parties to the Convention on Biological Diversity, Kunming–Montreal Global Biodiversity Framework (Decision 15/4, adopted 19 December 2022) UN Doc CBD/COP/DEC/15/4, Target 7.

incorporation of light-pollution measures into relevant species agreements or concerted actions. Any movement from recommendations towards binding obligations would require an appropriate legal instrument rather than treating existing COP resolutions as treaties.

Fourth, states should adopt international lighting standards governing luminance levels, colour temperature, directionality, and operational hours, providing an objective basis for assessing transboundary harm and enabling consistent application of the no-harm principle. Such standards could establish parameters for upward light emission, illumination levels, spectral characteristics, directionality, operating hours and environmental sensitivity zones. Existing technical work by Dark Sky International and the Illuminating Engineering Society demonstrates that such parameters can be translated into lighting ordinances and compliance mechanisms.

Fifth, light pollution should be incorporated as a discrete reporting category within national greenhouse gas inventories under the UNFCCC, recognising the energy-climate nexus of unnecessary illumination and enabling targeted mitigation through existing climate governance mechanisms. As a prospective policy option, the UNFCCC process could consider whether information concerning energy consumption associated with unnecessary outdoor lighting could be separately reported or tracked within existing national reporting mechanisms. Such reporting would require appropriate methodological guidance and should not be presented as an existing UNFCCC obligation. The night is not empty. It is full of life, of science, of culture, and of rights and it is time for international law to protect it.

ECOCIDE UNDER INTERNATIONAL CRIMINAL LAW: A CRITICAL EVALUATION OF INDIA'S POSITION ON THE PROPOSED AMENDMENT TO THE ROME STATUTE

- Dr. Aditi Singh*

- Ms. Gayathri Bantu**

ABSTRACT

In September 2024, Vanuatu, Fiji and Samoa put forward a proposal to amend the Rome Statute to include ecocide as the fifth core international crime. This Article does not address the question of whether or not ecocide should be criminalised, but asks whether India, which is not a party to the Rome Statute, and is a megadiverse developing economy with one of the world's most extensive bodies of environmental constitutionalism, has legal, environmental and geopolitical reasons to support, oppose or reshape the proposal. Drawing from a doctrinal analysis of Article 5, Article 8, Article 25 and Article 28 and the definition of the Independent Expert Panel, six contemporary Indian controversies- Great Nicobar, Joshimath, Buxwaha, Hasdeo Arand, Baghjan and Bhopal, and comparative state practice in countries such as Belgium, France, Chile, Brazil and Vanuatu. It is established that there is a lack of criminal punishment for extreme environmental harms under existing international criminal law. The domestic laws in India would not meet a complementarity test applied through the lens of ecocide, and that India has an interest not in abstaining from or opposing, but in constructive engagement, setting thresholds, defences and gravity criteria on an equitable footing and creating a domestic aggravated crime of serious environmental harm.

Keywords: *Ecocide, Rome Statute, International Criminal Court, Environmental Constitutionalism, corporate criminal liability.*

I. INTRODUCTION

In September 2024, three Pacific Island nations of Vanuatu, Fiji and Samoa officially proposed the addition of a fifth core international crime to the Rome Statute of the International Criminal Court, namely “ecocide.”¹ The proposal would add the most severe forms of environmental harm to the list of crimes the international community has agreed *must not go unpunished*² which includes genocide, crimes against humanity, war crimes and aggression. Although this term is not new, in 1970, the biologist Arthur Galston created the term “ecocide” from the Greek *oikos* meaning ‘home’ and the Latin *caedere* means ‘to kill’ to describe the mass

* Associate Professor, SOL, Woxsen University, Hyderabad.

** 3rd year, BBA LL.B Student, SOL, Woxsen University, Hyderabad

¹ Proposal of amendments to the Rome Statute submitted by Vanuatu, Fiji and Samoa (9 September 2024); see ICC Assembly of States Parties, Report of the Working Group on Amendments, ICC-ASP/23/26 (1 December 2024).

² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) preamble.

destruction of forests in Vietnam by chemical defoliants. Subsequently, jurist Polly Higgins gave it a definition in 2007.³ It means - Ecocide, *the killing of a home*, causing extensive damage to, destruction of or loss of ecosystems of a given territory, such that the peaceful enjoyment of that territory by its inhabitants is severely diminished.

There are three developments that have pushed the idea from the fringes to the mainstream of international criminal law. The *first* is the climate crisis, the IPCC now speaks of a rapidly nearing time horizon for a still liveable planet, while attribution science ties ever more clearly industrial actions to planetary damage.⁴ The *second* is the apparent ecological price of extraction and infrastructure of industrial mining, deforestation and megaprojects which are legal, licensed and yet devastating. The *third* is armed conflict. Like, Ukraine has now started investigating the destruction of the Kakhovka dam under its own criminal law as ecocide, and environmental damage in Gaza and elsewhere has become a new focus point in relation to the weakness of the laws of war in this regard.⁵ The three are exacerbated by each other since the living systems on which laws' humans rely on are also being dismantled at a rate that is unprecedented in human history.⁶

India is in a paradoxical position with regard to this debate. It is not a State Party of the Rome Statute, abstaining at the Conference at Rome in 1998 and not having ratified the Statute since.⁷ But it is also the most populous state, a megadiverse country with four biodiversity hotspots, one of the most climate-vulnerable major economies, and, of course, a developing country with huge energy and infrastructure demands. It has developed one of the world's most extensive bodies of environmental constitutionalism while the Parliament has recently sought to decriminalise much of its environmental law.⁸ The question of whether a state should support, resist or shape an ecocide amendment has not been considered to a large extent by the literature, which focuses primarily on Europe and the Pacific.

³ Arthur W Galston, remarks at the Conference on War and National Responsibility (Washington DC, February 1970); Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (2nd edn., Shephard-Walwyn 2015) 63.

⁴ IPCC, *Climate Change 2023: Synthesis Report* (IPCC 2023) 24-25.

⁵ Criminal Code of Ukraine, art 441 (ecocide); on Kakhovka, see UNEP, *Rapid Environmental Assessment of the Kakhovka Dam Breach* (UNEP 2023).

⁶ IPBES, *Global Assessment Report on Biodiversity and Ecosystem Services* (IPBES 2019) 10-12.

⁷ Statement by Mr Dilip Lahiri, Head of the Indian Delegation, Explanation of Vote (Rome, 17 July 1998); Usha Ramanathan, 'India and the ICC' 3 *Journal of International Criminal Justice* 627 (2005).

⁸ Jan Vishwas (Amendment of Provisions) Act 2023 (India), amending inter alia the Environment (Protection) Act 1986.

Today there is an abundance of scholarship on the crime of ecocide, and it is split between two camps- the normative advocacy for the crime and doctrinal criticism of its drafting. The missing element is the analysis of the situation of a major non-party developing state and its proper positioning, on a jurisdiction-by-jurisdiction basis. This paper is a first of its kind for India. The core question of its research is whether India should join the ecocide as a fundamental international crime, in the Rome Statute. The analysis is organized in five subsidiary questions-

- Sufficiency of existing international criminal law to punish severe environmental harm
- Sufficiency of the Rome Statute as it stands (Articles 8, 25 and 28)
- Would recognition of ecocide make a difference in accountability during peace and war?
- Would recognition of ecocide interfere with India's development priorities?
- What changes would be required to give ecocide domestic effect?

The method is doctrinal in nature by constructing the Rome Statute, the Independent Expert Panel definition, Indian constitutional and statutory materials and the relevant case law. It is complemented by comparative analysis of countries that have introduced legislation or advocated on the question of ecocide like Belgium, France, Chile, Brazil and Vanuatu for a comparative analysis of the practice of treaties and state practice, and by policy analysis of India's climate commitments and recent environmental conflicts that serve as analytical case studies.

II. THE EVOLUTION OF ECOCIDE AS AN INTERNATIONAL CRIME

Ecocide was a product of war. From 1962 to 1971, the United States sprayed some twenty million gallons of herbicides, including the dioxin-laced Agent Orange, in southern Vietnam, destroying some 20% of its forests and poisoning generations.⁹ Galston's arguments became currency at a high level, as Swedish Prime Minister Olof Palme opened the 1972 Stockholm Conference on the Human Environment and termed the Indochina war "ecocide" warranting it as an urgent concern for the rest of the world.¹⁰ In 1973, Richard Falk turned his indignation into draft law, by proposing an International Convention on the Crime of Ecocide.¹¹ The Stockholm Declaration and the subsequent Rio Declaration stated the environmental

⁹ Arthur H Westing, *Warfare in a Fragile World: Military Impact on the Human Environment* (Taylor & Francis 1980) 26-28.

¹⁰ Olof Palme, Address to the UN Conference on the Human Environment (Stockholm, 6 June 1972).

¹¹ Richard A Falk, 'Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals' (1973) 4 Bulletin of Peace Proposals 80.

obligations of States including the obligation not to cause transboundary harm, but it is still not considered a crime.¹²

International criminal codification was not far off but it didn't get that close. When the International Law Commission started drafting its Draft Code of Crimes against the Peace and Security of Mankind in 1991 there was an independent Article 26 in the draft law that criminalised "wilful and severe damage to the environment," but by the time of the Draft Code in 1996 that Article was removed and only remained as a war crime committed through wilful and severe damage of the environment.¹³ The same thing happened during the 1998 Rome Conference where environment was only allowed into the Statute as part of Article 8(2)(b)(iv), which is covered in Part III. Parallel treaty law, namely, the ENMOD Convention of 1976 and Articles 35(3) and 55 of Additional Protocol I, also dealt only with environmental modification and damage in wartime.¹⁴

The modern campaign turned things around. In 2010 Higgins put forward the proposal for ecocide as a crime of strict liability, applicable in times of peace or conflict, to the ILC. Following her passing, the Stop Ecocide Foundation hosted an Independent Expert Panel co-chaired by Philippe Sands QC and Dior Fall Sow, which has adopted the definition "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long term damage to the environment being caused by those acts" as reference text in June 2021.¹⁵ A policy on environmental damage has since been thickened through the ICC Prosecutor's 2016 policy on case selection pledged "special attention" to cases involving crimes committed by means of, or resulting in, environmental damage. the European Union's Environmental Crime Directive (2024) requires member states to "attach aggravated penalties" to "qualified offences" which "cause widespread and substantial, irreversible or long-lasting damage" to the environment, and in December 2025 the Office of the Prosecutor

¹² Declaration of the UN Conference on the Human Environment (16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 21; Rio Declaration on Environment and Development (14 June 1992) UN Doc A/CONF.151/26, principles 2 and 13.

¹³ ILC, 'Draft Code of Crimes against the Peace and Security of Mankind' (1991) II(2) Yearbook of the International Law Commission 94, art 26; ILC, 'Draft Code of Crimes against the Peace and Security of Mankind' (1996) II(2) Yearbook of the International Law Commission 17, art 20(g).

¹⁴ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151; Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, arts 35(3), 55.

¹⁵ Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (June 2021) (IEP Definition), proposed art 8 ter.

published a policy on addressing environmental damage under the current Statute.¹⁶ The 2024 Pacific proposal is thus not a wild or out-of-the-way idea, but rather a treaty-level reflection of a norm already gathering momentum in regional and domestic law. It is of legal importance in two ways, one, it would for the first time extend the scope of international criminal law, not just to peacetime conduct that primarily harms the human person, but also to the natural world. Two, it would test the capacity of the Rome system to incorporate an offence that is aimed less at the warlords than at the boardrooms and cabinet rooms.

III. EXISTING PROTECTION UNDER INTERNATIONAL CRIMINAL LAW

Under Article 5 of the Rome Statute, the ICC has the jurisdiction to prosecute only four crimes, genocide, crimes against humanity, war crimes and the crime of aggression. No harm in environmental destruction anywhere. It does not enter the Statute directly but only through article 8(2)(b)(iv), which criminalises intentional launching an attack, which, by its nature, would cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹⁷

The specifications are virtually impractical because of four aspects. First, its threshold is conjunctive, the effects must be widespread, long-term and severe. Although these terms, borrowed from ENMOD and Protocol I, aren't defined either, long-term is taken to mean decades over the course of the travaux. Secondly, its *mens rea* is doubly demanding as it requires knowledge of the consequences and a value judgement that the harm would be clearly excessive in relation to the military advantage, an anthropocentric proportionality test which gives the environment a lesser weight than the military advantage. Thirdly, it is limited to international armed conflict and does not apply to the non-international conflicts which are more common events of today. Fourthly, it's never been charged in the Court's history. In the last few decades, the worst environmental catastrophes, starting with the oil fires in the Gulf, to Kakhovka, have not seen any prosecution under it.

¹⁶ ICC Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) para 41; Directive (EU) 2024/1203 of 11 April 2024 on the protection of the environment through criminal law (2024) OJ L, art 3(3) and recital 21; ICC Office of the Prosecutor, 'Policy on Addressing Environmental Damage through the Rome Statute' (December 2025).

¹⁷ Rome Statute (n 2) art 8(2)(b)(iv).

The protection for the other crimes is indirect and secondary. In principle, genocide may be committed in ecological ways, by foreseeably causing conditions of life calculated to bring about the destruction of a protected population. The ICC jurisprudence on Darfur has recognised with respect to poisoned wells and the crimes against humanity, including forcible transfer, persecution and other inhumane acts can encompass environmental devastation, where it is part of a widespread or systematic attack against a civilian population. All these are the paths that were used for land-grabbing and the destruction of nature by the Prosecutor's 2016 policy. But the protection is anthropocentric by design, as harm on ecosystems only counts as harm to humans. Harm must be based on attack or a protected group, purely peacetime, purely ecological catastrophe is not touched.

Nor do the Statute's liability provisions extend to those most involved in the destruction of the environment. Article 25 only has jurisdiction over natural persons, a suggestion by the French to add corporate liability was never taken up due to a lack of consensus and because complementarity requires that national systems have the power to try companies, which is not the case in practice for many, and certainly not in India.¹⁸ Article 28 mentions command and superior responsibility doctrine, designed for military structures, does not fit well in the context of the diffuse corporate decision-making. The answer is that as it stands, international criminal law is far from sufficiently penalizing massive environmental damage, in war where no case has ever reached its threshold, in peace, its substance is empty.

IV. THE PROPOSED CRIME OF ECOCIDE

The IEP definition, which is nearly identical to that of the 2024 Pacific proposal, would include ecocide as Article 8 ter "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts".¹⁹ Each element repays scrutiny. There are two levels of disjunctive *actus reus*. Actions are deemed to be qualifying conduct if they are unlawful, that is, in violation of national or international law or if they are wanton which is reckless disregard for damage that is clearly disproportionate to the social and economic good that is expected. Damage has to be 'severe' leading to serious adverse changes, disruption or harm to any element of the environment and either 'widespread' extending beyond a limited geographic

¹⁸ Rome Statute (n 2) art 25(1); Per Saland, 'International Criminal Law Principles' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 1999) 199.

¹⁹ IEP Definition (n 15), proposed art 8 ter; proposal (n 1) annex I.

area, crossing state boundaries or affecting an entire ecosystem, species or large number of human beings or ‘long-term’ which could be irreversible or incapable of natural redress within a reasonable period. The purpose of the disjunctive threshold is to break the impossible conjunction of article 8(2)(b)(iv).

The *mens rea* is different from the Statute’s normal *mens rea*. Article 30 requires intent and knowledge, IEP proposes liability on knowledge of a substantial likelihood of the proscribed damage (*dolus eventualis*). The Panel considered that industrial actors rarely, if ever, have a purpose to cause an ecological disaster. A purpose standard would justify the very conduct the crime aims at. Critics argue that recklessness liability for the core crime undermines the moral seriousness of the crime, which in turn undermines the moral seriousness of the supranational penalty.²⁰

There are four main problems in the critical literature. First, they are vague with terms like severe, widespread and long-term are defined by adjectives no more determinate than themselves, raising legality (*nullum crimen*) objections. Second, the clearly excessive language in the wanton limb engages criminal judges to make a cost-benefit calculation where damage is clearly excessive to the anticipated social and economic benefits of the development. Here, criminal courts are poorly equipped and legitimated to perform. However, Kevin Jon Heller counters with the opposite argument saying most of the catastrophic environmental damage is licensed and so legal, and the benefits clause covers socially beneficial projects, meaning the definition in practice catches very little of the more egregious damage, or an anthropocentric loophole cloaked in eco-centric language.²¹ Third, there can be political misuse because the third world states are afraid of the possibility of selective prosecution of mega-projects in the South by a Court that has already been accused of selectivity. Fourthly the ICC is targeting corporate conduct through corporate liability, but is unable to prosecute corporations, and ecocide would only be available to the ICC as a crime against natural persons, a mismatch unless there are complementary national laws to do the job. A related objection is based on military necessity where the proposal does not address how a peacetime ecocide standard will interact with the *lex specialis* of the wartime context under article 8(2)(b)(iv) for combat conduct.

²⁰ Darryl Robinson, ‘Ecocide - Puzzles and Possibilities’ 20 *Journal of International Criminal Justice*, 328-34 (2022).

²¹ Kevin Jon Heller, ‘The Crime of Ecocide in Action’ (*Opinio Juris*, 28 June 2021).

Compared with its would-be siblings, ecocide is an outlier in protected interest but not in structure. Genocide requires a special intent, that of destroying, in whole or in part, the existence of a group, as opposed to individuals. The crimes against humanity requirement is widespread or systematic attack against civilian populations, and the war crimes requirement is linked to an armed conflict and aggression is a crime of the leadership, directed against those who formulate the policy of the State. As drafted, ecocide is an interest in the environment, the first non-anthropocentric interest, and both threshold vocabulary and, arguably, the leadership clause of war crimes are borrowed from the war crimes context and necessary for ecocide to rest at the level of those who decide, rather than those who dig.²²

V. INDIA'S POSITION ON ECOCIDE

A. India and the Rome Statute

India was actively involved in the Conference held in Rome and refused to enter into its formation. India refrained from signing the final text and didn't sign the Statute. Delhi saw its own objections to the Statute in the explanation of the word vote, introduced by Dilip Lahiri, a power of referral and deferral by the Security Council for the Court, giving the five States a special place, and the *proprio motu* powers of the prosecutor, threatening him with a politically motivated prosecution. The inclusion of internal armed conflicts meant that the courts could begin to hear internal conflicts of other countries, while the omission of the word terrorism meant that the most important security concern of India remained unaddressed and India had moved an amendment to criminalise the use of nuclear weapons, which exposed the enterprise as one of selective morality.²³

There are three ways that these objections influence the ecocide question.

1. Procedurally- The non-party India cannot influence within the Assembly of States Parties, but rather in the margins of the Working Group on Amendments, in the G20, BRICS and the Sixth Committee.²⁴
2. Jurisdictionally- An ecocide amendment would only affect the ratifying parties, while Indian nationals would generally only be targeted for acts on an accepting State Party's territory, or if the acts were referred to the Security Council. Indian officials and corporations would be beyond the reach of the Court at home. However, Indian

²² Robinson (n 20) 316-20.

²³ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Criminal Court' (18 July 1998) UN Doc A/CONF.183/SR.9.

²⁴ Usha Ramanathan, 'India and the ICC,' 3 *Journal of International Criminal Justice*, 628-34 (2005).

corporations involved in mining, energy and infrastructure projects in Africa, Latin America and the Pacific would not be.²⁵

3. Normatively- The historic grievance of India was that international criminal law criminalised the weapons and wars of the weak, and of the strong. Ecocide asks India to try that criticism from the other side. A crime of industrial destruction is as much a condemnation of the past conduct of the developed economies as their growth is of the present conduct of developing economies.

B. The Constitutional Perspective

India's constitutional jurisprudence is amazingly aligned with the logic of ecocide, it's the treaty posture which is sceptical. Since *Subhash Kumar v State of Bihar*, the right to have pollution-free water and air has been read into the guarantee of life provided by article 21²⁶, aided by the state's obligation to protect the environment and the citizen's obligation.²⁷ The doctrine of absolute liability for hazardous activities was created in the oleum gas leak case²⁸ and the doctrine of continuous judicial oversight of polluting industry was created in *Ganga and Taj*.²⁹ The precautionary principle and the polluter pays principle were domesticated in Indian law as part of the Vellore Citizens Welfare Forum, where it was embedded in sustainable development,³⁰ the public trust doctrine was imported in the case of *M C Mehta v Kamal Nath* which posited rivers, forests and air as held by the state as trustee for the public.³¹ The intergenerational equity found its way in the case of the forests of Himachal.³² Most recently, *M K Ranjitsinh v Union of India* granted a unique fundamental right to be free from the adverse impact of climate change under Articles 14 & 21.³³

India's 'environmental constitutionalism' already expresses every value that the ecocide campaign calls upon, like dignity, trusteeship, precaution, intergenerational justice, internalisation of ecological cost. However, it lacks a penal register. Indian environmental doctrine is remedial and regulatory, it compensates, restores, supervises, does not punish and certainly not severely. The question is not whether ecosystems deserve legal protection, it is

²⁵ Rome Statute, arts 12, 121(5). On the reach of amendments over non-party nationals; Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties' 1 *Journal of International Criminal Justice* 618 (2003).

²⁶ *Subhash Kumar v State of Bihar* (1991) 1 SCC 598 (7).

²⁷ Constitution of India, arts 48A, 51A(g), inserted by the Constitution (Forty-second Amendment) Act 1976.

²⁸ *M C Mehta v Union of India* (1987) 1 SCC 395 (Oleum Gas Leak 31-32).

²⁹ *M C Mehta v Union of India* AIR 1988 SC 1037 (Ganga Pollution); *M C Mehta v Union of India*, 2 SCC 353 (Taj Trapezium) (1997).

³⁰ *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647; see also *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212.

³¹ *M C Mehta v Kamal Nath* (1997) 1 SCC 388.

³² *State of Himachal Pradesh v Ganesh Wood Products* (1995) 6 SCC 363.

³³ *M K Ranjitsinh v Union of India* 2024 SCC OnLine SC 570.

already established. But, if the most heinous environmental degradation warrant serious punishment under the criminal law.

C. Indian Environmental Legislation

The statutory picture is good, but structurally not alignment from an ecocide context. The umbrella Act³⁴ has made contravention punishable by imprisonment of up to five years and seven years if the contravention is continued. However, it is a regulatory offence, it does not take into account the scale of ecological harm. Even the Jan Vishwas Act 2023 has since removed the punishments from many contraventions of the EPA and turned them into civil penalties.³⁵ The Forest (Conservation) Act 1980 requires that diversion of forest land has to be approved by the Centre but under the 2023 amendment, strategically located and border area projects have been exempted from its coverage. Both the Wild Life (Protection) Act 1972 and the Biological Diversity Act 2002 regulate access to biological resources and prohibit exploitation of resources of listed species but without any assessment of the gravity of the impact on the ecosystem.

The National Green Tribunal Act, 2010 established a forum of experts with restitution powers, instead of a criminal court.³⁶ The difference is exacerbated by corporate criminal liability, as when the companies are found guilty the statute mandates imprisonment, but the courts also have the discretion to replace that with fine.³⁷ The doctrine of attribution is clearly underdeveloped. Indian law is not compliant with an international ecocide framework, where both liability of companies and superior liability are included, nor does it seem willing to shift from its current stance.

D. India's Climate Commitments

India's international environmental stance is ambitious on paper for mitigation of damage however it is very weak for differentiation strategies. Its revised Nationally Determined Contribution has a pledge to cut emissions intensity of GDP by 45% from 2005 levels, and to have about 50% of installed electric capacity from non-fossil sources by 2030. The Glasgow

³⁴ The Environment (Protection) Act 1986.

³⁵ Environment (Protection) Act 1986, ss 15-16 (as amended by the Jan Vishwas (Amendment of Provisions) Act 2023).

³⁶ Wild Life (Protection) Act 1972; Biological Diversity Act 2002; National Green Tribunal Act 2010, ss 15, 20.

³⁷ *Standard Chartered Bank v Directorate of Enforcement* (2005) 4 SCC 530.

Panchamrit added 500 GW of non-fossil capacity and a 2070 net-zero horizon. Mission LiFE also aims to constitutionalise, sustainable consumption at the individual level.³⁸ At the same time, India believes in common but differentiated responsibilities as it defends coal expansion as equity issue for a country where per capita emissions are still much lower than the global average and considers energy security as a development non-negotiable.³⁹ Although, it appears hypocritical but the primary issue lies in providing a structure to it. As on one hand the state is leading the International Solar Alliance (ISA) while on the other hand, it is expanding coal blocks in Hasdeo. Therefore, India's interest lies in not ignoring the negotiation altogether but in ensuring thresholds, especially for defences and gravity so the crime doesn't restrict development but ends up punishing wanton devastation.

VI. CONTEMPORARY INDIAN CASE STUDIES

The IEP elements are demonstrated in six recent controversies, they reflect both the significance and impediments of Indian facts to the proposed crime. They are only a critical analysis of the projects, in no way meant as an accusations. However, the same vein of significance with respect to an ecocide framework runs through all of them.

1. *The Great Nicobar Holistic Development Project*

The ₹72,000 crore project of transshipment port at Galathea Bay, airport, power plant and township involves diversion of around 130 square kilometres of some of the most pristine rainforest in India, the cutting down of close to a million trees and construction on nesting beaches of the giant leatherback turtle, home to a particularly vulnerable tribal group, the *Shompen*.⁴⁰ Severity and long-term damage appears doubtful on any reading, and the ecosystem-level widespread limb can be plausibly understood on an island biogeography rationale. But the project has been thoroughly licensed, with an environmental clearance and a forest clearance, and a statute to make its way smoother. Unlawfulness can thus be challenged and the 'wanton' aspect comes into conflict with the claimed strategic and economic gain of a national scale. Great Nicobar is Heller's critique where the lawful, deliberated megaproject is

³⁸ Government of India, 'India's Updated First Nationally Determined Contribution under the Paris Agreement' (August 2022); PIB, 'National Statement by Prime Minister at COP26' (1 November 2021); Ministry of Environment, Forest and Climate Change, 'Mission LiFE' (2022).

³⁹ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79, art. 2(2) (CBDR-RC).

⁴⁰ MoEFCC, Environmental Clearance for the Great Nicobar Holistic Development Project (November 2022); NGT, *In re Great Nicobar Project* (April 2023) (constituting a High-Powered Committee rather than suspending clearance).

exactly what the IEP definition strives to get at and exactly what much of the Indian environmental bar thinks it should.

2. Joshimath Land Subsidence

The 2023 collapse of Joshimath is the outcome of 50 years of ignoring warnings against building on ancient landslide material. It dates back to the Mishra Committee's 1976 report, however the tunnelling for hydropower, and road-widening continued despite of that.⁴¹ As an ecocide problem it fails at nearly every level, since the harm is not caused by one things, instead it is a cumulative effect of many agencies spread across decades making the problem hard to attribute still victimising both humans and the built environment.

Joshimath gave us a cautionary lesson proving that majority of the worst environmental disasters in India have been slowly brewing and are caused by multiple factors many of which were authorised by administrative machinery. Therefore, attaching criminality would be an incorrect move, placing state accountability in terms of planning, reform and administration should be considered of paramount importance.

3. The Buxwaha Diamond Mining Project

The Bunder project in Madhya Pradesh's Chhatarpur district would clear some 382 hectares of forest including over two lakh trees in water-stressed Bundelkhand to mine one of Asia's largest kimberlite deposits.⁴² 382 hectares may seem too small to result in widespread environmental harm, but some members of the assessment team were concerned that the project would lead to the felling of more than two lakh trees in the water-stressed Bundelkhand region. When assessing the severity and duration of the harm, potential implications for groundwater recharge, hydrological systems, and biodiversity and the ecological resilience of the surrounding region need to be taken into account for the project.

But going by the initial estimates, it would be too early to draw a firm conclusion that the Buxwaha project meets the severe, widespread or long-term requirement for ecocide. The project thus illustrates an important difference between significant environmental effects and

⁴¹ M.C Mishra Committee, Report on Joshimath Subsidence (1976); National Disaster Management Authority, Post-Disaster Needs Assessment: Joshimath (2023).

⁴² A. R. Chowdhury, "In Madhya Pradesh's Buxwaha Forest, a Diamond Mine Could Claim Two Lakh Trees: Local Sentiment and Legal Hurdles," Land Conflict Watch / Mongabay India Reports, 14(3), 45-52 (2022) .

environmental destruction which falls within the scope of criminal law. In particular, the duration of hydrological and ecological impacts of the project and whether or not the impacts beyond the project area need to be considered, have not yet been empirically assessed. Therefore, it is clear from the Buxwaha case that the use of an ecocide offence cannot rely on the amount of forest diverted, or trees felled, but instead must take in account the ecological importance of the area affected, the impacts on biodiversity, the hydrological consequences, the duration and reversibility of the damage, and the cumulative impacts of the intervention.

Therefore, Buxwaha perhaps can currently be described not as a clear case of ecocide, but as a borderline case, which illustrates the difficulties of evidence and definition in applying an ecocide threshold to domestic environmental projects. Thus, it is important to introduce legislation on domestic ecocide that contains objective and scientifically measurable criteria for evaluating environmental harm, also taking into account international developments in the definition and assessment of ecocide where relevant, such as the size of the area in which the harm occurs, its ecological and species significance, its hydrological effects, its duration, its reversibility and its cumulative impacts.

4. The Hasdeo Arand Coal Mining Controversy

Hasdeo Arand, a 170,000 hectares of connected dense forest, located over one of the richest coal seams in central India, is the clearest fact pattern of ecocide in India. The Indian Council of Forestry Research and Education (ICFRE) and the Wildlife Institute of India (WII) recommended that mining outside existing leases would bring irreparable harm at the landscape level, including a level of human-elephant conflict that was unmanageable. Nevertheless, clearances and felling for the Parsa East and Kete Basan extension continued despite sustained Adivasi resistance and contested consents of the Gram Sabhas.⁴³ Each and every IEP component has been challenges, like the extent of damage as severity of damage caused has been determined by experts and certified as irreversible. Further, it is so widespread that an entire ecosystem has been affected while also being long term and continued. There are proven records to verify the damage claims, and even unlawfulness in the manner consent is said to have been obtained. Again, in spite of meeting every criterion for expert-certified

⁴³ Wildlife Institute of India & Indian Council of Forestry Research and Education. (2021). *Biodiversity assessment with emphasis on select faunal groups in the Hasdeo Arand Coal Field, Chhattisgarh* (Technical Report No. Tr No/2021/08). Dehradun, India: WII & ICFRE; Chhattisgarh Legislative Assembly, *Private Member Resolution on Cancellation of Coal Block Allocations in the Hasdeo Aranya Forest*, Fifth Assembly, Eleventh Session (adopted 26 July 2022).

widespread and severe loss it is justified against energy security for a power-hungry State, as that is the paradigm for social and economic benefit thereby completely negating liability. Hasdeo therefore asks the hardest question to India's predicament: if the definition were not applicable to Hasdeo then what is it for? and if it were applicable then, is India ready for that?

5. *The Baghjan Blowout*

In May 2020, the well of the oil major Oil India Limited in the state of Assam was blown out and was burning for 173 days near Dibru Saikhowa National Park, ruining the Maguri-Motapung wetland and killing endangered species and displacing thousands. The NGT had appointed a committee led by Justice B P Katakey which had found that the well had been operated without valid consents and clearances, for which the Tribunal had ordered interim deposits and restoration.⁴⁴ *Baghjan* is the Indian parallel to the IEP's basic case of operating an illegal act without consents, knowledge of a high level of risk that is embedded in the industry, and significant, long-term destruction of wetlands. The fact that the repercussions for the corporation were modest deposits and no serious criminal liability for any decision-maker is the accountability gap between the two in a single image and the strongest evidence at home that the current law would not meet the standard of 'ecocide'.

6. *Bhopal as Benchmark*

Although the Bhopal disaster in 1984 happened before and on a scale greater than the ecocide frame, its victims were almost entirely humans, it nonetheless serves as a test case of what Indian and transnational law can and cannot do in the face of mass environmental catastrophe. The \$470 million settlement of 1989, the two-year prison term for Indian executives who were convicted in 2010 under IPC(s) 304A, the failure to extradite the foreign chairman, the fact that the site is still polluted, and the Supreme Court's denial of a curative petition for higher compensation in 2023 all illustrate the impunity frame as described by ecocide advocates, where liability is insignificant relative to harm, the corporate veil remains untouched, and cross-border enforcement has been broken.⁴⁵ That is why the Indian debate on ecocide cannot be simply written off as the northern moralising, the call for grave-crime accountability for grave environmental damage has a genealogy older than the contemporary campaign.

⁴⁴ NGT, *In re Baghjan Oil Well Blowout* (2020-2021), including the Justice B P Katakey Committee Report (2020).

⁴⁵ *Union Carbide Corporation v Union of India* (1989) 1 SCC 674; *CBI v Keshub Mahindra* (CJM Bhopal, 7 June 2010); *Union of India v Union Carbide Corporation* (curative petition dismissed, Supreme Court, 14 March 2023).

VII. COMPARATIVE ANALYSIS

Belgium is the first EU country to make ecocide a crime at the international level with the introduction in the Penal Code of 2024 as an offence of committing, by act or omission, an unlawful act with the knowledge that it causes serious, widespread and long-term environmental damage, punishable by up to twenty years' imprisonment and substantial corporate fines.⁴⁶ This is an instructive legislation where a small, treaty bound state legislates as a cautionary tale so as to influence the emerging norm. **France** took the first leap to implement the concept of ecological crime, albeit in lesser form through the Climate and Resilience Law of 2021 which established a *délit d'écocide*.⁴⁷ It creates an offence of ecological devastation, although it is still not considered a crime in the true sense of the term, violation creates a Maximum sentence up to 10 years of imprisonment. Ironically, it is condemned by the very citizens' convention that suggested the legislation in the first place. In **Chile**, ecocide is embedded within the framework of attacks against the environment and have been incorporated in the country's 2023 Economic Crimes Law.⁴⁸ India is clearly missing any such law which includes a sanction based corporate criminal liability architecture. **Brazil** has yet to pass any ecocide offence however they are a good example of megadiverse developing federations moving cautiously when subnational extraction from the Amazon is a point of issue. In 2019, **Vanuatu**, the norm entrepreneur, first made the request for ICC recognition and co-sponsored the 2024 proposal for climate-vulnerable small states suggesting ecocide is existential self-defence by legal means.⁴⁹

There are three lessons that India can learn. Firstly, treaty change has been preceded or supplanted everywhere by domestic incorporation. Belgium, France, Chile, legislation even without Assembly of States Parties (ASP) under the ICC, similarly a third party can also follow suit and legislate as they have nothing to lose jurisdictionally. Secondly, credible versions of the offence are those that are connected to corporate liability reform, because otherwise ecocide without corporate liability is just symbolism. Thirdly, the alliance that backs the crime is no rich country club, but one run by the most vulnerable in the Global South. Despite of a

⁴⁶ Belgian Penal Code 2024, art 94; see Stop Ecocide International, 'Belgium becomes first European country to recognise ecocide as international level crime' (February 2024).

⁴⁷ IEP Definition (n 15) commentary; Higgins (n 3) chs 5–6; Robinson (n 20); Heller (n 21).

⁴⁸ *Ley 21.595 de Delitos Económicos (Chile, 17 August 2023)*, Title III.

⁴⁹ Statement of Vanuatu, ICC Assembly of States Parties, 18th Session (December 2019); ICC-ASP/23/26 (n 1).

traditional legal framing on one hand and a robust Pacific -led criminal law imposition, Congo endorsed the latter, India can also follow suit.

VIII. CRITICAL EVALUATION

At the root of the case for recognition is impunity. In India, in the name of environmental justice communities that lose forests, wetlands and groundwater including the *adivasi* communities that suffer catastrophic loss are looked at as a compensatory afterthought. In the name of climate accountability, a crime of awareness of high risk of grave harm is still performed with full knowledge of the science of climate change and the extent to which it may cause harm. *Baghjan* and Bhopal are the Indian examples of zero to little corporate responsibility not creating any deterrent effect for personal liability of corporations. Even when there is accountability, the fines are way less than the operating costs. Further, identifying it as an intergenerational justice issue would enable penal provisions to be applied to the already existing statutory and constitutional legislations.⁵⁰

It is not possible to formulate the principle of legality in the context of the definition of excessive other than under the assumptions that the criminal law will not be used to regulate the political process, and that criminal law should not be a laboratory for standards that administrative law has not yet made precise. Further, routine regulatory violations should not be elevated to international crimes, or the notion of core crimes would be degraded. For the same, if a threshold is set by impassioned judges, it could stifle infrastructure, energy transition and would eventually lead to poverty alleviation, all this will affect the developing economies while the already built economies would thrive in the name of no retroactivity. India has now had experience of the flair of the Indian Constitution for giving broad jurisdiction to these adjudicatory bodies, but to internationalise that function is to place it in a court which India does not trust concerning its workload and its financing. Anyway, it is not the executives of the historically biggest emitters that will be the realistic first defendants of an ecocide regime.⁵¹

The most serious Indian challenge to ecocide is not sovereignty, as the exposure for a non-party is slight but it is distribution. the most powerful Indian argument for engagement is based on that premise, that the benefits clause, gravity criteria and complementarity doctrine are all the places where distributional equity will be written into the crime, and they will be written

⁵⁰ IEP Definition (n 15) commentary; Higgins (n 3) chs 5-6.

⁵¹ Robinson (n 20); Heller (n 21).

by whoever shows up. India's environmental constitutionalism provides it with the authority to demand that the crime be not just eco-centric in its protection, but also equitable in its application. That is, it must target the wanton, science-defying destruction of *Baghjan*, and the unlawful devastation that led to it, without being applied to deliberated, mitigated and consent-based development, which must be left to the domain of regulatory law. Abstention leaves that drafting table behind, opposition leaves it to others.

IX. CONCLUSION & RECOMMENDATIONS

For India. *First*, introduce a statutory definition of grave environmental destruction as an aggravated offence, with quantifiable measures of gravity, scale and duration, overlaying, but not replacing, the existing regulatory laws. The Law Commission could be commissioned to draft an Environmental Crimes Code incorporating the penal provisions of the environmental laws currently spread across EPA, forest, wildlife and water laws. *Secondly*, restore corporate offending to be restored by statutory attribution rules, sentencing linked to turnover, imputing knowledge to CEO/CFO, and restoration orders as a criminal remedy, which was the direction that the *Jan Vishwas* had taken. *Thirdly*, strengthen investigative ability of environmental forensics units, dedicated prosecutors on NGT benches, and proforma connecting pollution boards with criminal process be established. *Fourthly*, participate internationally without objection to be an observer in the Working Group on Amendments, coordinate a G20/BRICS position, and push for a text sensitive to CBDR, as India can exert a greater influence on the definition of ecocide as a constructive non-party than as a silent objector.⁵²

For the ICC and the Assembly of States Parties (ASP), make thresholds in the Elements of Crimes, and not allow severe, widespread and long-term mechanisms to be left up to judicial improvisation on indicative quantitative benchmarks, guidance on protected-area and species status, and guidance on cumulative harm. *Secondly*, shape corporate gap, because article 25 will not soon apply to legal persons, the Office of the Prosecutor (OTP) needs to give complementarity guidance which makes strong national corporate liability regimes the first choice, and gravity guidance which prioritises penalising the decision-makers. *Thirdly*, embed safeguards against politicisation within the offence itself, by means of a leadership clause, limiting liability to those shaping or controlling the relevant policy or enterprise. Also, the Pre-Trial Chamber authorisation practice that takes into account the development context and

⁵² A. Greene, "The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Necessity?," *Fordham International Law Journal*, 43(3), 469–528 (2019).

express recognition that lawful, mitigated development, carried out with free, prior and informed consent, is not wanton conduct.⁵³

This paper has suggested that the query *should ecocide become an international crime?* is the wrong question, it should first consider that there is a clear lack of international criminal law to punish severe environmental destruction and it is absent from the context of war and limited in the context of peace. Also, the jurisdictional exposure of a non-party to an ecocide amendment is limited while capacity to shape one is not. India's constitutional commitment to environmental protection, developed over four decades, from *Subhash Kumar* to *Ranjit Singh*, along with its pivotal developing economy position puts India in a unique position to shape the emerging discourse where no other state has a domestic jurisprudence this congruent with the values of the ecocide, and has a developmental stake this large in its careful drafting.

There are indeed legitimate fears, relating to sovereignty, developmental priority and ICC's selectivity. Also, nothing here advises a ratification of the Rome Statute. But the Hasdeo and *Baghjan* studies indicate that India's own accountability deficit is also a reality, that Bhopal demonstrates it is an old issue, and that the comparative record demonstrates that the states articulating the norm are doing so first in the domestic context. India can thus help to provide for a balanced international regime threshold to recognize wanton devastation, defences to accommodate equitable development, complementarity to incentivize true national enforcement and improve its own criminal law on the worst ecological crimes. The recognition of ecocide should not be viewed as a barrier to growth, but as an opportunity, an opportunity to be consistent with India's constitutional understanding and to ensure that when the fifth crime is written, as on current momentum, it is written in terms of a developing megadiverse, climate-vulnerable democracy that can live with it, because it helped write them.

⁵³ K. J. Heller, "Skeletal Prioritization: Why Ecocide Needs Specificity and Safeguards for Developing Nations," *Journal of International Criminal Justice*, 19(4), 893–912 (2021).

BEYOND THE COMMANDER: RECONSTRUCTING INDIVIDUAL CRIMINAL RESPONSIBILITY IN AUTONOMOUS WEAPONS SYSTEMS

- Dr. Aneesh V. Pillai*

- Nandana Rajesh**

ABSTRACT

The rapid adoption of autonomous weapons systems hereinafter referred to as AWS and their accompanying warfighting dynamics have fundamentally challenged established models of individual criminal responsibility in international criminal law. Current doctrines, in particular command responsibility and direct perpetration, assume the presence of human activity, intention, and control in the commission of international crimes. But as algorithmic systems that are able to choose and take aim at targets with minimal or no human intervention, attributing criminal liability to individual actors becomes legally complex. In discussing AWS, this article throws light on the failure of existing international legal norms to provide sufficient justification for responsibility of such criminal behaviours. Instead, it examines how autonomy, opacity and distributed decision-making run counter to the fundamental notions of mens rea, actus reus and causal attribution.

This article builds on international humanitarian law, international criminal law and emerging state practice to interrogate whether applicable modes of liability for example, indirect perpetration, superior responsibility and joint criminal enterprise could be translated into a specific context of autonomous warfare. It also provides for the ongoing normative debates around the implications of meaningful human control and accountability gaps for individual criminal responsibility. The article concludes with calling for reconstruction of the law that moves beyond the traditional military commander and includes designers, programmers and political decision makers behind deploying AWS. The study seeks to inform the global context of what remains to be done in AI warfare at least in policy and legal accountability with a view of proposing doctrinal improvements and to inform future developments.

Key words: Autonomous Weapons Systems, Individual Criminal Responsibility, International Criminal Law, Command Responsibility, Meaningful Human Control

I. INTRODUCTION

The burgeoning use of Artificial Intelligence for military operations marks a profound change in the way arms are engaged in armed conflict. One of the most contentious outcomes that this transition is likely having is the growth and possible implementation of Autonomous Weapons Systems to be used for picking and engaging targets without human involvement. While technological progression promises greater military precision and decreased human deaths, it also questions the fundamental principles of both international humanitarian law and international criminal law which are premised on human agency, intent and accountability.¹

* Associate Professor, School of Legal Studies, CUSAT

** Research Scholar, School of Legal Studies, CUSAT

¹ Tim McFarland and others, 'The Legal Classification of Autonomous Systems' (2014) 36 *Boston College International and Comparative Law Review* 1.

Key elements of standard frameworks of individual criminal responsibility typically exist among identifiable human decision-makers, notably as military commanders or political leaders. Command responsibility, direct perpetration, and co-perpetration, rely on a human actor exercising effective control over the commission of crimes. Indeed, as autonomy in weapons systems grows, it distributes power and responsibility across complex socio-technical networks comprising programmers, engineers, manufacturers, military personnel, and political officials. This diffusion of agency causes what scholars refer to as an “accountability gap,” whereby serious violations of IHL can be committed without a clearly identifiable individual perpetrator.²

The present article finds the existing doctrines of individual criminal responsibility fall short as they do not account for the harms AWS causes. They argue that basing accountability on traditional military commanders fails conceptually in cases of autonomous warfare. In its place, the article offers a reconstructed accountability framework, that extends criminal responsibility beyond the commander to involve all other relevant human actors implicated in the lifecycle of AWS. This study seeks to contribute by examining and interpreting international legal doctrines, developing state practice, and ethical debates with regard to meaningful human control in the emerging discourse on accountability in algorithmic warfare.

II. RESEARCH QUESTION AND METHODOLOGY

This article examines the following central research question: To what extent can existing modes of individual criminal responsibility under international criminal law be applied to unlawful conduct involving autonomous weapons systems, and what doctrinal adjustments, if any, are necessary to address accountability across the lifecycle of such systems?

The article adopts a doctrinal and analytical methodology. It examines the Rome Statute, particularly Articles 25, 28 and 30, the Elements of Crimes, relevant international humanitarian law rules, and jurisprudence of international criminal tribunals and courts concerning individual criminal responsibility, participation, superior responsibility, control and mental elements. These legal materials are analysed alongside scholarship and institutional materials concerning autonomous weapons systems and meaningful human control. The article does not assume that existing international criminal law already recognises a separate category of criminal liability for designers, programmers or other actors involved in autonomous weapons

² Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 115–149.

systems. Rather, it looks into whether existing modes of liability can, within their present legal limits, apply to different actors across the AWS lifecycle.

The article combines three analytical stages. First, it identifies the existing law governing individual criminal responsibility and determines the elements that must presently be established for particular modes of liability. Second, it looks into the doctrinal difficulties created by autonomy, algorithmic opacity, distributed decision-making and temporal separation between system development and battlefield harm. Third, on the basis of those difficulties, it proposes a doctrinal reconstruction as well as prospective legal reform aimed at improving accountability without extending criminal responsibility beyond the requirements of legality, individual culpability and the applicable mental elements.

Accordingly, references to existing international criminal law are distinguished from the article's normative proposals. The proposed lifecycle accountability model is presented as a framework for interpreting and, where necessary, developing existing principles rather than as a claim that international law presently imposes automatic criminal liability upon every human actor involved in an autonomous weapons system.

III. AUTONOMOUS WEAPONS SYSTEMS: CONCEPTUAL AND LEGAL OVERVIEW

Autonomous Weapons Systems are typically defined as “weapons that possess the functionality to autonomously select and perform engagement actions when activated,” where such ability is necessary for the operational process of the system. This distinctive feature sets AWS apart from remotely operated or semi-autonomous systems in which human pilots maintain a say in the targeting and engagement decisions. AWS process real AI information including but not limited to machine learning, sensor fusion, pattern recognition, as well as predictive analytics to see its operating environment and perform lethal actions.³

Crucially, autonomy is on a continuum: including human-in-the-loop systems, with human authorization required for each engagement; human-on-the-loop systems, in which individuals do some of the work, and then human-out-of-the-loop systems, in which humans operate autonomously after deployment. Such variation in autonomy carries profound legal consequences.⁴ On these principles, however, international humanitarian law does not prohibit these new weapon technologies. Instead, it controls the use of weapons according to

³ *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08 (International Criminal Court, 21 March 2016).

⁴ Robert Sparrow, ‘Killer Robots’ (2007) 24 *Journal of Applied Philosophy* 62.

fundamental standards such as distinction, proportionality, and precaution. These principles need to be applied consistently such as using evaluative judgment, attention to context and the ability to make value decisions strengths traditionally utilized by human combatants.⁵

This automation of lethal decision-making casts serious doubts on the extent to which AWS is equipped to adequately interpret complicated battlefield contexts, distinguish combatants from civilians or assess real-time proportionality. The effectiveness of algorithms in adhering to these requirements, especially when operating under uncertainties, civilian populations, and fast-changing environments, is disputed. Legally, AWS are not unregulated, but are regulated indirectly through extant IHL norms and weapons review obligations, such as Article 36 of Additional Protocol I, although those are constructs that were developed in times when human agency was considered central in all military operations. But because of this, their utility to autonomous systems is of questionable value conceptually.⁶ But questions are not only about compliance, but also about accountability for violations when they happen, especially when human participation is diminished or temporally removed from the hazardous consequence. Adding to the problems is the lack of a universally accepted legal meaning of AWS.⁷

While considerable debate is to be had within the Convention on Certain Conventional Weapons framework, the states themselves remain at odds on relevant aspects as how much autonomy should be a matter of interest in law, and if meaningful human control is a legal and technical condition necessary for international humanitarian law, or an optional by-product of policy preferences.⁸ The discussions have yielded important normative and soft-law guidance, but international binding rules for AWS cannot be found. The definitional and regulatory ambiguity has particular implications for the attribution of individual criminal responsibility since vagueness in the nature and limits of autonomy makes inferences about the nature of control, foreseeability, and intent in response to international humanitarian law violations difficult to make.⁹

⁵ Michael N Schmitt, 'Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics' (2018) 94 *International Law Studies* 57.

⁶ *Prosecutor v Delalic and Others (Celebici Camp Case)* (Judgment) IT-96-21-T (ICTY, 16 November 1998).

⁷ Kenneth Anderson and Matthew C Waxman, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can* (Hoover Institution Press 2013).

⁸ Noam Lubell and Nathan Derejko, 'A Global Battle for the Soul of Warfare: International Law and Autonomous Weapons' (2013) 32 *Harvard International Review* 47.

⁹ Matthew C Waxman, 'International Law and the Future of Warfare' (2010) 35 *Yale Journal of International Law* 427.

IV. FOUNDATIONS OF INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW

Individual criminal responsibility constitutes a foundational pillar of international criminal law, affirming that accountability for grave international crimes rests with natural persons rather than abstract entities or states alone. This principle is firmly embedded in the jurisprudence of the International Criminal Court and codified in the Rome Statute, which establishes that individuals may be held criminally liable for genocide, crimes against humanity, war crimes, and the crime of aggression. Article 25 of the Rome Statute articulates a comprehensive framework of liability, extending responsibility to those who commit crimes directly, act jointly with others, order or solicit their commission, or otherwise aid and abet their perpetration.¹⁰

At the core of this framework lie the classical criminal law concepts of *actus reus* (the prohibited conduct) and *mens rea* (the requisite mental element). International crimes generally require proof that the accused engaged in conduct contributing to the commission of a crime with any intent, knowledge, or, in certain circumstances, recklessness or negligence as specified by law. Crucially, international criminal liability also depends on establishing a sufficient causal nexus between the accused's conduct and the resulting harm. This requirement reflects the individualized nature of criminal responsibility and seeks to ensure that liability is not imposed in an overly expansive or abstract manner.¹¹

To operationalize these principles in complex conflict settings, international criminal law has developed multiple modes of liability. This includes either direct or indirect perpetration by alternative person or organization, joint criminal enterprise, and aiding and abetting. Each of these modes presupposes some degree of control, contribution, or authority over the criminal act, whether exercised directly or indirectly. The unifying thread across these doctrines is the assumption of human agency namely, that human actors make decisions, exercise judgment, and can foresee and intend the consequences of their actions.¹²

Command responsibility occupies a particularly significant place within this framework. Under this doctrine, military commanders and civilian superiors may be held criminally responsible for crimes committed by their subordinates where they know or, owing

¹⁰ Paul Scharre, *Army of None: Autonomous Weapons and the Future of War* (W W Norton & Company 2018) 281–312.

¹¹ Shane Darcy, *Collective Responsibility and Accountability under International Law* (Cambridge University Press 2017) 98–123.

¹² United Nations Institute for Disarmament Research, *The Human Element in Decisions about the Use of Force* (UNIDIR 2020).

to the conditions, should have known that such crimes were being or were about to be devoted. They usually fail to take necessary and reasonable measures to prevent or punish them. This type of liability is not based on direct participation but on the failure to exercise effective control over subordinates. As developed in international jurisprudence, effective control implies a material ability to prevent or repress criminal conduct through hierarchical authority and human supervision.¹³

V. THE CHALLENGE OF ATTRIBUTION IN AUTONOMOUS WARFARE

Autonomous Weapons Systems have the potential to challenge much of the classic attribution logic involved in individual criminal responsibility. Attribution under international criminal law relies on the capacity to attribute an outlawed consequence to a particular human actor who had the necessary intent and had control over the criminal conduct. AWS, through algorithmic autonomy in lethal decision-making, further complicate this linkage in different interdependent manners.

The first is that decision-making by algorithm is so opaque that mens rea is severely compromised. A lot of AWS use complex machine learning models that learn from a vast amount of data and come up with outputs that their designers do not always understand. These so-called “black box” systems render it nearly impossible to reconstruct how a given targeting decision was made, or whether the outcome was foreseeable at the time of deployment. In criminal cases, which require the establishment of proof of intent or knowledge beyond reasonable doubt, such opacity poses deep evidentiary problems. Without a clearer sense of how an algorithm sifted through data and chose one target, trying to pin intent on a human does not exactly fall into line with the law.¹⁴

Second, autonomy reduces the contributing link between human behaviour and the injury caused. Conventional forms of liability have a more direct relationship between an individual’s acts and whether a crime was committed. For AWS, however, the system may be operating in an independent manner after its activation, leading to the possibility of lethal outcomes. A military commander could have directed the deployment of the system based on existing rules of engagement but could have not foreseen or, indeed, had not intended the

¹³ Jens David Ohlin, ‘The Combatant’s Stance: Autonomous Weapons on the Battlefield’ (2016) 92 *International Law Studies* 1.

¹⁴ Kevin Jon Heller, ‘The Concept of Control in the Rome Statute’ (2007) 5 *Criminal Law Forum* 137.

particular unlawful act executed by the machine.¹⁵ By contrast, the programmers or engineers behind the algorithm likely had great power over how the algorithm behaved, but lack situational awareness of the operational environment in which the harm ultimately occurred. This temporal and contextual distance muddies our ability to determine causation and culpability.¹⁶

Third, autonomous warfare decision-making is distributed across actors and several levels of actor that go beyond the design, development, testing, authorization, and deployment of the system. During the actual deployment, choices taken during development such as when to select data, target classification parameters, or risk thresholds may work with real-world inputs at times. This siloing of agency undermines liability models that attempt to pinpoint a single overwhelming agent or controlling mind responsible for the crime. Rather, responsibility could be distributed among a cluster of actors, and none are seen to meet the traditional definitions of control or intent necessary for criminal responsibility.¹⁷

VI. RETHINKING COMMAND RESPONSIBILITY IN THE AGE OF AUTONOMOUS WEAPONS SYSTEMS

Command responsibility application to AWS reveals a striking doctrinal schism in international criminal law. Although military leaders unquestionably hold themselves responsible for acquiring, authorizing and employing weapons systems, there is, of course, a real limitation that their ability to exercise effective control over mission management capabilities such as those of autonomous systems is intrinsically limited.¹⁸ The doctrine of command responsibility as is well-known in the international law system. It is enshrined in the Rome Statute, is predicated on the superior having enough material power to forestall or suppress the commission of crimes perpetrated by subordinates. This assumption makes use of a hierarchical system of human subjects who can be directed, are subject to discipline, and are subject to direct oversight the latter of which is becoming untenable on the ground once lethal decision making is handed over to autonomous systems.¹⁹

¹⁵ Rebecca Crootof, 'War, Responsibility, and Killer Robots' (2015) 40 *North Carolina Journal of International Law* 909.

¹⁶ Alex Whiting, 'Responsibility for Atrocities: Individual Criminal Liability' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 632.

¹⁷ UN Secretary-General, *Current Developments in Autonomous Weapons Systems* (UN Doc A/76/136, 2021).

¹⁸ Marco Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified' (2014) 90 *International Law Studies* 308, 315.

¹⁹ Convention on Certain Conventional Weapons (adopted 10 November 1980, entered into force 2 December 1983) 1342 UNTS 137.

The notion of “effective control” has been understood to mean practical power to affect behaviour and intervene in order to stave off unlawful behaviour. AWS capability in this sense could well be much weakened after system activation however. Operations which are autonomous can be performed at machine speed and in dynamic environments where immediate human intervention is either not feasible technologically or operationally difficult, whether human-assisted robots or machine led. As a result, even committed commanders can still be without the capacity to predict or protect themselves from precisely the sort of legal-related harm that results when an autonomous system cannot be counted in question, and that challenges the idea that it is fair to punish the system entirely on the basis of deployment decisions and does not make much sense.²⁰

Furthermore, focusing only on commanders can also distort the attribution of accountability by ignoring the larger ecosystem of individuals and actors that are implicated in causing autonomous harm. For example, AWS’s potential capabilities, limitations and deployments can include engineers, programmers, technicians, manufacturers, military procurement officials and political authorities.²¹ Directing the blame solely to commanders not only excessively punishes the military leadership but it may absolve others whose behaviour is directly or indirectly responsible for the war’s spread. This approach could serve only to contribute to promoting the tactical transfer control of decision making to machines, as a tool for dispersing responsibility, thus frustrating the preventive and deterrent aspects of international criminal law.²²

Command responsibility must thus be re-conceptualised, in view of these concerns, to account for the communal, layered character of control in autonomous warfare. International law ought not to rely solely upon commanders as bearers of criminal responsibility, but should acknowledge that effective command and control in AWS is frequently distributed among many actors and at different decision-making stages. A deeper and more multi-faceted methodology would define responsibility according to the quality of role and severity of control exercised by each actor along the operational lifecycle of the system: design, authorization and deployment. This reconceptualization is needed to maintain command responsibility as a

²⁰ Jelena Pejic, ‘The Protective Scope of Common Article 3: More Than Meets the Eye’ (2011) 93 *International Review of the Red Cross* 189.

²¹ International Committee of the Red Cross, *ICRC Position on Autonomous Weapon Systems* (ICRC 2021).

²² Kenneth Anderson and others, ‘Autonomous Weapon Systems and the Law of Armed Conflict’ (2022) 37 *American University International Law Review* 491.

legitimate and equitable accountability mechanism in this age of autonomous weapons, and to not compromise the fundamental essence of individual criminal responsibility.²³

VI. EXPANDING THE CIRCLE OF INDIVIDUAL CRIMINAL RESPONSIBILITY

As a result, there is an accountability gap created by Autonomous Weapons Systems that must be filled by moving individual criminal responsibility beyond traditional military actors. We cannot confine liability to battlefield commanders because it falls short of the multifaceted human decision-making network upon which the design and deployment of autonomous technologies is built. With AWS, harm does not have to be a result of an individual operational decision, but the cumulative choices taken over a system's development and release. Designers, programmers, manufacturers, procurement officials, and political leaders may thus face personal criminal responsibility if their actions are considered to have made a significant contribution to the commission of international crimes.²⁴

Programmers and engineers, notably, are positioned to influence the behaviour of autonomous systems. Where these actors intentionally design or produce systems that cannot comply with basic values of international humanitarian law, e.g., distinction, proportionality, or intentionally disregard foreseeable risk of criminal harm, their behaviour may constitute a significant component of criminal outcomes. In these cases, liability may also arise under the doctrines of aiding and abetting or indirect perpetration, in particular when there is a clear reliance on technical design decisions that allow unlawful conduct to be predetermined to criminal conduct in operational contexts that can be foreseen.²⁵

Crucially, the crime would not be carried out over technical involvement and it would be about demonstrating knowledge, intention or will-full failure of a legal duty. Programmers and engineers may occupy an important position within the causal and decision-making chain of an autonomous weapons system. However, technical involvement alone does not establish individual criminal responsibility under existing international criminal law. Liability would require the prosecution to establish the elements of a recognised mode of liability, including the relevant material contribution, the applicable mental element, and the required connection between the accused's conduct and the crime charged. Thus, the mere fact that a programmer

²³ Gary E Marchant and others, 'International Governance of Autonomous Military Robots' (2011) 12 *Columbia Science and Technology Law Review* 272.

²⁴ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001).

²⁵ Heather M. Roff, Meaningful human control or meaningful state responsibility?, 15 *Hum. Rts. & Int'l Legal Discourse* 1 (2021).

designed an algorithm subsequently used in an unlawful attack would not, by itself, establish criminal responsibility.

Where a programmer or engineer intentionally contributes to the commission of a crime, or knowingly provides assistance that facilitates its commission, the conduct may potentially be examined under Article 25(3) of the Rome Statute, subject to the elements of the relevant mode of liability. Similarly, where an individual uses another person as an instrument for the commission of a crime, the requirements of indirect perpetration must be independently established. The autonomous operation of a weapon does not itself satisfy these requirements.²⁶

The same caution applies to procurement officials and political decision-makers. Their approval, procurement or deployment of an AWS may be relevant to criminal responsibility only where the applicable legal elements are satisfied. A decision to procure or authorise a system cannot, without more, be treated as criminal participation merely because the system later causes unlawful harm. The legally significant inquiry must instead examine the actor's conduct, knowledge and/or intent, the foreseeable consequences within the applicable legal framework, the degree of contribution or control, and the connection between that conduct and the crime ultimately committed.²⁷

VII. MEANINGFUL HUMAN CONTROL AS A LEGAL SAFEGUARD

Meaningful human control has been a central normative response to legal and ethical obstacles to Autonomous Weapons Systems. The International Committee of the Red Cross (ICRC) and several states have consistently endorsed the concept in multilateral disarmament processes as a minimum safeguard against the delegation of life-and-death decisions to machines. Meaningful human control, at its most basic level, is about preserving human judgment in vital aspects of warfare, such as choosing targets or engaging in combat, and making certain that lethal force takes place with human deliberation, responsibility and moral agency. Although defined in ethical terms, meaningful human control is legally relevant and relevant to international humanitarian law, and therefore to international criminal law.²⁸

It is important to highlight, however, to embed human oversight on critical components of decision-making processes e.g., system design, target selection parameters, and real-time

²⁶ Milan Markovic, 'Accountability for Autonomous Weapons Systems' (2015) 28 *Harvard Journal of Law and Technology* 397.

²⁷ Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 121–154.

²⁸ Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn, Oxford University Press 2014) 166–205.

engagement authorization to preserve a clear connection between human conduct and battlefield result. For an assessment of individual criminal liability, this linkage is instrumental, given that it allows courts to balance intent, foreseeability, and control in a way that complies with recognized liability doctrines. In this sense, meaningful human control might serve as a realistic connection between current laws and emerging autonomous technologies.²⁹

Furthermore, meaningful human control may act as a potential guide for interpreting the legality of AWS under contemporary international law. Systems for which humans cannot meaningfully engage should therefore be inherently at odds with the principles of distinction, proportionality and precaution, principles that require judgment within context and based on values.³⁰ From this standpoint, a lack of meaningful human control could indeed mean that there would be an unlawful act itself and the lack of practical human authority to control, especially as autonomous operation can produce foreseeable potential risks of indiscriminate or disproportionate harm. Although there are normative aspects to it, the idea of meaningful human control exists in law but remains underdeveloped.³¹

There is no unified definition and there are no binding standards at the international level of human intervention to establish the level of or variety of human participation. States vary widely in their understanding and range from very little oversight at the time to real-time decision capability. This conceptual confusion threatens to degrade real human control into mere rhetoric, rather than a legitimate mechanism of accountability. Without specific legal expression and enforceable standard the idea may not be able to contain state practice and be used as a reliable mechanism to attribute criminal liability.³²

Thus, meaningful human control must be translated into clearer normative criteria through which weapons reviews of warfare, operational doctrine, and judicial evaluation might determine its meaning if it is to operate as a real legal protection. The contents and legal status of human responsibility must therefore be clarified if the regulation of autonomous warfare is to avoid such developments from being divorced from the central theme of human responsibility and ensure that in the development of technology-driven warfare people are responsible.³³

²⁹ Guenael Mettraux, *The Law of Command Responsibility* (Oxford University Press 2009) 35–89.

³⁰ International Committee of the Red Cross, *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons* (ICRC 2016).

³¹ Antonio Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013) 246–278.

³² Kai Ambos, *Command Responsibility and the Concept of Control in International Criminal Law* (Springer 2016) 23–45.

³³ Dapo Akande, 'The Individual Criminal Responsibility of Heads of State and Senior Officials' (2004) 2 *Journal of International Criminal Justice* 114.

VIII. RECOMMENDATIONS

The questions raised by Autonomous Weapons Systems require a forward-looking, principled approach from international law in which human dignity, accountability as well as the rule of law remain central in the era of rapid technological change. Against the doctrinal void that emerged from this article, the following recommendations can be provided as a basis of a more consistent and equitable regulatory system.

First, there is a crucial need to clarify and operationalize what meaningful human control entails when applying it to the tools of international law. Instead of being a vague moral vision, meaningful human control should be described by precise legal criteria that specify the nature, timing, and extent of human involvement in the employment of force. This kind of clarification would help states carry out reviews of weapons, assist with practices within the military, and serve as a normative reference for courts to judge legality and accountability as well. Incorporating this concept into current international humanitarian law regimes would increase compliance while increasing accountability.³⁴

Second, the concept of personal criminal responsibility is also needed to be recast to recognize distributed decision-making in autonomous warfare. International criminal law should not remain limited to battlefield commanders and consider the complex ways in which designers, programmers, officials in procurement, and decision-makers in politics exert control.³⁵ Clarifying the doctrine of liability for technological contributions especially where these contributions pose foreseeable risks of unlawful harm would help narrow accountability gaps without undermining the concept that certain individual actors are at fault.³⁶

Third, the Article 36 weapons review process should be reinforced to make it more suitable for the specific risks of AWS. States should be guided to undertake robust review work with multidisciplinary focus which goes beyond simply ensuring their technical performance to measuring compliance with international humanitarian law, mechanisms of accountability, and capacity to be meaningfully controlled. A higher level of transparency in weapons review

³⁴ Thomas Burri, 'International Law and Artificial Intelligence' (2017) 60 *German Yearbook of International Law* 91.

³⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 28.

³⁶ Geoffrey S Corn, 'Autonomous Weapons and the Law of Armed Conflict: A Military Perspective' (2018) 94 *International Law Studies* 27.

standards, coupled with international cooperation and information-sharing, would encourage uniformity while enabling normative consensus.³⁷

Fourth, international organizations must shape the future of autonomous weapons governance. The United Nations and more multilateral venues must develop binding mechanisms or in principle quasi-binding norms in the context of the autonomy, accountability, and human control of warfare. Though it may be politically difficult to go from a mere treaty to a truly comprehensive treaty, a series of small steps like agreement upon principles, interpretive guidelines, or codes of conduct would slowly but surely establish legal conditions and would influence state behaviour.³⁸

Lastly, any regulatory response must be firmly rooted in the human-centered basis of international law. Technological innovation should never be allowed to diminish humanity's moral or legal responsibility to make decisions relating to life and death in the world. Accountability in autonomous war is not only an operational or procedural problem; it is a normative one that reflects the everlasting principles of humanity, justice, and restraint in war. In this era of machinery, however, responsibility cannot solely lie with machines; it must ultimately rest with humans, as by proactively adapting legal doctrines and the frameworks that shape policy, international law remains relevant to the ongoing emergence of algorithmic warfare.³⁹

IX. CONCLUSION

The analysis shows that autonomous weapon systems do not constitute an entirely new legal field, independent of international criminal law. There are no changes to existing principles of individual criminal responsibility in relation to elements of the relevant offence and mode of liability that can be proved. The Rome Statute offers important aspects for individual conduct, participation, superior responsibility and mental elements under articles 25, 28 and 30 of the Statute. The real problem is not the complete absence of applicable law, but the evidentiary and doctrinal issues that arise from autonomy, distributed decision-making, technological opacity, and the time lag between the development of systems and their consequences at the battlefield.

³⁷ William H Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, Oxford University Press 2016) 137–158.

³⁸ William H Boothby, *How to Think about the Law of Armed Conflict* (Oxford University Press 2018) 208–232.

³⁹ David Turns, 'Autonomous Weapons Systems and International Humanitarian Law: Challenges of Distinction, Proportionality and Precautions' (2015) 37 *Human Rights Quarterly* 889.

The battlefield commander focus remains a traditional emphasis, however, where there are many actors and stages involved in the responsibility for an autonomous weapons system. Each of these individuals can be designated as a designer, programmer, engineer, procurement official, a commander, or a senior civilian decision-maker in this chain; and without their participation, the chain does not imply criminal responsibility. The assessment of each actor must be based on the conduct of that actor, the causal or contributory connection, the applicable mental element and the applicable mode of liability.

This article introduces the lifecycle accountability model which overcomes this challenge by offering a structure that can be used in order to analyse responsibility for design, development, testing, procurement, authorisation and deployment. Its main importance lies, therefore, not in establishing an automatic liability of the non-command actor, but rather in developing a way to determine when existing doctrines would seem to be applicable and where there is a gap in the current doctrinal framework that might need to be addressed in the future.

Similarly, meaningful human control should be interpreted in a doctrinally prudent fashion. At the international level, it is preferable to consider it as a regulatory and normative protection, possibly with evidentiary value under the rule of control, foreseeability, knowledge and attribution, rather than an autonomous criminal responsibility. Further development of the weaponry review criteria, operational rules and international regulation, however, could further reinforce the linkage between technological autonomy and human accountability.

The law challenge with autonomous weapons is therefore a challenge of attribution and not a challenge of the absence of responsibility. The search for human conduct, knowledge, contribution and control as part of a crime may become more difficult in the context of autonomous operation, but does not warrant the abandonment of the principles of legality and individual culpability. International law should ensure that there are no truly unfillable accountability lacunae at the same time ensuring that criminal liability remains proper with precise and established legal criteria and proven individual guilt.

SOVEREIGNTY, VALUE EXTRACTION, AND THE GLOBAL TAX ORDER: READING PART XIII OF THE CONSTITUTION OF INDIA AGAINST THE OECD'S PILLAR ONE (AMOUNT A) FRAMEWORK

- Dr. Priyanka Anand*

ABSTRACT

The OECD's two-pillar plan for a digital tax levy on the digitalised economy is the most ambitious revision of international tax norms since the League of Nations model conventions of the 1920s. Pillar One, and its Amount A mechanism in particular, is at the heart of the discussion, as it aims to reallocate a share of the residual profits of the world's largest and most profitable multinational enterprises (MNEs) to the market jurisdictions, in the absence of physical presence. The negotiations are not just about tax policy for India. It highlighted a carefully scripted domestic constitutional framework, including the constitutional amendments contained in Part XIII of the Indian Constitution, which deals with the regulation of trade, commerce and intercourse within the territory of India, as well as the constitutional structure enshrined in the articles of the Indian Constitution, 246A, 253 and the Seventh Schedule. Combining doctrinal and critical theoretical perspectives, this paper examines the interaction of India's domestic constitutional order with, and sometimes opposition to, the new global tax order. It is grounded in postcolonial theory, feminist political economy and institutional critique, suggesting that the Pillar One regime, as it stands, formalizes taxing rights but fails to provide market economies with fiscal autonomy necessary for them to turn taxing rights into equitable outcomes, and thus perpetuates structural asymmetries embedded in colonial value-extraction practices. The examination of the site of the abolition of the Equalisation Levy in India (2024-2025), the conditional engagement with the Multilateral Convention text, and the dramatic withdrawal of the United States from the Global Tax Deal in January 2025, are considered as instances of interaction between legal form, sovereign claim, and geopolitical power. The paper ends by making a case based on the constitution of India for negotiating constitutional-based changes to dispute resolution, a permanent provision for its Significant Economic Presence criterion, and a more equitable division of the burden in formulating any potential future multilateral agreement.

Keywords: Pillar One, Amount A, Part XIII Constitution of India, Equalisation Levy, Significant Economic Presence, BEPS, Postcolonial Tax Theory, Digital Services Tax, Multilateral Convention, Global Tax Governance.

I. INTRODUCTION: THE RETURN OF THE PERMANENT ESTABLISHMENT PROBLEM

At the heart of the question of value taxes in the "digital economy" is a question of economic geography. International tax law for a century-plus has been based on a core principle from

* Associate Professor of Law, National Law University, Cuttack

manufacturing: profits are taxable where produced and production is tied to physical presence. This logic was embodied in the permanent establishment (PE) rule which was contained in successive versions of the OECD and UN Model Tax Conventions. However, the digital economy blew up the premise. A business can provide products and services to millions of Indian customers, collect data, influence their actions and then make billions of dollars of profit without ever opening a business in India. The prevailing rule on PE under the income tax treaties, in force in India, provided no relief.

The Indian reaction was typically combative and creative. The Equalisation Levy (EL) is a new 6% levy imposed by the Finance Act 2016 on payments made for digital advertising with non-resident service providers.¹ In 2020, the Finance Act was passed which also made a 2% levy on e-commerce companies that enable online sales to India.² Unilateral action in terms of a 2% taxing right led to immediate resistance from the USA, the USTR declared that the 2% taxing rate was “discriminatory”,³ and paved the way for the larger multilateral project. Back in October 2021, the OECD's two-pillar proposal was officially accepted by the Inclusive Framework, which proposed a formal solution to these conflicting demands.⁴

This paper examines the mechanism of transferring taxing rights to market tax jurisdictions (Amount A) of Pillar One and its integration into India's constitutional framework.⁵ The main thrust of the argument is that the present design of Amount A and the political context in which it is being discussed is indicative of structural imbalance which cannot simply be left

¹ Finance Act 2016 (India), Chapter VIII, s 165 (imposing equalisation levy at 6% on the amount of consideration for 'specified services' received or receivable by a non-resident from a person resident in India carrying on business or profession, effective 1 June 2016 vide Central Government Notification No 37/2016 dated 27 May 2016).

² Finance Act 2020 (India), s 163(1) (inserting s 165A into the Finance Act 2016, Chapter VIII, imposing equalisation levy at 2% on consideration received or receivable by a non-resident e-commerce operator from e-commerce supply or services made or provided or facilitated, effective 1 April 2020).

³ Office of the United States Trade Representative, *Report on India's Digital Services Tax* (2021) <https://ustr.gov/sites/default/files/enforcement/301%20Investigations/Report-India-Digital-Service-Tax.pdf> accessed 27 June 2026, concluding that India's 2% equalisation levy on e-commerce operators is unreasonable, discriminatory, and burdens or restricts US commerce within the meaning of s 301 of the Trade Act of 1974, 19 USC § 2411.

⁴ OECD/G20 Inclusive Framework on BEPS, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (8 October 2021) <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> accessed 27 June 2026. Over 135 jurisdictions joined the framework.

⁵ OECD/G20 Inclusive Framework on BEPS, *Multilateral Convention to Implement Amount A of Pillar One* (text released 11 October 2023) <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> accessed 27 June 2026. As at 27 June 2026, the MLC has not been opened for signature; the OECD acknowledges members retain 'different views on a handful of specific items': OECD/G20 Inclusive Framework on BEPS, *Pillar One Update from the Co-Chairs* (13 January 2025) <https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/pillar-one-update-co-chair-statement-inclusive-framework-on-beps-january-2025.pdf> accessed 27 June 2026.

unchallenged by constitutional law, in particular, Part XIII and Article 253, without critically engaging with it on principled lines. On 20 January 2025, the United States unconditionally withdrew from the global tax deal,⁶ not just indicating preference for a tax policy. It came as confirmation to those who have long believed in the postcolonial and institutional analysis of tax governance that it is fundamentally a competition of sovereign economic interests, and that multilateral form is not necessarily multilateral equity.

II. THE ARCHITECTURE OF PILLAR ONE: AMOUNT A AND ITS DESIGN LOGIC

A. What Amount A Proposes

Part of the challenge in coming up with Pillar One is that it moves away from the source-based taxation principle that has been the basis for taxing corporations throughout international tax history since the 1920s. It suggests a new measure for determining the level of 'sovereign' control of a MNE: a 25% tax rate on its residual profit (profits over the routine return on revenue) to the jurisdiction where MNE revenue is equal to or more than €1 million in the case of larger economies, or €250,000 in the case of smaller ones.⁷ The allocation is based on sales, not on assets or payroll, which is a key methodological difference that is intentional and clearly gives an advantage to those who make a market jurisdiction claim over those who make a residence jurisdiction claim.

The OECD published on 11 October 2023 the text of the Multilateral Convention (MLC) aiming to serve as the legally binding text to implement Amount A.⁸ It also had clauses relating to abolishment of Digital Services Taxes (DSTs) and related unilateral measures that directly impacted on India's Equalisation Levy. Perhaps most significantly, the MLC also suggested a

⁶ The White House, *The Organization for Economic Co-operation and Development (OECD) Global Tax Deal* (Presidential Memorandum, 20 January 2025) <https://www.whitehouse.gov/presidential-actions/2025/01/the-organization-for-economic-co-operation-and-development-oecd-global-tax-deal-global-tax-deal/> accessed 27 June 2026.

⁷ OECD/G20 Inclusive Framework on BEPS, *Multilateral Convention to Implement Amount A of Pillar One* (n 5), art 2 (Scope), art 3 (Covered Groups — revenue threshold of EUR 20 billion, profitability above 10%), art 6 (Amount A — reallocation of 25% of residual profit above a 10% routine return), art 7 (Revenue Threshold for Market Jurisdictions — EUR 1 million general threshold, EUR 250,000 for jurisdictions with GDP below EUR 40 billion). See also OECD, 'The Multilateral Convention to Implement Amount A of Pillar One — Overview' (OECD, 2023) <https://www.oecd.org/en/topics/sub-issues/reallocation-of-taxing-rights-to-market-jurisdictions/multilateral-convention-to-implement-amount-a-of-pillar-one.html> accessed 27 June 2026.

⁸ OECD/G20 Inclusive Framework on BEPS, *Multilateral Convention to Implement Amount A of Pillar One* (n 5); see also US Department of the Treasury, *Request for Public Input on the Draft OECD/G20 Inclusive Framework Multilateral Convention to Implement Amount A of Pillar One* (Press Release JY-1789, 11 October 2023) <https://home.treasury.gov/news/press-releases/jy1789> accessed 27 June 2026.

new mandatory binding dispute resolution process, arbitration, for settling Amount A disputes, a process which has been controversial for a number of developing and emerging market economies.

B. Amount B: Simplification or Further Subordination?

In addition to Amount A, the Pillar One framework also introduces Amount B, which represents a simplified and streamlined method for applying the arm's length principle (ALP) to the baseline marketing and distribution activities. The concession to lower income countries that do not have the administrative capacity for full transfer pricing analyses was made in the form of Amount B. But India has had a similar hesitation about Amount B, seeing the return formula as a cap on its capacity to tax distribution profits in accordance with its domestic law.

In December 2024, guidance was published by the OECD for the implementation of Amount B,⁹ which enables jurisdictions to implement it on an elective basis from January 2025. In the USA, the IRS gave Notice 2025-4, making it available for Subsidiary Distribution Companies to rely on Amount B as a safe harbour.¹⁰ The implementation of Amount B is significant for India as well, because of the transfer pricing regime under the Income Tax Act 1961, in which the tax authorities have the ability to review related party transactions with non-residents.

III. INDIA'S CONSTITUTIONAL FRAMEWORK: PART XIII, ARTICLE 253, AND THE LIMITS OF LEGISLATIVE SOVEREIGNTY

A. The Architecture of Part XIII

The Constitution of India provides for the constitutional regime of trade commerce and intercourse in the territory of India through Part XIII (Articles 301-307).¹¹ The basic guarantee is mentioned in Article 301 which states that "trade, commerce and intercourse shall be free throughout the territory of India. But this is not an absolute guarantee: Parliament has the power

⁹ OECD, *Pillar One — Amount B: Inclusive Framework on BEPS* (OECD Publishing, February 2024, updated guidance December 2024) <https://www.oecd.org/en/topics/sub-issues/reallocation-of-taxing-rights-to-market-jurisdictions/multilateral-convention-to-implement-amount-a-of-pillar-one.html> accessed 27 June 2026. The December 2024 guidance enables jurisdictions to adopt Amount B on an elective basis from January 2025.

¹⁰ Internal Revenue Service (US), *Notice 2025-4: Safe Harbor for Covered Distribution Arrangements Under the Arm's Length Standard* (January 2025), permitting US distribution, supplier, and marketing subsidiaries of foreign-parented multinationals to use the Amount B framework as a safe harbour starting in 2025. See BDO, 'The US Withdraws From Global Tax Agreement' (4 February 2025) <https://www.bdo.com/insights/tax/us-withdraws-from-global-tax-agreement> accessed 27 June 2026.

¹¹ Constitution of India 1950, arts 301–307 (Part XIII: Trade, Commerce and Intercourse within the Territory of India). Art 301 provides: 'Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.'

to impose restrictions under Article 302 for the public interest, and state legislatures can tax goods originating in other states (in a not-disparaging manner) and impose reasonable restrictions in the public interest with Presidential assent under Article 304.

Part XIII was developed to address domestic trade and commerce in light of the Australian inter-state trade jurisprudence and the commerce clause issues of the American constitutional tradition. But its scope presents constitutional ramifications to the design of cross-border tax regimes. If in the absence of an international instrument such as MLC, the formula for determining the taxable revenue of a non-resident e-commerce operator from the Indian consumers under the MLC is one of foreign policy, then the question is whether this taxing formula would fall in the ambit of foreign policy or the trade and commerce freedoms guaranteed under Part XIII.¹² Articles 301-304 are in their plain terms, measures of domestic economic union and the interest to which they apply is here indirect but real: that any measure which collects Amount A from or for a non-resident enterprise constitutes a condition upon that enterprise's business in India, for which purpose international treaty or convention is immaterial, and is thus a restriction of the sort Part XIII anticipates. What will determine whether it is correctly considered a tax measure not subject to Part XIII scrutiny, or a trade restriction subject to it, is the pith and the substance, not its international origin. The findings have meaningful consequences for the form of the implementing laws in India for a future Pillar One agreement.

B. Article 253: Treaty-Making Power and Domestic Implementation

Article 253 of the Indian constitution gives legislative power to the parliament for the entire country for implementing any Treaty, Agreement or Convention with any other country or countries or any decision reached at any international conference, association or body.¹³ This is the major constitutional door that would allow international tax agreements, such as any future obligations arising from Pillar One that are based on the MLC, to be introduced into domestic law.

¹² Constitution of India 1950, art 301 read with art 302 (Parliament's power to impose restrictions in the public interest) and art 304 (state legislature's power to tax and impose reasonable restrictions with Presidential assent). See GKToday, 'Article 246A' (November 2025) <https://www.gktoday.in/article-246a-2/> accessed 27 June 2026 (discussing the interplay of legislative competence provisions in the context of cross-border trade taxation).

¹³ Constitution of India 1950, art 253 ('Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body') read with Entry 14, List I (Treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries), Seventh Schedule.

Here are two separate constitutional issues that need to be separated. The first question is whether Parliament has the legislative competence, at the threshold, to enact Amount A implementing legislation at all, which, as it happens, is not seriously in doubt; the second question is whether Parliament has the competence to do so. The second question is whether Parliament has the competence to do so; the first question is answered, at the threshold, by Article 253 read with Entry 14 of List I and is not seriously in doubt. The second question is whether the law that Parliament actually passes is substantively valid, which relies on the consistency of the law in question with Article 265, Part XIII, and where individual rights are involved, with Part III. Competence does not excuse Parliament from the substantive constraints on its constitutional powers discussed in the rest of this Part, but rather only allows it to legislate in the area.

The Supreme Court in *Union of India v H S Dhillon*¹⁴ held that the power of Parliament under the Union List has to be interpreted in the widest possible context and the power under the residual clause of Entry 97 also strengthens the power of the Union to enact fiscal laws. In *State of West Bengal v Kesoram Industries Ltd*,¹⁵ this principle was reiterated saying that legislative entries are functional and purposive and not technical and restrictive. These precedents are relevant for understanding how India might exercise its obligations under the Pillar One proposals: Parliament would be passing legislation under Article 253, and Entry 14 of List I, and any legislation inconsistent with this would be repealed by Parliament under Article 254.

GST was given a constitutional basis by the Constitution (One Hundred and First Amendment) Act 2016, which provided concurrent powers to Parliament and state legislatures on the taxability of goods and services, and only Parliament on inter-state supplies.¹⁶ Even though Article 246A is in the sphere of domestic indirect taxes, it shows the Constitution's ability to

¹⁴ *Union of India v H S Dhillon* AIR 1972 SC 1061 (Supreme Court of India, Constitution Bench) (holding that when determining the validity of central legislation, the court must enquire only whether Parliament has the competence to legislate on the field, and that residual legislative power under Entry 97 of List I, Seventh Schedule confers the broadest fiscal authority on Parliament; the enquiry is not whether the legislation trenches on the State List). Available at <https://indiankanoon.org/> accessed 27 June 2026.

¹⁵ *State of West Bengal v Kesoram Industries Ltd* (2004) 10 SCC 201 (Supreme Court of India, Constitution Bench) (reaffirming that legislative entries in the Seventh Schedule must be given their widest amplitude, and that the pith and substance of a law determines its constitutional validity rather than any incidental effects on entries assigned to another legislature). Available at <https://indiankanoon.org/> accessed 27 June 2026.

¹⁶ Constitution of India 1950, art 246A (inserted by the Constitution (One Hundred and First Amendment) Act 2016, with effect from 16 September 2016), cl (1) (conferring concurrent power on Parliament and State Legislatures to make laws with respect to goods and services tax imposed by the Union or such State) and cl (2) (Parliament's exclusive power for inter-State supplies). See Constitution of India, art 246A text at <https://www.constitutionofindia.net/articles/article-246a-special-provision-with-respect-to-goods-and-services-tax/> accessed 27 June 2026.

accommodate new multi-level tax arrangements. Any future treaty implementation legislation would need to be carefully drawn to link the constitutional basis for enacting the legislation (probably Article 253 for the implementation power)¹⁷ with the substantive power to tax (probably Article 265 (no tax without authority of law) as the limitation on any delegated legislation).¹⁸

It is not appropriate to let these constitutional mechanisms merge three types of sovereignty into one. The external commitment India assumes on signing and ratifying the MLC in international law is the treaty obligation, while the residual freedom of India to tax the value created within its market, even after it has entered into the treaty obligations, is international tax sovereignty in the sense used in this paper, which is most visibly exercised in the SEP rule discussed next. The conclusion of a treaty at the international level does not of itself lead to a forfeiture of domestic tax sovereignty; rather, the degree of forfeiture depends on domestic law which must be constitutional and in accordance with Article 265.

C. The Significant Economic Presence Rule: A Constitutional Assertion

The PE rule failed to capture profits from digital economy; the India's Significant Economic Presence (SEP) rule was the conscious domestic law effort to address this.¹⁹ Under the SEP rule, a non-resident is said to have a business connection with India if its revenue on transactions with a person in India from the sale, lease or hire of goods, services or property is more than Rs 2 crore or if it has more than 300,000 users in India during the course of a year through interaction or soliciting of business. It's a law that is asserting taxing rights in the absence of a physical presence, just the space that Pillar One says it will fill on the multilateral level.

¹⁷ Constitution of India 1950, art 253 (n 13). *See also* Taxlogue, 'Taxlogue #2: Power to Tax' (April 2025) <https://www.taxlogue.com/post/taxlogue-2-power-to-tax> accessed 27 June 2026, discussing the primacy of art 253 over art 246 in the context of international treaty implementation and Entry 14, List I.

¹⁸ Constitution of India 1950, art 265 ('No tax shall be levied or collected except by authority of law'); *see also* Income Tax Act 1961 (India), s 90 (Agreement with foreign countries — where a DTAA provision is more beneficial to the assessee, DTAA prevails over domestic law), and s 195 (obligation to deduct tax at source on payments to non-residents).

¹⁹ Income Tax Act 1961 (India), s 9(1)(i), Explanation 2A (Significant Economic Presence), inserted by Finance Act 2018 (India) with effect from assessment year 2019–20, and thresholds operationalised by CBDT Notification S.O. 1741(E) dated 3 May 2021 with effect from 1 April 2022, prescribing: (a) aggregate payments from transactions exceeding INR 2 crore (INR 20 million) per year; and (b) systematic and continuous soliciting of business or engagement with 3 lakh (300,000) or more users in India.

The SEP rule has not yet been implemented in treaty cases as India has PE clause based Double Taxation Avoidance Agreements (DTAAs) which limit India's taxing powers.²⁰ The SEP rule is thus mostly for non-treaty situations. Before the more general constitutional and multilateral issues covered by this paper are resolved, the first line of defense against SEP, or its applicability in a treaty situation, will be the Income Tax Appellate Tribunal and High Courts with jurisdiction; it will be their job to determine, on a case-by-case basis, whether there is any remaining space for SEP in a treaty context under section 90(2), when a taxpayer does rely on SEP, or when a non-resident is found to be unable to rely on SEP at all. But it is an important constitutional and legislative cudgel: Should Pillar One not succeed to provide equitable market jurisdiction taxing rights, India will still have SEP as its domestic fall-back which has now been established as constitutional under Article 253 and Entry 82 of List I (taxes on income).

IV. THE PILLAR ONE CRISIS: US WITHDRAWAL AND THE FRAGMENTATION OF THE GLOBAL TAX ORDER

A. The January 2025 Memorandum

On 20 January 2025, President Trump signed a memorandum of his office making it clear that the OECD Global Tax Deal (which is understood to include Pillars One and Two) "has no force or effect in the United States."²¹ The memorandum directed the US Permanent Representative to OECD and the Treasury Secretary to inform the OECD that any prior promises made by the Biden administration were invalid without Congressional approval. It also ordered a review of tax regimes in jurisdictions outside of the UK that would have "extraterritorial or disproportionate effects" on American firms,²² a clear nod to DSTs and the Undertaxed Profits Rule (UTPR) in Pillar Two.

²⁰ Income Tax Act 1961 (India), s 90(2) (where an assessee is a resident of a country with which India has a DTAA, the provisions of the Act shall apply only insofar as they are more beneficial to the assessee than those of the DTAA). See Taxguru, 'Significant Economic Presence (SEP): Implications for Non-Residents in India' (2024) <https://taxguru.in/income-tax/significant-economic-presence-sep-implications-non-residents-india.html> accessed 27 June 2026 (confirming that SEP's impact on nations with existing DTAAs is nil, as treaties override domestic law).

²¹ The White House (n 6).

²² The White House (n 6), s 2 (directing the Secretary of the Treasury, in consultation with the US Trade Representative, to investigate whether any foreign countries have tax rules in place 'that are extraterritorial or disproportionately affect American companies' and to develop a list of protective measures). See also Gide, 'Trump Executive Orders Signal a New US Frontier for Cross-Border Tax' (24 June 2025) <https://www.gide.com/en/news-insights/trump-executive-orders-signal-a-new-u-s-frontier-for-cross-border-tax/> accessed 27 June 2026.

It was no wonder. Congressional Republicans have always resisted legislation to adopt OECD tax reforms, and the Joint Committee on Taxation had estimated that the global minimum tax could cost the US more than \$120 billion in tax revenues.²³ In May 2025, the House passed the “One Big Beautiful Bill” that contained a provision (Section 899) to impose punitive withholding taxes on income received by jurisdictions that impose the UTPR against United States firms.²⁴ In June 2025, this legislative proposal was eventually dropped as part of a G7 consensus that included a “side-by-side” solution,²⁵ with France and Germany agreeing to exclude US companies from the UTPR's scope, an important concession to the US.

B. Implications for Pillar One

The US withdrawal put an end to Pillar One as a near-term prospect. Amount A's viability depends on the participation of jurisdictions accounting for a significant share of the Ultimate Parent Entities of in-scope MNEs. The MLC is almost useless because the most lucrative technology MNEs are based in the United States, meaning that they are not participating.²⁶ In the OECD Inclusive Framework's statement by its co-chairs for January 2025, the impasse was recognized, and it was suggested that negotiations will continue, though no timeline or serious commitment from the big holdout was offered.

This results in a very disproportionate advantage for India. In August 2024, India had removed its 2% Equalisation Levy and in April 2025 removed its 6% levy²⁷ on the assumption that this

²³ US Congress, Joint Committee on Taxation, *Analysis of the OECD/G20 Base Erosion and Profit Shifting Project* (JCX-22-23, June 2023), estimating US revenue loss exceeding \$120 billion under the global minimum tax. See House Ways and Means Committee, 'President Trump Puts America First in Unwinding Democrats' Unilateral Global Tax Surrender' (5 January 2026) <https://waysandmeans.house.gov/2026/01/05/president-trump-puts-america-first-in-unwinding-democrats-unilateral-global-tax-surrender/> accessed 27 June 2026 (attributing the \$120 billion figure to the JCT analysis).

²⁴ House Ways and Means Committee (n 23). See also Roel Dom, Costanza Greppi Maturana and Pascal Saint-Amans, 'Has the Global Minimum Tax Survived Trump?' (*Bruegel*, January 2026) <https://www.bruegel.org/analysis/has-global-minimum-tax-survived-trump> accessed 27 June 2026, confirming that s 899 of the One Big Beautiful Bill as passed by the House in May 2025 would have imposed punitive withholding taxes on income flowing to jurisdictions imposing the UTPR against US companies.

²⁵ Dom, Greppi Maturana and Saint-Amans (n 24); see also OECD, *Tax Challenges Arising from the Digitalisation of the Economy — Global Anti-Base Erosion Model Rules (Pillar Two): Side-by-Side Package* (OECD Publishing, 2026) <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-minimum-tax/side-by-side-package.pdf> accessed 27 June 2026. Under the Side-by-Side arrangement, US companies are exempted from the UTPR provided they are subject to the US NCTI (Net CFC Tested Income) regime at 14%, enacted by the One Big Beautiful Bill Act (July 2025).

²⁶ OECD/G20 Inclusive Framework on BEPS, *Pillar One Update from the Co-Chairs* (n 5, January 2025 Co-chairs' Statement); see also BDO, 'The US Withdraws From Global Tax Agreement' (n 10) (noting that 'the overall failure of Pillar One to advance seems likely to result in the re-proposal of digital service taxes directed at US technology and media multinationals').

²⁷ Finance (No 2) Act 2024 (India) (withdrawing the 2% equalisation levy under Finance Act 2016, s 165A with effect from 1 August 2024, passed by Lok Sabha on 7 August 2024 and by Rajya Sabha on 8 August 2024); Finance Act 2025 (India) (abolishing the 6% equalisation levy under Finance Act 2016, s 165 with effect from 1

mechanism would generate similar or better revenue via the multilateral mechanism of Pillar One. India was able to garner around INR 3,500 crore per annum from such levies.²⁸ The abolition has been partly in response to pressure from the United States on the country's trade and partly as a good faith gesture towards the multilateral process, which leaves India with a fiscal deficit and without any multilateral remedy. Now the question that has to be addressed by Indian tax law and policy is pressing: once India has lost one of its constitutional and legislative instruments, what does it have to lose if Pillar One does not come to fruition any time soon?

V. CRITICAL THEORETICAL PERSPECTIVES: POSTCOLONIALISM, FEMINIST POLITICAL ECONOMY, AND POSTMODERNISM

A. Postcolonial Critique: Who Designs the Rules?

The previous Part has discussed the doctrinal and geopolitical dynamics of India's position; the following sections question the distribution of power in the underlying framework. Design of the international tax system, starting from the model conventions of the League of Nations in the 1920s till the present OECD scheme has been influenced by the interests of the capital exporters — the industrial countries. International law is no exception to the rule that the rules, conventions and institutions of global governance are not neutral coordinating devices but rather the effects of past power dynamics that work against post-colonial states.²⁹ An international tax system is an example of this criticism. The PE rule was created when the bulk of the productive capital of the world was located in North America and Western Europe, the arm's length standard was developed at that time, and the residence-based approach to primary taxing rights was formulated at that time. They didn't exist to explain a world where value is added in the using markets of the global South.

April 2025, passed by Parliament and confirmed by the National Foreign Trade Council statement dated 1 April 2025 <https://www.nftc.org/nftc-welcomes-indias-removal-of-discriminatory-digital-ads-tax/> accessed 27 June 2026).

²⁸ Beacon Filing, 'Equalization Levy — India's Digital Tax (Abolished 2025)' (17 March 2026) <https://beaconfiling.com/glossary/equalization-levy> accessed 27 June 2026, reporting approximately INR 3,500 crore collected in FY 2023–24 and INR 3,300 crore in FY 2024–25, with full abolition from April 2025 projected to cause revenue loss exceeding INR 3,000 crore in FY 2025–26. Figures are drawn from publicly available government and media estimates and should be treated as indicative.

²⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 196–248 (arguing that international law's foundational concepts — sovereignty, self-determination, the mandate system — were shaped by colonial power relations and systematically disadvantage post-colonial states even in their ostensibly universal form).

Pillar One's Amount A is a partial correction: It does recognise the claims to market jurisdiction. The threshold, however, is carefully designed to be €20 billion in revenue and 10% profit, meaning that only a small number of companies (mainly technology-led U.S. companies) fall under its jurisdiction.³⁰ The OECD estimates indicated that Amount A would merely be responsible for rerouting \$125-\$200 billion in profits around the world. The amounts reallocated would be far too small to cover the lost revenue under unilateral measures for a nation with the Indian size of its consumer base and the size of its digital market. This limited scope, that is, the scope of Amount A, does not have to happen: it is a result of the political process, the bargaining power of the scope of the companies and their jurisdictions.

Here, it is fitting that international legal argument plays a constant dance of "apology" (accepting the state power) and "utopia" (assertion of universal principle) that Martti Koskenniemi described.³¹ The two-pillar framing by OECD is a universalist and consensus-based approach which camouflages the distributive effects of the rules. This doesn't mean that there was equal representation across the jurisdictions that "endorsed" the framework.

B. Feminist Political Economy: Visibility, Burden-Sharing, and Care

The feminist political economy focuses on distributional impacts of taxation regimes and gender aspects of fiscal architecture. Tsilly Dagan has made this argument about the international tax system, noting that it regularly chooses efficiency over distributive justice as if it were an economic fact and not a value-based one, and that this prioritisation is more likely to favour the interests of developed countries and their more vulnerable citizens.³² The losses in the Indian context due to elimination of the Equalisation Levy (about INR 3,500 crore per year) is the amount of money which could have been used for public expenditures on health, education and social protection. The decision not to replace the levy with a multilateral, binding

³⁰ OECD/G20 Inclusive Framework on BEPS, *Multilateral Convention to Implement Amount A of Pillar One* (n 5), art 3 (Covered Groups). See also Tax Foundation, 'Global Tax Agreement: Details and Analysis' (updated 2026) <https://taxfoundation.org/blog/global-tax-agreement/> accessed 27 June 2026 (noting that Amount A would impact 'roughly \$200 billion in profits' of only the largest and most profitable MNEs, predominantly US-headquartered technology companies).

³¹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005, reissue with new epilogue) 17–70 (Chapters 1–2, setting out the apology/utopia structure of international legal argument) and 590–596 (epilogue, discussing structural bias in global governance institutions).

³² Tsilly Dagan, *International Tax and Global Justice* (Cambridge University Press 2018) 1–50, 134–160 (arguing that international tax law systematically prioritises efficiency over distributive justice, reflecting value choices of capital-exporting states, and that this hierarchy systematically disadvantages developing countries and their vulnerable populations).

replacement without one in hand is thus not just a tax policy decision, but a distributive one as well that directly affects people who rely on public services.

Another feminist institutional analysis also shows lack of voices of the developing country in the design of Amount A. While developing countries are formally represented under the OECD Inclusive Framework, the agenda, working party structures and Secretariat of the OECD is dominated by OECD member countries. In his remarks on India's role, the Revenue Secretary, Sanjay Malhotra, explicitly pointed out that India was not prepared to sign Pillar One at any cost and would demand a "reasonable solution which is acceptable to the dynamics of Indian economy. This is not obstructionism; it's a legally sound claim to fiscal sovereignty.

C. Postmodern Critique: The Indeterminacy of Global Tax Norms

The distinction between primary and secondary rules by H L A Hart is useful in the field of international tax governance.³³ International tax law, in its current form, does not have effective incentives to make its rules of recognition, adjudication, and change determinate and enforceable. The MLC text is a high-level, convention-type document but needs to be domesticated by the legislatures. It depends on the involvement of the USA, which is no longer present. The ambiguity of Pillar One, who is in scope, how much is allocated, when it takes effect, is not just a negotiating problem; it is a systemic issue that is in fact embedded in the very nature of the system as it must simultaneously serve the interests of the hegemonic powers, emerging markets, and technical feasibility.

The "global consensus" narrative of the two-pillar solution should be deconstructed from a postmodern lens. The 2025 US withdrawal in January was not an exception, but an eye-opener: It showed the fragility of a governance model that presupposed a geopolitical configuration that was supposed to be stable enough to allow treaty ratification and implementation. India, where the constitutional system is very strong and the national law-making system places a high value on parliamentary sovereignty in tax issues (Articles 110, 113, 117 and 265 of the Constitution), the message is unambiguous: any international tax commitment has to be domestically constitutional, and withstand domestic political turbulence among the signatories.

³³ H L A Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 79–99 (Chapter 5, setting out the distinction between primary rules of obligation and secondary rules of recognition, change, and adjudication) and 213–237 (Chapter 10, on international law and its character as a regime of primary rules without effective secondary rules — questioning whether it constitutes a legal system in Hart's sense).

VI. DOCTRINAL ANALYSIS: IMPLEMENTATION CHALLENGES AND CONSTITUTIONAL CONSTRAINTS

A. The Charging Provision Problem

One of the fundamental principles of the Indian constitutional tax structure enshrined in Article 265 of the Indian Constitution is that no tax can be levied or collected without an Act of Parliament. This would entail that any Amount A liability would have to be prescribed in domestic law for any Indian-resident MNE (as a potential Amount A payor to another market jurisdiction) and any Amount A receipts in India would have to be prescribed in domestic law as an amount A receiver from a non-resident (as a market jurisdiction to which Indian-residents would be reallocating profits). This constitutional distinctiveness of the Equalisation Levy, that it was introduced under chapter VIII of the Finance Act 2016, so outside the Income Tax Act 1961, and therefore not covered by the treaty protection under section 90 of the ITA, is just what it was designed not to be. Such a mechanism to collect Amount A in India would have to be similarly designed to not be considered a "tax on income" of non-resident and be precluded by current DTAAAs.

B. The Treaty Override Risk

India has signed more than 90 Double Taxation Avoidance Agreements with various countries. According to Section 90 of the Income Tax Act 1961, if the benefit of DTAA provision is better to a taxpayer than the provision of domestic law, then DTAA is prevailing.³⁴ If the Indian government were to do so under the India-USA DTA, there is a real risk that an in-scope MNE could point out that the reallocation of profits is a taxable event, which is not specifically contemplated under the PE and profit attribution articles of the DTAA. The Equalisation Levy was an attempt to avoid this legal exposure and to do that it was done outside the income tax system.

The MLC itself is formulated to be an amendment to the existing bilateral treaties, but this will be dependent upon the existence of the MLC and the bilateral treaty partners also having signed

³⁴ Constitution of India 1950, art 253 read with Entry 14, List I (Seventh Schedule) — treaties and agreements with foreign countries. Entry 14 of List I provides Parliament with legislative competence over 'entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.'

the MLC. The present status quo is that India's current treaty network is a limitation on asserting the market jurisdiction taxing rights which the SEP rule does not address in treaty situations.³⁵

C. Retrospective Taxation and the Rule of Law

The Vodafone case and the changes in Income Tax Act, 1961, made in 2021 in retrospect to tax indirect transfers of Indian assets³⁶ (which were subsequently repealed in 2021) provide a cautionary tale for the design of the implementation of Pillar One in India. In principle, retrospective taxation is constitutional, but it involves high costs of the rule of law and reduces investor confidence. Any domestic legislation that implements Amount A obligations, including provisions that create collecting obligations for domestic companies making payments to non-residents or that claim India's share of Amount A payments from non-residents, must be prospective, be specific, and be clearly mandated by a legislative provision that meets the requirement of the Article 265 (authority of law).

VII. JURISPRUDENTIAL DIMENSIONS: WHAT TAX PHILOSOPHERS TELL US

However, it is important to note that the philosophical basis of taxation is very rarely brought into the discussion on technical international tax issues, but it is essential to understand the normative content of concepts in the framework of instruments such as Pillar One. There are three strands in jurisprudence that are relevant.

The ability to pay principle, as expounded by Adam Smith in the Canons of Taxation and further developed in the principles of Kaldor-Hicks welfare economics, is a principle that tax systems should be sensitive to the economic capacity of the taxpayer. This principle helps facilitate minimum tax regimes for MNEs, which are the moral basis of Pillar Two. But it also bolsters claims by the market state of taxation: If a company is benefiting from a market, then

³⁵ See generally the doctrinal discussion in Taxlogue, 'Taxlogue #2: Power to Tax' (April 2025) <https://www.taxlogue.com/post/taxlogue-2-power-to-tax> accessed 27 June 2026, discussing the interplay of arts 246, 246A, 248, 253 and the Seventh Schedule in the context of international tax commitments, and noting that art 253 gives Parliament overriding power to legislate on matters in the State List for the purposes of international agreements.

³⁶ *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613 (Supreme Court of India, Civil Appeal No 733 of 2012, judgment dated 20 January 2012, Chief Justice SH Kapadia) (holding unanimously that India lacked jurisdiction to tax the offshore acquisition by Vodafone International Holdings BV of shares in CGP Investments (Holdings) Ltd, a Cayman Islands company, and that s 9(1)(i) of the Income Tax Act 1961 as it then stood did not cover indirect transfers of Indian assets; the situs of shares is where the company is incorporated); Taxation Laws (Amendment) Act 2021 (India) (enacted 13 August 2021, removing retrospective tax demands on indirect asset transfers arising from the Finance Act 2012 amendment to s 9(1)(i)). Available at <https://indiankanoon.org/doc/115852355/> accessed 27 June 2026.

the ability-to-pay principle justifies the market state's taxing of the profits, whether those come from its head office or its servers.

Second, there is the Buchanan-Public Choice principle that the benefit received from public goods should be the basis for taxation. India offers market infrastructure (consumers, digital payments networks, regulatory frameworks, legal systems) for profitability of MNE. The benefit principle provides a sound philosophical basis for India's stance that it has taxing rights according to the SEP principle and any future Pillar One tax regime.

Third, and most importantly, world theories of distributive justice (such as Rawls's "law of peoples" and Thomas Pogge's more cosmopolitan views) raise doubts about the legitimacy of international tax regimes that systematically remove value from the developing world, and add it to the developed world. The Pillar Two global minimum tax is in a very active process of implementation by more than 65 jurisdictions, and perhaps it will make the situation worse for some countries such as India: If the top-up tax rate under Pillar Two is paid by an Indian MNE to a jurisdiction in Europe because of the lower effective tax rate it has in India, the Indian tax revenues (and not the profits of the Indian companies) will suffer the consequences of the global tax floor. This is a reallocative process, not allocative, which works in opposition to the market country interest.

VIII. INDIA'S STRATEGIC POSITION: LESSONS AND RECOMMENDATIONS

A. The Fiscal Cost of Good Faith

The removal of both levels of the Equalisation Levy (2% levy from August 2024 and 6% levy from April 2025)³⁷ was a big step of good faith towards the multilateral process. The loss in revenue is estimated to be more than INR 3,000 crore every year.³⁸ The US decision to pull out of the Global Tax Deal leaves India, as of this writing, with a one-way concession without a multilateral quid pro quo. That is how the postcolonial scholars perceive the asymmetry that developing countries face in their engagement in international economic governance: costs are immediate and certain, benefits are deferred and contingent.

³⁷ Finance (No 2) Act 2024 (India) (n 27); Finance Act 2025 (India) (n 27).

³⁸ Beacon Filing (n 28).

B. Maintaining the SEP Rule

SEP rule under section 9(1)(i) of the Income Tax Act 1961³⁹ is a constitutional principle based domestic legislation. It would have to be modified in the event of a treaty situation — that's the point of the MLC. However, if the MLC does not take effect, then India must not make any informal declaration to abandon the SEP rule. The rule is a legal boundary and a bargaining chip: India's readiness to implement the SEP rule fully in the scenarios of treaties is a tangible leverage that can be used in multilateral negotiations in future.

C. Dispute Resolution Reform as a Red Line

One of the concerns stated by India has been the binding arbitration provision for Amount A disputes required by the MLC.⁴⁰ As of now India has not introduced the binding arbitration clause in its tax treaties — which is reflected in India's stance on the BEPS Multilateral Instrument (MLI). The experience of investor-state arbitration suggests that India is right to be wary; when large corporations have prevailed over legitimate governmental action by developing countries. Any future Pillar One negotiation should also demand as a minimum condition, that the dispute resolution mechanism encompass strong carve-outs for domestic regulatory measures, and that the composition of the arbitral panels incorporate the representation of developing countries.

D. A Role for Part XIII Jurisprudence

Last but not least, Indian courts will need to pay close attention to the Pillar One dimension of any legislation that implements Pillar One. Article 301 guarantees freedom of trade and the art 302-304 framework makes it clear that restrictions on cross-border commercial activity is subject to constitutional examination. Should the Pillar One collecting mechanism turn out to be a restriction on the freedom of foreign MNE to trade within India, the courts will have to determine if it is in the public interest, if it is non-discriminatory, and whether it is authorised by Parliament.⁴¹ The pith and substance doctrine, as applied in the case of *State of Bombay v*

³⁹ *Income Tax Act 1961 (India)*, s 9(1)(i), Explanation 2A (n 19).

⁴⁰ OECD/G20 Inclusive Framework on BEPS, *Multilateral Convention to Implement Amount A of Pillar One* (n 5), Part V (Administration and Certainty), Arts 27–31 (mandatory and binding dispute prevention and resolution mechanisms, including a review panel process). See International Tax Review, 'India and the Two-Pillar Solution: The Road Ahead' (19 August 2024)

<https://www.internationaltaxreview.com/article/2dmy2lhwi8la8dmbp6gw0> accessed 27 June 2026 (reporting Revenue Secretary Sanjay Malhotra's statement that India's concerns about dispute resolution and withholding tax treatment must be addressed as a condition of accepting Pillar One).

⁴¹ Constitution of India 1950, arts 301–304 (n 11); see also Taxlogue (n 17) (discussing the application of arts 301–304 to legislation authorised under art 253).

F N Balsara,⁴² is the analytical tool that can be used to determine whether such legislation in its very substance is a tax measure or a trade restriction, with the latter being protected by Part XIII of the Indian Constitution.

IX. KEY DATA: TABLES AND SUPPORTING FIGURES

The figures, rates and implementation statuses in Tables 1 to 4 have been re-checked against the primary and secondary sources identified below, each table, as at the date of this revision, and are retained, subject to the caveat, where noted, that figures for revenue estimates for the Equalisation Levy are based on reporting by government and the media rather than audited accounts of the Department.

Table 1: Comparative Overview of Digital Services Taxes and Pillar One Reallocation: Selected Jurisdictions (as at June 2026)

Jurisdiction	Unilateral DST / Measure	DST Rate	DST Status (June 2026)	Pillar One MLC Signatory?
India	Equalisation Levy (2016 & 2020)	6% / 2%	Fully abolished (April 2025)	Participates in IF; not yet signed
France	Digital Services Tax	3% (proposed 5%)	Active; increase under review	Inclusive Framework member
United Kingdom	Digital Services Tax	2%	Active; scrapping under discussion	Inclusive Framework member
Italy	Digital Services Tax	3%	Active	Inclusive Framework member
Canada	Digital Services Tax	3%	Enacted; withdrawal June 2025	Inclusive Framework member
United States	None (GILTI/NCTI regime)	14% (NCTI)	Withdrew from Global Tax Deal (Jan 2025)	Non-signatory post-2025

⁴² *State of Bombay v F N Balsara* AIR 1951 SC 318 (Supreme Court of India) (establishing and applying the pith and substance doctrine to determine the true nature and character of legislation for the purposes of determining legislative competence; a statute will be characterised according to its dominant purpose and will be valid if it falls within the competent legislative field, even if it incidentally affects matters assigned to another legislature). Available at <https://indiankanoon.org/> accessed 27 June 2026.

Source: OECD Inclusive Framework Reports; Baker McKenzie Digital Tax Landscape (March 2025); Tax Foundation Global Tax Agreement Tracker (2026).

Table 2: Revenue Impact of India's Equalisation Levy — Key Figures

Financial Year	Approximate EL Revenue (INR crore)	Key Event
FY 2021-22	~2,500	2% levy extended to e-commerce operators
FY 2022-23	~3,200	USTR investigation; bilateral transitional agreement
FY 2023-24	~3,500	Transitional agreement extended to June 2024
FY 2024-25	~3,300	2% levy abolished from August 2024; 6% levy still applied
FY 2025-26 (projected)	Nil (EL abolished)	6% levy abolished from April 2025; full fiscal gap

Source: Income Tax Department, Government of India; Beacon Filing (2026); International Tax Review (2024). Figures are publicly available government/media estimates and should be treated as indicative.

Table 3: Constitutional Provisions Relevant to Pillar One Implementation in India

Constitutional Provision	Relevance to Pillar One
Article 246 + Entry 82, List I	Parliament's power to tax income (including non-resident MNE income)
Article 246A	Concurrent GST power; model for novel multilevel tax architectures
Article 248 + Entry 97, List I	Residual legislative power to cover novel tax bases not listed elsewhere
Article 253 + Entry 14, List I	Power to implement international agreements, including the MLC
Article 265	No tax without authority of law — requires specific statutory charging provision
Articles 301-307 (Part XIII)	Freedom of trade; any collecting mechanism must be non-discriminatory and in public interest

Article 304	State-level restrictions on inter-state trade — not directly applicable but analogically informative
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Source: Constitution of India 1950 (as amended).

Table 4: Pillar Two Global Implementation Status (as at June 2026)

Category	Number of Jurisdictions	Key Examples
Enacted Pillar Two legislation	65+	EU member states, UK, Japan, Korea, Australia
Draft legislation introduced	~20	Several emerging market and developing economies
Side-by-side arrangement (2026)	147 (Inclusive Framework)	US companies carved out of UTPR; NCTI at 14%
Pillar One (Amount A) — MLC in force?	0	MLC not signed; negotiations effectively stalled
India	Observer/participant	No domestic Pillar Two legislation enacted as at June 2026

Source: OECD, Central Record of Legislation with Transitional Qualified Status (May 2026); PwC Pillar Two Country Tracker (June 2026); Bruegel, "Has the Global Minimum Tax Survived Trump?" (January 2026).

X. CONCLUSION: SOVEREIGNTY IS NOT A CONCESSION

The Pillar One story, in essence, is a story about the capacity of multilateralism, when one powerful state is unwilling to embrace it on terms that others are willing to accept. The OECD's two pillars solution was a real bold shot: a rules based one designed to be accepted by both capital exporting and market economies, and which would replace the myriad of standalone digital services taxes which appear to be poised to drive a wedge into the global trading system. The headline from the image posted: "Trump: 100% tax on European imports if tax on digital services is imposed" is a perfect illustration of the coercive dynamics that Pillar One was supposed to prevent, but has instead become trapped in.

The Indian story is special. As a rule-maker, it has introduced the Equalisation Levy as an innovative constitutional and legal response to the lack of equality in the PE framework, but later dismantled it in the hope of multilateral reciprocity as a rule-taker. The removal of the Equalisation Levy was constitutionally acceptable, the decision was taken legislatively in the Finance Acts of 2024 and 2025 and for diplomatic reasons, the government wanted to converge with the Inclusive Framework. A multilateral alternative to that agreement has not come about, though.

This paper has made three arguments from the perspective of Part XIII jurisprudence, Article 253, and the overall constitutional framework of fiscal sovereignty. The initial step towards the implementation of the commitments of Pillar One in the Indian context is to have the constitutional framework that is sufficiently capable of doing so: Article 253 of the Constitution, which names the power to implement treaties, and Entry 82 of List I, which gives competence to the Union government for income tax, are adequate. The commitments need to be enacted through domestic legislation that is specific, prospective and constitutionally sound. Second, India must oppose relinquishing the SEP as a domestic legal tool until there is a multilateral legally binding replacement in place that is operational. Third, the nature of any future Pillar One dispute resolution process should allow for India's principle-based refusal to be bound by a dispute resolution mechanism, which is in line with India's treaty practice and the constitutional right to access domestic judicial remedies.

The three critical theories examined in this paper, postcolonial legal scholarship, feminist political economy, and institutional critique share a common thread — they focus on the recognition that an institutional form of universality does not ensure an institutional substance of equity. An international tax rule that is endorsed by 140 countries can still be distributively unfair if the countries with the most structural influence on the design of the rules are the countries that benefit the most from the rules. India's response to Pillar One is not obstruction. India's response to Pillar One is engaged, conditional and clear eyed. It is an exercise of the sovereign right based on the Constitution that requires ensuring fair allocation of taxing powers in a globalized, digital economy through multilateral arrangements.

The way forward is not simply to withdraw unilaterally (as the United States does) but to surrender unconditionally (as India threatened to do by repealing the Equalisation Levy too soon). It is about the well-crafted presentation of a constitutionally, legally, and normatively sound case, from an OECD Inclusive Framework to the UN Tax Committee and bilateral

diplomacy, to support a Pillar One concept that is narrow enough to be technically viable, but broad enough to be distributively compelling. India has the constitutional tools, the fiscal history, and the intellectual heritage to make that argument. The issue is, will it use them?

INDRAPRASTHA LAW REVIEW

INTERNATIONAL & NATIONAL LEGISLATIVE BLIND SPOT ON ENVIRONMENTAL IMPACT ASSESSMENT FOR SEABED MINING

- Ananthasankar A Kartha*

- Dr. Binu Mole K.**

ABSTRACT

The extraction of seabed minerals has long been a global concern. While the immense economic potential of these resources has encouraged states to pursue mining, the potential environmental consequences pose a formidable deterrence. To strike a balance, Environmental Impact Assessment (EIA) has emerged as one of the most effective tools for ensuring safe and sustainable seabed mineral extraction. In the pursuit of a means for safe extraction of seabed minerals, the environmental impact assessment has been considered as one of the best parameters. The International Seabed Authority has accorded due recognition to the requirement of EIA and the Seabed Dispute Chamber has further elevated it to a direct responsibility of every sponsoring state. Consequently, many states have integrated this principle into their national legislative framework, some depending completely on international law, while others have developed independent approach.

India has consistently expressed a positive stance towards seabed mining. However, its legal framework remains inadequately equipped both to regulate seabed mining and to incorporate an effective EIA mechanism. As a dualist state, India requires a comprehensive national legislation that establish clear EIA procedures, supported by effective administrative mechanism. This paper critically analyses the shortfall of existing international and national legal provisions concerning EIA for seabed mining and propose measures to bridge these gaps, especially with active global co-operation, thereby paving the way for responsible and viable seabed mineral extraction.

Key words: Seabed mining, Environmental Impact Assessment, Common Heritage of Mankind, Marine ecosystem, liability and International Seabed Authority

I. INTRODUCTION

The foundational discussions on seabed mining initiated by Arvid Pardo, Maltese Ambassador, continue to resonate in the governance of the world's oceans.¹ Despite the significant global efforts to advance mineral extraction from seabed, the environmental concerns remain a persistent and formidable challenge. The unique ecology of deep sea characterised by high pressure, low visibility and vulnerable flora and fauna has, for the first time, compelled humanity to seriously consider the consequences of exploitation before proceeding.² The

* Research Scholar, School of Legal Studies, CUSAT

** Director and Associate Professor, School of Legal Studies, CUSAT

¹ Hakon Andersen, 'A short Human History of the Ocean Floor', in Catherine Banet (ed) *The Law of the Seabed: Access, Uses and Protection of Seabed Resources* (Brill 2020).

² Eva Ramirez-Llodra, 'Deep-Sea Ecosystems: Biodiversity and Anthropogenic Impacts', in Catherine Banet (ed) *The Law of the Seabed: Access, Uses and Protection of Seabed Resources* (Brill 2020); Luc Cuyvers and others, 'Deep Seabed Mining: A Rising Environmental Challenge' (IUCN and Gallifrey Foundation 2018); Andrew R Thurber and others, 'Ecosystem Function and Services Provided by the Deep Sea', (2014) 11 *Biogeosciences* <<https://doi.org/10.5194/bg-11-3941-2014>> accessed 4 June 2026); Eva Ramirez-Llodra Angelika Brandt and others, 'Deep, Diverse and Definitely Different: Unique Attributes of the World's Largest Ecosystem' (2010) 7 *Biogeosciences* <<https://doi.org/10.5194/bg-7-2851-2010>> accessed 4 June 2026; James J

establishment of International Seabed Authority (ISA), despite the opposition from many industrialised states³, has helped to restrain unregulated exploitation of resources. Although the ISA has responded with the enhancing demand for extraction of minerals by enacting exploration codes and by drafting a model exploitation code, the same has not yet been implemented. The uncertainties regarding the impact of commercial scale mining are one of the barriers in finalising the norms for regulating the exploitation activities. Even with the limited information, the impact of mining activities is calculated to be devastating and long lasting.⁴ Nevertheless, the considerable economic potential of these resources continues to

Childrees, Horst Felbeck and George N Somero, 'Symbiosis in the Deep Sea', (1987) 256 (5), *Scientific American*, < https://www.researchgate.net/publication/247688543_Symbiosis_in_the_Deep_Sea> accessed 4 June, 2026; Steven HD Haddock, Mark A Moline and James F Case, 'Bioluminescence in the Sea', (2010) 2(1), *Annual Review of Marine Science*, <

https://www.researchgate.net/publication/49667852_Bioluminescence_in_the_Sea> accessed 4 June, 2026; Cinzia Corinaldesi, 'New Perspectives in Benthic Deep-Sea Microbial Ecology', (2015) 2, *Frontiers in Marine Science*, <<https://doi.org/10.3389/fmars.2015.00017>> accessed 4 June 2026; Claire W Armstrong, Naomi S Foley, Rob Tinch and Sybille van den Hove, 'Services from the Deep: Steps Towards Valuation of Deep Sea Goods and Services', (2012) 2 *Ecosystem Services* < 10.1016/j.ecoser.2012.07.001> accessed 4 June, 2026; Kakani Katija, Rob E Sherlock, Alana D Sherman and Bruce H Robinson, 'Marine Snow Formation by Giant Larvaceans Enhances Carbon Export to the Deep Sea', (2017) 3(9), *Science Advances*, <<https://doi.org/10.1126/sciadv.1700715>> accessed 4 June 2026; Antje Boetius and others, 'A Marine Microbial Consortium Apparently Mediating Anaerobic Oxidation of Methane', (2000) 407, *Nature*, <<https://doi.org/10.1038/35036572>> accessed 4 June 2026; L Caesar, G D McCarthy, D J R Thornalley, N Cahill and S Rahmstorf, 'Current Atlantic Meridional Overturning Circulation Weakest in 1,600 Years', (2021) 14, *Nature Geoscience*, <<https://doi.org/10.1038/s41561-021-00699-z>> accessed 4 June 2026.

³ Michael W Lodge, 'The Deep Seabed', in Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens (eds) *The Oxford Handbook of the Law of the Sea* 226–253 (Oxford University Press 2015).

⁴ Philip Gales, 'Deep Sea Mining Equipment', (2023) *Deep Sea Mining Inc*, <https://deepseamining.ac/deep_sea_mining_equipment#gsc.tab=0> accessed 4 June 2026; Rahul Sharma, 'Environmental Issues of Deep Sea Mining', in Dr. Harsha Vardhan, Dr. M Govinda Raj and Dr. M Aruna (eds) *Global Challenges, Policy Framework & Sustainable Development for Mining of Mineral and Fossil Energy Resources* (2015); Joanna Dingwall, 'Commercial Mining in the Deep Seabed beyond National Jurisdiction: The International Legal Framework' in Catherine Banet (ed) *The Law of the Seabed: Access, Uses and Protection of Seabed Resources* (Brill 2020); Trueblood DD, 'US Cruise Report for BIE—II Cruise' (NOAA Technical Memo OCRS 4, National Oceanic and Atmospheric Administration, Colorado, USA 1993); Ingole BS, Ansari ZA, Rathod V and Rodrigues N, 'Response of Deep-Sea Macrobenthos to a Small-Scale Environmental Disturbance', (2001) 48(16), *Deep Sea Research II: Topical Studies in Oceanography*, <[https://doi.org/10.1016/S0967-0645\(01\)00048-0](https://doi.org/10.1016/S0967-0645(01)00048-0)> accessed 8 June 2026; World Economic Forum, 'Deep Sea Minerals: What Manufacturers and Markets Need to Know', Briefing Paper (November 2020); Rahul Sharma, 'Development of Environmental Management Plan for Deep Sea Mining', in *Deep Sea Mining*, (Springer International Publishing 2020); Kathryn A Miller, Kirsten F Thompson, Paul Johnston, and David Santillo, 'An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts and Knowledge Gaps', (2020) 35, *Marine Policy*, < <https://doi.org/10.3389/fmars.2017.00418>> accessed 8 June, 2026; Dwight D Trueblood, Erdogan Ozturgut, Mikhail Pilipchuk and Ivan F Gloumov, 'The Ecological Impacts of the Joint U.S.-Russian Benthic Impact Experiment', in *Proceedings of the International Symposium on Environmental Studies for Deep-Sea Mining*, Metal Mining Agency of Japan, (1997); Aline Jaeckel, 'Benefitting from the Common Heritage of Humankind: From Expectation to Reality', (2020) 35, <https://www.researchgate.net/publication/345366135_Benefitting_from_the_Common_Heritage_of_Humankind_From_Expectation_to_Reality#fullTextFileContent> accessed 8 June, 2026; Sandra Cassotta and Michael Goodsite, 'Deep-Seabed Mining: An Environmental Concern and a Holistic Social Environmental Justice Issue', (2024) 2, *Frontiers in Ocean Sustainability*, < <https://doi.org/10.3389/focsu.2024.1355965>> accessed 10 June 2026.

incentivise states to pursue them.⁵ With a view to balance these competing interests, the Environmental Impact Assessment (EIA) is often projected. The principle of EIA has been moulded as a study to anticipate the potential consequences of any proposed project upon the environment.⁶ The EIA obtained legal recognition through the Environmental Policy Act 1969 of the United States of America⁷ and later, it was adopted into almost every legal system. The EIA mandates the application of scientific knowledge to systematically evaluate the ecological, social and economic impacts of planned projects or programmes before any decision to proceed is made.⁸ There are mainly three important considerations for the EIA, which are the adverse impact, primary and secondary environmental effects and the cumulative impacts of a proposed project.⁹ The ripples of EIA originated in USA made impact on Indian legal system too. The Indian judiciary resorted to EIA in umpteen number of cases to ensure development without compromising the conservation of environment.¹⁰

It is the realisation that any anthropogenic interference into the seabed could disturb the marine ecosystem demanded the introduction of EIA into the realm of seabed mining. Hence, the ISA mandates the impact assessment as a pre requisite for both exploration and exploitation activities in seabed.¹¹ India, being a pioneering state, has also incorporated the requirement of EIA into its domestic legal framework governing seabed mining. However,

⁵ Ilya Epikhin, and others, 'Seabed Mining: A \$20 Trillion Opportunity' (Arthur D Little, Aug, 2024) <<https://www.adlittle.com/en/insights/viewpoints/seabed-mining-20-trillion-opportunity>> accessed 10 June, 2026; Office of the Principal Scientific Adviser to the Government of India, 'Deep Ocean Exploration', (2025) <<https://www.psa.gov.in/mission/deep-ocean-exploration/39>> accessed 10 June 2026; See Rachel Reeves, 'My Family's Pacific Island Home Is Grappling with Deep-Sea Mining', (2021) Hakai Magazine, <<https://hakaimagazine.com/features/my-familys-pacific-island-home-is-grappling-with-deep-sea-mining/#:~:text=In%201965%2C%20the%20year%20New,case%20for%20mining%20the%20seafloor.>>> accessed 10 June, 2026.

⁶ Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials*, (2nd ed., Oxford University Press (2019); Joseph Castrilli and Elizabeth Block, 'Environmental Impact Assessment', (1975) 4 (3) *Alternatives: Perspectives on Society, Technology and Environment* <<https://www.jstor.org/stable/45030034>> accessed 10 June, 2026.

⁷ Michael R Greemberg and Stuart Shapio, 'NEPA in the United States: death by extremism or redesign of a more useful tool?', in Alberto (ed) *Handbook of Environmental Impact Assessment*, (Edward Elgar Publishing, 2022).

⁸ Attaullah Shah and others, 'Environmental Impact Assessment of Infrastructure Development Projects in Developing Countries', (2010) 1, *OIDA International Journal of Sustainable Development*, <<https://oidaijsd.com/wp-content/uploads/2019/03/01-04-04.pdf>> accessed 10 June 2026.

⁹ P Leela Krishnan, 'Environmental Impact Assessment: Legal Dimensions', (1992) 24 (4) *Journal of the Indian Law Institute*, <<https://www.jstor.org/stable/43953194>> accessed 10 June 2026

¹⁰ *Narmada Bachao Andolan v UoI* (AIR 2000 SC 3751); *M/s Electrothermy (India) Ltd v Patel Vipul Kumar Ramjibhai & Ors* (AIR 2016 SC 3563); *State of Uttar Pradesh v Gaurav Kumar* (Civil Appeal No. 14170/ 2024)

¹¹ International Seabed Authority, 'Enforcement and liability Challenges for Environmental Regulation of Deep Seabed Mining', (2016) Discussion Paper No. 4, <<https://isa.org.jm/wp-content/uploads/2022/12/DP4.pdf>> accessed 10 June 2026.

while promoting the EIA as an essential procedural measure, its application to the unique context of seabed mining remains in a nascent and nebulous stage.

II. EIA: INTERNATIONAL PERSPECTIVE

The concept of EIA has been incorporated into the United Nations Convention on Law of the Seas (UNCLOS) 1982. Article 206 of UNCLOS proposes the requirement of EIA, but the same has been limited to the waters within the national jurisdiction of the states. With respect to the seabed beyond the national jurisdiction, Part XI of UNCLOS directs that the seabed activities shall not hamper the marine environment.¹² Although the UNCLOS 1982 is silent with respect to the need for EIA for the activities in the Area, both the Exploration Regulations and the draft of Exploitation Regulation prepared by the ISA fills that gap.¹³ The need for EIA has also been pointed out by the Seabed Dispute Chamber while narrating its Advisory Opinion on Responsibilities and Obligation of the States Sponsoring Persons and Entities with Respect to Activities in the Area.¹⁴ In the opinion of the Chamber, EIA is a part of both due diligence obligation and direct obligation of the sponsoring states, the failure of which attracts liability.¹⁵

The scope of EIA in maritime zone has been further enhanced by the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction, 2023 (BBNJ). Part IV of the Agreement specifically deals with the Environmental Impact Assessment. Article 28 imposes the obligation to conduct EIA as is provided in the Agreement for the proposed activities in the Area prior to obtaining authorisation. Under the BBNJ Agreement 2023, the states can

¹² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force in 16 November 1994) 1833 UNTS 3, Art.145, 165 (2) (d).

¹³ International Seabed Authority, 'Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters', ISBA/19/C/17, (July 22 2013) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-19c-17_0-2.pdf>, accessed 10 June, 2026, Regulations 5; International Seabed Authority, 'Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulfides in the Area', ISBA/16/A/12/Rev.1), (May 7 2010) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-16a-12rev1_0.pdf>, accessed 10 June, 2026, Regulation 5; International Seabed Authority, 'Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area', ISBA/18/A/11), (July 23 2012) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-18a-11_0.pdf>, accessed 10 June, 2026, Regulation 5; International Seabed Authority, Draft Regulations on Exploitation of Mineral Resources in the Area, ISABA/29/C/CRP.1), (February 16 2024) <https://www.isa.org.jm/wp-content/uploads/2024/02/Consolidated_text.pdf> accessed 10 June, 2026.

¹⁴ *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, (Advisory Opinion, Seabed Dispute Chamber, International Tribunal for the Law of the Sea, Case No.17, 1 February 2011) [2011] ITLOS Rep 10, para 141-150.

¹⁵ Advisory Opinion (n 13) [145].

determine whether to proceed with the proposed plan after evaluating the potential impacts.¹⁶ However, under the ISA Regulations, a valid contract would be entered into between the applicant and the ISA only after the applicant obtains the assent of the Legal and Technical Commission¹⁷ and the Council.¹⁸ Although the requirement of EIA has been prescribed by the international law, the same do not exclude the liberty of the sponsoring states to impose enhanced standards of EIA beyond the existing international standards.¹⁹ Therefore, through the introduction of EIA into the seabed activities, the goal is to eliminate the possibility of all foreseeable damage that could be avoided by exercising due diligence and care rather than to bring immutable norms.

This lack of clarity in the EIA standards also creates confusion in the liability regime. With respect to the liability, the international law resorts to the requirement of fault to impose the liability rather than imposing no fault liability.²⁰ In other words, unless a wrongful conduct is attributable to the contractor, ISA or sponsoring state, no liability is attracted. An act would be considered as a wrongful act only when it falls short of the standards prescribed either in UNCLOS 1982 or in the ISA Mining Codes. Since the EIA norms have not attained finality, it is difficult to impose the liability either upon the contractor, sponsoring state or ISA for an impact not foreseen by the impact assessment. The attribution of ‘wrong’ on a party is close to

¹⁶ Agreement Under The United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction, U.N. Doc A/CONF.232/2023/4 (June 19, 2023), <<https://www.un.org/bbnjagreement/sites/default/files/2024-08/Text%20of%20the%20Agreement%20in%20English.pdf>> accessed 10 June 2026, Art. 34 (1).

¹⁷ International Seabed Authority, ‘Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters’, ISBA/19/C/17, (July 22, 2013) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-19c-17_0-2.pdf> accessed 10 June 2026, Regulations 16 (2); International Seabed Authority, ‘Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area’, ISBA/16/A/12/Rev.1, (May 7, 2010) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-16a-12rev1_0.pdf> accessed 10 June 2026, Regulation 17(2); International Seabed Authority, ‘Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area’, ISBA/18/A/11, (July 23, 2012) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-18a-11_0.pdf> accessed 10 June 2026, Regulation 17 (2).

¹⁸ International Seabed Authority, ‘Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters’, ISBA/19/C/17, (22 July 2013) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-19c-17_0-2.pdf>, accessed 10 June 2026, Regulations 16 (3); International Seabed Authority, ‘Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area’, ISBA/16/A/12/Rev.1, (May 7, 2010) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-16a-12rev1_0.pdf>, accessed 10 June 2026, Regulation 17 (3); International Seabed Authority, ‘Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area’, ISBA/18/A/11, (July 23, 2012) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-18a-11_0.pdf> accessed 10 June 2026, Regulation 17 (3).

¹⁹ *BBNJ Agreement 2023*, (n 16), Art. 25 (2).

²⁰ *Advisory Opinion* (n 14), para 188-205.

impossibility as the burden is on the person who makes the claim. Apart from the degree of responsibility, the extent of liability also creates dilemma. According to the ISA Mining Codes, the contractor and Authority are liable to compensate the whole damage caused by their wrongful act.²¹ Though it is clear that the wrongdoer can be made liable for the entire damage caused by it, the complication lies in quantification of that damage as well. The primary obstacle is the profound lack of scientific knowledge regarding deep sea ecosystem. It is almost impossible to predict the extent and nature of damage caused by a specific activity in the seabed, which includes whether impact is permanent or temporary, impacts on the structure of the oceans, the effects upon the oil deposits and other non living resources, the extent of destruction of the ecosystem, the fish resources, the blue carbon deposits and, to what extent, in terms of distance, the damage might go. Without accurate data as to the impacts of seabed activities, the inaccuracy in EIA report would neither constitute wrongful conduct nor aids in assessing the damage caused by the impugned activities. Furthermore, the ISA enters into a contract for seabed activities only after two staged scrutinies.²² Hence, it cannot be later challenged that the EIA report submitted along with the application is insufficient or inaccurate, as it is for the Legal and Technical Commission and the Council to verify prior to the conclusion of the contract.²³ Similar restraint is applicable to the sponsoring state also. It is the direct obligation of the sponsoring state to ensure that the EIA report submitted by the applicant is sufficient. At present the international legal framework contain no provision to determine the adequacy of an EIA report. In such a scenario, the imposition of liability upon the

²¹ International Seabed Authority, 'Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters', ISBA/19/C/17, (July 22, 2013) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-19c-17_0-2.pdf>, accessed 13 June 2026, Regulation 30; International Seabed Authority, 'Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulfides in the Area', ISBA/16/A/12/Rev.1, (May 7, 2010) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-16a-12rev1_0.pdf>, accessed 13 June 2026, Regulation 32; International Seabed Authority, 'Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area', ISBA/18/A/11, (July 23, 2012) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-18a-11_0.pdf>, accessed 13 June 2026, Regulation 32.

²² International Seabed Authority, 'Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters', ISBA/19/C/17, (July 22, 2013) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-19c-17_0-2.pdf> accessed 13 June 2026, Regulations 21, 22 and 23; International Seabed Authority, 'Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area', ISBA/16/A/12/Rev.1, (May 7, 2010) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-16a-12rev1_0.pdf>, accessed 13 June 2026, Regulations 23, 24 and 25; International Seabed Authority, 'Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area', ISBA/18/A/11, (July 23, 2012) <https://www.isa.org.jm/wp-content/uploads/2022/04/isba-18a-11_0.pdf>, accessed 13 June 2026, Regulations 23, 24 and 25.

²³ *UNCLOS*, 1982, (n 12) Article 165; Article 162.

contractor, sponsoring state and the Authority, in relation to the EIA, remains vague and scanty. Since the international legal framework fails to address the EIA requirements effectively, it is necessary to analyse how the states, particularly India, have responded to the same.

III. EIA: AN INDIAN PERSPECTIVE

India, with its peninsula shape and having 7517 km long coastline, is enriched with marine resources. About 30% of the Indian population depends on oceans for their sustenance.²⁴ Beyond that, India always showed interest in research, especially the deep oceans, which made India a pioneering state in the realm of deep sea mining. Currently, India holds three contracts with the ISA for the seabed exploration.²⁵ In the year 1987, ISA has allotted exclusive rights over an area of 75000 sq.km. in Central Indian Ocean Basin for the extraction of polymetallic nodules and the same has been extended till 2027 through renewal.²⁶ Another contract is for the exploration of the polymetallic sulfides in the Indian Ocean Ridge which was entered into in the year 2016 and is valid up to 2031.²⁷ In 2024, India has submitted two applications for the exploration of the polymetallic sulfides in the Carlsberg Ridge with an area of 10,000 sq.km and the other is for the exploration of cobalt rich ferromanganese crusts in the Afanasy- Nikitin Seamount area with an extent of 3000 sq.km²⁸ and in 2025, India made its third contract for the exploration in Carlsberg Ridge.²⁹ In the year 2019, India launched its Deep Ocean Mission with the aim of developing technologies for deep sea mining, for deep ocean survey, technological development for exploration and conservation of the deep sea etc and has allocated around Rs. 8000 crores for the same.³⁰ As a part of the same, India has developed Varaha-3 machines for the deep sea exploration and is developing Matsya 6000, manned submersible, to explore the seabed upto 6000 meters depth.³¹ In order to regulate the seabed

²⁴ Ministry of Earth Science, 'Deep Ocean Mission', Government of India <<https://www.moes.gov.in/schemes/dom>>, accessed 11 June 2026.

²⁵ International Seabed Authority, 'Exploration Contracts', <<https://www.isa.org.jm/exploration-contracts/>>, accessed 11 June 2026.

²⁶ International Seabed Authority, 'The Government of India submits two applications for approval of plans of work for seabed exploration in the Indian Ocean', (2024) <<https://www.isa.org.jm/news/the-government-of-india-submits-two-applications-for-approval-of-plans-of-work-for-seabed-exploration-in-the-indian-ocean/#:~:text=The%20second%20exploration%20contract%20signed,expire%20on%2025%20September%202031>> accessed 11 June 2026.

²⁷ Deep Ocean Mission (n 24).

²⁸ Deep Ocean Mission (n 24).

²⁹ ISA, Minerals: 'Polymetallic Nodules', <<https://isa.org.jm/exploration-contracts/polymetallic-nodules/>> accessed 11 June, 2026.

³⁰ Office of the Principal Scientific Adviser to the Government of India, 'Deep Ocean Exploration', <<https://www.psa.gov.in/mission/deep-ocean-exploration/39>>, accessed 11 June 2026.

³¹ *Deep Ocean Mission*, (n 24).

activities, India has enacted the Offshore Areas Mineral (Development and Regulation) Act, 2002. The ripples of executive initiatives towards fostering seabed activities brought in impacts in the legislative framework, as India adopted eight secondary legislations under the OAMDR Act 2002 within a period of two years.³²

The OAMDR Act 2002 was adopted with the objective of developing and regulating the mineral resources in Indian offshore, such as territorial waters, continental shelf, exclusive economic zone and other maritime zones of India³³ thereby leaving the Area untouched. The Act imposes a duty to protect marine environment upon both government³⁴ and the permit holder³⁵ along with the consequential liability for causing pollution upon the contractor.³⁶ Unfortunately, the Act failed to recognise the requirement for the EIA. The enactment of Offshore Areas Mineral Conservation and Development Rules 2024 has brought in some elements of EIA into the Indian legal framework for seabed activities. Rule 15 (2) (j) of the Rules requires the inclusion of environment management plan, baseline information, impact assessment and mitigation measures in the production plan to be submitted with an application under the Act. The Offshore Areas Mineral (Auction) Rules 2024 also mandates the need for impact assessment.³⁷ The lack of specificity in the offshore areas laws leads to the feasibility of application of EIA Notification of 2006, which does not specifically deal with the offshore areas activities.

Theoretically, India has accomplished the obligation of due diligence as pointed out by the Chamber by requiring EIA prior to granting of permissions for seabed activities. Practically, these provisions trigger concerns than clarity and solution. The primary concern is with respect to the limited application of the legislative framework as it is limited up to the exclusive economic zone of India. Therefore, it has no application with respect to the activities carried out beyond the national jurisdiction of India. The Advisory Opinion rendered by the Chamber is confined to the Area rather than seabed within the national jurisdiction.³⁸ In that perspective India is far away from complying the obligations of sponsoring state. On one hand it could be

³² Offshore Areas Mineral Trust Rules, 2024; Offshore Areas (Existence of Mineral Resources) Rules, 2024; Offshore Areas Operating Rights Rules, 2024; Offshore Areas Mineral Conservation and Development Rules, 2024; Offshore Areas Mineral (Auction) Rules, 2024; Offshore Areas Atomic Minerals Operating Rights Rules, 2025; Offshore Areas Mineral (Prevention of Illegal Mining and Transportation) Rules 2026; Offshore Areas Mineral Adjudication of Penalties Rules, 2026.

³³ Offshore Areas Mineral (Development and Regulation) Act, 2002, s 3.

³⁴ OAMDR Act 2002 (n32) s 19 A.

³⁵ OAMDR Act 2002 (n32) s 20.

³⁶ OAMDR Act 2002 (n32) s 20 (2).

³⁷ Offshore Areas Mineral (Auction) Rules 2024, Rule 22

³⁸ *Advisory Opinion* (n 14), para 82-97.

argued that since India has not assumed the role of a sponsoring state, there is no ignorance of any responsibility. However, the same cannot be accepted as an excuse, as India is one among the pioneering states and is having the potential to carry out the seabed activities in the Area. The states like Cook Islands, Republic of Nauru, Singapore etc have already drafted legislation for regulating activities in Area.³⁹ In addition, the obligation imposed on the sponsoring state by the Chamber is to ensure that the states would take more obligations to minimise the damage to marine environment.⁴⁰ Unfortunately, India has not acted to the expectation of the Advisory Opinion in enacting effective legislation for regulating activities in Area.

The legislative lacuna in Area turns into legislative confusion when it comes to the waters under national jurisdiction. Rule 15 (2) (j) of the OAMCD Rules, 2024 provides for the requirement of environmental impact assessment to be submitted along with the production plan and the violation of the same is dealt with by Rule 60 (1).⁴¹ Upon a close perusal of Rule 60 (1), it could be seen that the provision imposes a blanket penalty without any precision. Therefore, there is no certainty with respect to whether the provision imposes punishment on lack of EIA report or insufficiency of EIA report or fraudulent EIA report. While reading together the legal provisions contained in various legal frameworks, the first possibility of lack of EIA report does not arise at all, because Rule 15 (1) of the OAMCD Rules, 2024 mandates the competent authority to refuse the grant of license if the application is incomplete with sufficient material particulars or documents.⁴² Hence, no application would get approval from the authority without annexing the EIA report and the omission of the same can result only in rejection and not penal consequences.

The next possibility is the insufficiency of the EIA report. When the requirement of sufficiency of EIA considered, it actually looks into the accuracy and precision of the impacts which a particular activity in the seabed could cause. Even though the humans were able to study the galaxies beyond the Milky Way, we are not yet able to explore the oceans completely.

³⁹ International Seabed Authority, 'A Comparative Study of the National Laws and Regulations on Deep Sea Mining in the Area', (Apr 2022), <https://www.isa.org.jm/wp-content/uploads/2022/04/Comparative_Study_NL.pdf> accessed 12 June, 2026.

⁴⁰ *Advisory Opinion* (n 14), para 124-140.

⁴¹ OAMCD Rules 2024, rule 60 (1), "*Without prejudice to anything contained in the Act, any contravention of rules 6,7, sub-rule (1) of rule 9, 10,11,12,13,15,16, sub-rule (1) of rule 18,19,20,24,25,27,31 to 46, 48,50,51,52,56,58,62,63,67 and 74 shall be punishable with imprisonment for a term which may extend to five years or with fine of fifty lakhs rupees, which may extend to one crore rupees or with both, and in the case of a continuing contravention, with additional fine which may extend to five lakh rupees for every day during which contravention continues after conviction for the first such contravention.*"

⁴² *ibid*, rule 15 (1)– "*No production operations shall be undertaken except in accordance with a production plan, which has been approved, modified or reviewed by the competent authority referred to in Rule 14 and in accordance with Rules 16,17 and 18.*"

It is estimated that only around 20% of the oceans are explored even now.⁴³ In such a situation, any impact assessment made by a permit holder cannot be expected to encompass each and every impact on the marine environment. That is, the impacts so projected by every EIA report would mostly be stemmed from the anticipations based on the limited available data. Thus, the EIA report submitted by an applicant would not be complete and it will always carry threats beyond the impacts projected by the same. Since it is not possible to prepare a report with absolute accuracy in the near future, the inaccuracy is an inevitable evil and imposing liability for the same will not benefit the future development of the industry.

Moreover, Section 33 of the OAMDR Act, 2002 exempts both penal and civil liability for anything done in good faith. On that ground, it is possible for a contractor to evade from the liability that might be imposed under Rule 60 (1) of OAMCD Rules 2024. There is yet another angle to be considered with respect to the insufficiency of EIA report annexed with an application. The EIA Notification of 2006, which was issued under the Environment (Protection) Act 1986, contains the framework for the EIA policy in general. It stipulates a set of procedures to be followed while conducting the EIA.⁴⁴ Though offshore mining has not been specifically covered by the Notification, it can be brought under the term ‘mining’ and thus the provisions can be extended to cover the seabed mining as well. In the absence of specific measures regarding the seabed activities either in the Act or in Rules, the procedure contemplated in the EIA Notification 2006 needs to be resorted to. Hence the entity which submits an application for seabed mining has to submit an EIA report which is prepared in accordance with the EIA Notification of 2006. As per the EIA Notification 2006, the mining activity requires the environmental clearance from the Ministry of Environment and Forests and the approval from the Ministry will be obtained only upon the recommendations of the Expert Appraisal Committee.⁴⁵ So the proposed contractor has to submit an application for environment clearance along with pre- feasibility report.⁴⁶ Thereafter the application will go through three stages of scoping, public consultation and appraisal.⁴⁷ If the an applicant obtains the environment clearance from the regulatory authority under the EIA Notification and the

⁴³ Emily Nunez, ‘Why Does So Much of The Ocean Remain Unexplored and Unprotected?’, (8 June 2020) Oceana, <<https://oceana.org/blog/why-does-so-much-ocean-remain-unexplored-and-unprotected/#:~:text=Only%20about%2020%25%20of%20the,understood%20%E2%80%93%20places%20in%20the%20universe>> accessed 11 June 2026.

⁴⁴ Ministry of Environment & Forests, ‘Notification’, <https://environmentclearance.nic.in/writereaddata/EIA_notifications/2006_09_14_EIA.pdf>, accessed 11 June 2026, Clause 7.

⁴⁵ EIA Notification 2006 (n 44) Cls 2 and 4.

⁴⁶ EIA Notification 2006 (n 44) Cls 6.

⁴⁷ EIA Notification 2006 (n 44) Clse 7.

same is filed along with the production plan under Rule 15 of OAMCD Rules, 2024, how the same can be later declared to be insufficient and attract the liability under Rule 60 of the said Rules, is a serious question to be considered. Even if there happened to be any insufficiency, then also the liability will not arise as the applicant had acted in good faith as he has complied with all the legal formalities and the failure was on the part of the administrative authorities while acting under EIA Notification 2006. Moreover, the OAMCD Rules 2024 does not stipulate the precondition of obtainment of clearance from the Ministry Environment and Forests. This would invoke conflicting jurisdictions among the competent authority under the OAMCD Rules 2024⁴⁸ and the Ministry of Environment and Forests under EIA Notification of 2006, with respect to which body is the appropriate and competent forum to determine the adequacy of an impact assessment.

In this scenario, the remaining position, that is, the liability for fraudulent EIA report is to be analysed. It is very interesting to note that neither the legislation nor the rules enacted thereunder deal with this situation. According to the OAMDR Act, 2002, the penal liability arises when there is a failure on the part of the applicant to submit all the data required as provided in Section 5(2).⁴⁹ Section 5(2) is a vague provision which merely provides all the reports, data etc to be furnished to the administering authority and only when there is a failure to submit the records, the liability under Section 23 arises. The same is the position under the OAMCD Rules, 2024. That is, Rule 15 (2) provides that the production plan shall be accompanied by the list of documents prescribed in the rule, including the impact assessment and Rule 60(1) imposes liability when there is any contravention to 15(2). Hence, only in the absence of such a report, the liability arises and that is practically impossible so far as the present provisions are considered. Practically the liability as provided under Rule 60(1) is only a scarecrow which will remain dormant in the papers. Furthermore, there exists several concomitant complexities and hurdles in the imposition of liability. Attributing fraud becomes inherently difficult in the absence of a clearly defined standard of conduct against which the impugned act is to be measured. Secondly, neither the international nor national legislative framework adequately specify the conditions for attributing the fraud and the consequential penal liability. Thirdly, the law is entirely vague on the procedural matters as it fails to identify who has the locus standi to raise a claim of fraud and what is the requisite standard of proof for succeeding the claim. Since the nature of liability imposed is a fault based liability, the

⁴⁸ *OAMCD Rules, 2024*, (n 41), Rule 14.

⁴⁹ *OAMDR Act, 2002* (n 33) s. 23.

herculean burden of proving the fraud with sufficient evidence is upon the claimant. A common man, whose livelihood depends on oceans, cannot be reasonably expected to meet this burden. Such a person lacks the access to the internal documents, especially the EIA reports, made with ISA or with sponsoring states. Even if access is granted, the technical jargon and complex nature of subject matter create a significant hurdle having the potential even to prevent the aggrieved from knocking the doors of justice. Finally, even in the event that fraud is successfully established on the part of a contractor in conducting the EIA, it may not culminate in punishment if the claimant cannot prove that the fraudulent EIA resulted in a tangible loss to him or fails to prove the causal nexus between the fraudulent conduct and environmental destruction.

IV. SUGGESTIONS

Mere criticism on the deficiency of the law alone is inadequate for strengthening the EIA framework. The international and national legal set up are in the clutches of inherent flaws. The identification of deficiencies in the legal framework, though crucial, is not a solution. The path forward lies in developing comprehensive mechanisms to enhance the effectiveness and efficiency of EIA process. Starting with the central challenge, that is, the impossibility of exploring the oceans completely in the near future leads to the alternative measures that could be adopted. It is neither feasible nor practical to postpone all the mining activities till the oceans are explored completely, as the demand for deep sea minerals is getting hiked every day. Consequently, predictions of mining impacts will inevitably involve assumptions. Then the goal must be to render the assumptions as accurate and precise as possible by grounding them in reliable and empirical data. Since reliable data will only emerge once actual mining operations commence, a solution can be brought in through international co-operation and adaptive management. A proposed solution is for the Authority to initiate a carefully controlled and monitored mining within a designated portion of the Area, in co-operation with the states and other stakeholders, with the best available technology. This would enable the scientists to detect, monitor and study the real consequences of mining activities on the marine environment. The data so collected could then be used to establish robust and science based standards and thresholds for shaping EIA requirements. It can also be set as a universal benchmark. When an application is submitted, not only the ISA, but also the sponsoring states can analyse the same in the light of this data and that would bring about uniformity around the world. With that, the issue of insufficiency could be eliminated to a great extent. It will also

enable the contractor as well as the insurers, if any, as to the potential liability that could arise in the future from the proposed seabed activity.

The existing legal framework for the EIA for seabed activities is confined to the requirement of EIA report to be annexed to an application for seabed activities and does not specify the constituent elements to be considered while preparing the same. While assessing the potential impacts for a particular seabed activity, not only the impacts on marine environment that has to be taken in account, but also the impacts on other users of the oceans who might be affected by the same need consideration. For example, the mining activity in the Indian ocean can adversely affect the fishing folk, oil mines, tourism and marine biomedical industry. The damage suffered by such users should find a significant space in the impact assessments for every seabed activity.

While contemplating legal reforms for seabed mining, defining the role of state and its machinery is also of paramount importance. In Indian context, significant dilemma persists concerning the identification of appropriate regulatory authority, along with a clear delineation of its powers and functions. In addition, Indian law failed to give due consideration to the follow up monitoring and surveillance of the activities on the sea floor. The follow up studies are inevitable for framing effective for rectifying the deficit in the existing EIA standards and for formulating efficient EIA framework for future. Since the mining is carried out in the oceans which are intertwined, it is not possible for a single state to ensure effective protection of marine environment. For an effective governance, a healthy co-operation with the states and other entities which are engaged in this realm is also inevitable. The states shall make proactive measures to adopt effective co-operation strategies, which would help in framing the EIA requirements as well as in monitoring, consulting and imposing liability in relation to the EIA. Along with this, the law should seriously address the litigation process, which includes the jurisdiction of courts, the locus standi, the applicability of domestic law and international law, standard of proof, fixation of liability, extra territorial applicability of the order, imposition of punishment etc. Merely extending the already existing legal framework to these aspects will result in a total failure as the seabed mining is a complex activity which is having an extraterritorial impact.

Notwithstanding the deficiency of the Indian statutory provisions for EIA of seabed activities, the environmental jurisprudence developed by the Indian judiciary can, to a considerable extent, compensate for such deficiencies. The recognition of clean and healthy environment as a fundamental right under Article 21 of the Constitution of India was one of

the significant steps taken by the Indian judiciary.⁵⁰ By declaring healthy environment as a fundamental right, the duty of preservation of marine environment from any destruction is imposed upon the state.⁵¹ Moreover, the introduction of public interest litigation could relieve the affected party from the complex litigation procedure.⁵² The polluter pays principle⁵³ is yet another environmental principle accepted by the Indian judiciary to cure the damage caused. Recently, in *M/s Rhythm County v Sathish Sanjay Hedge*⁵⁴ the Supreme Court made an observation that it is not possible to formulate uniform equation for the quantification of compensation in case of environmental deterioration and the same would be moulded on the basis of polluter pays principle. Thus, the judiciary holds the discretion to determine the amount of compensation rather than following a pre-determined formula. Conferment of such a discretion is suitable in the case of seabed activities as the threats annexed to each and every activity in seabed varies from one another and it would be highly improbable to apply a uniform standard for determining the compensation. The inefficiency of the state machineries can also be addressed through the well established environmental principle of public trust doctrine.⁵⁵ The precautionary principle⁵⁶ can be considered as an extension of EIA and the same would also ensure the protection of marine environment, even if the EIA is inadequate. The Indian environmental jurisprudence is vast and is capable of ensuring the protection of marine environment together with the impact assessment. Integrating all the environmental principles along with the EIA could minimise the impact caused by the seabed activities and thereby protect the marine environment.

V. CONCLUSION

The legal realm governing the EIA for seabed mining is incomplete in international as well as domestic legal framework. However, India cannot afford to remain idle, awaiting a consensus from international community. As a pioneering state with significant investments in deep sea exploration, India has the responsibility to take proactive and positive steps to establish robust

⁵⁰ *Andhra Pradesh Pollution Control Board v M V Nayudu* (AIR 1999 SC 812).

⁵¹ *T Damodar Rao v Special Officer, Municipal Corporation of Hyderabad* (AIR 1987 AP 171); *L K Koolwal v Sate*, (AIR 1988 Raj 2); *Mohammed Hazi Rafeeq v State of Uttaranchal*, (AIR 2006 Utr 18); *K Muniasamythevar v Dy. Superintendent of Police* (AIR 2006 Mad 255).

⁵² *Bandhua Mukti Morch v UoI* (AIR 1984 SC 802).

⁵³ *Indian Council for Enviro-Legal Action v UoI* (AIR 1996 SC 1446).

⁵⁴ 2026 INSC 102.

⁵⁵ *In Re T N Godavarman Thirumulpad v Union of India*, 2024 SCC OnLine SC 243; Erin Ryan, 'The Public Trust Doctrine, Property, and Society', in Nicole Graham, Margaret Davies and Lee Godden (eds), *The Routledge Handbook of Property, Law and Society*, (1st edn, Routledge, 2022).

⁵⁶ *Vellore Citizens Welfare Forum v UoI* (1996) 5 SCC 647.

and comprehensive environmental safeguards, especially with regard to the EIA. Since the deep ocean contains one of the planet's most fragile and indispensable ecosystems critical to the sustenance of life on Earth, no compromise can be afforded in its protection and preservation. However, the abundant economic potential of seabed minerals is a strategic reality that cannot be neglected. The reconciling of these two imperatives lies in implementing robust and efficient measures for the protection of marine environment, starting with the impact assessment studies. A rigorous EIA process, founded on precaution and adaptive management, is the primary tool for minimising damage to the marine environment. It is therefore incumbent upon the legislature to take decisive action by amending the current legal provisions, which are inherently handicapped. The question to be ultimately answered is not what others can do for you, but what you can do for others.

ABORTION LAWS AND INTERNATIONAL CRIMINAL LAW: NAVIGATING THE BOUNDARIES OF REPRODUCTIVE RIGHTS AND STATE RESPONSIBILITY

- Shubhra*

ABSTRACT

Laws pertaining to abortion gradually emerged as a significant point of contestation between women's reproductive rights and state's responsibility to ensure potential life. From the inception itself, laws regulating termination of pregnancy considered as a matter of domestic jurisdiction of the respective states. However, recent transitions in International human rights law and criminal law challenged the aforesaid perception. The Growing recognition of reproductive rights violations by virtue of the criminalization of forced pregnancy under Rome Statute evidence the transition in abortion jurisprudence. The significant shift results into the gradual acceptance of reproductive rights and laws governing the termination of pregnancy, diluting the territorial boundaries. Present paper explores the evolving nexus between abortion laws and international criminal law, dealing with the pivotal role of state's responsibility to strike a balance between reproductive autonomy and foetal rights. Paper analyses the impact of restrictive abortion laws upon the international legal obligation to safeguard reproductive as well as bodily integrity. It also elaborates the cardinal principles of parens patriae and international criminal accountability arising due to restricted access to abortion services in the circumstances of gender-based violence, crime against humanity, armed conflict etc. International legal framework and judicial pronouncements have been dealt along with the analysis of prevailing circumstances wherein states cannot invoke the doctrine of sovereignty to justify the legislations jeopardizing reproductive rights. In the present study, doctrinal methodology is adopted in order to analyse the evolution and recognition of abortion rights.

Keywords- Reproductive justice, abortion laws, reproductive autonomy, parens patriae, crime against humanity.

I. INTRODUCTION

Abortion laws always remain one of the most contentious domains within the contemporary legal discourse being placed at the intersection of state's sovereignty and women's reproductive rights. Across the globe, laws pertaining to termination of pregnancy give the reflection of conflicting legal, political and moral perspective regarding reproductive autonomy as well as extent of state's role in regulating the reproductive decision making. Primarily, states have exercised their discretionary power in enacting legislations regulating abortion. However, the gradual acceptance of women's reproductive autonomy as part and parcel of human rights plays a decisive role to subject such regulations under international scrutiny. Subsequently, abortion laws no longer been considered to be governed solely within domestic legal framework, rather than it is regarded as an issue which inevitably tends to implicate questions

* Research Scholar, University Department of Law, TMBU(State Government University)

of reproductive and bodily integrity, dignity and access to safe and legal reproductive healthcare services beyond territorial jurisdictions.

International human rights played a pivotal role behind the evolution as well as transformation of discourse around reproductive autonomy. By virtue of such transformation, international institutions, treaty monitoring organizations, international courts have started to recognize the adverse impact of restrictive abortion laws upon the basic human rights, i.e., right to life with dignity, right against discrimination, right to reproductive autonomy, right to health, etc.¹ The right centric approach has deeply contested the doctrine of state sovereignty by establishing the acceptance of reproductive autonomy as the chief constituent element of gender equality as well as human dignity. Such rights based approach has increased the probability of domestic abortion laws compliance with the international human rights threshold and states accountability to provide uninterrupted access to abortion services without any disproportionate barriers to attain reproductive justice.

Nexus between abortion laws and international criminal law is another point of intersection which needs legal scrutiny, considering recognition of reproductive injustice being crime against humanity under Rome Statute of the International Criminal Court.² Initially, international criminal law was confined to recognize war crimes, genocide as grave violations. Gradually, the legal and humanitarian interpretation has changed the dynamics, resulting into the recognition of GBV (gender based violence) and reproductive harms, imposing international criminal accountability. In the context of international criminal accountability, significant development has been witnessed in the form of adoption of Rome Statute of the International Criminal Court.³ Rome Statute of the International Criminal Court guarantees the recognition of forced pregnancy as crime against humanity. In certain specified circumstances, forced pregnancy has also been statutorily accepted as war crime by the Rome Statute of the International Criminal Court.⁴ The aforesaid recognition makes the entire mankind to witness the drastic shift in the meaning of reproductive autonomy as its all forms of violations recognized as international crime when committed against entire civilian population of particular jurisdiction. The recognition of reproductive injustice being international crime has significant implications upon abortion laws. In the circumstances of humanitarian crisis and

¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) arts 1, 2, 3 and 25.

² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 7(1)(g).

³ Rome Statute (n 2) arts 7(1)(g), 7(2)(f).

⁴ Rome Statute (n 2) arts 8(2)(b)(xxii), 8(2)(e)(vi).

armed conflict, unreasonable restrictions imposed upon the victims of forced pregnancy for availing the accessibility to abortion services exacerbate the sufferings and causes double jeopardy. International criminal law has gradually acknowledged the reproductive harm and any form of violence pertaining to same as coercive practice which not only violates the reproductive autonomy rather it also undermines the sanctity of pregnant women causing immense threat to reproductive justice. Hence, laws governing abortion are no longer confined within the periphery of domestic policies but are intrinsically linked with the issues of reproductive justice, international criminal accountability and protection of reproductive rights. In this context, bone of contention lies between state sovereignty and discharge of international obligation. Mostly, restrictive domestic abortion regime has been attempted to be justified by the respective states, invoking their legal, political, moral and religious perception. However, such justification deems to be frivolous in the pretext of severe reproductive rights violations. The significant question lies in the form of determining the extent of state's intervention in regulating the issue of abortion while being responsible to discharge its obligation under international criminal and human rights laws. This challenge becomes prominent when states impose arbitrary restrictions in the cases of forced pregnancy, mass rape or sexual violence, leading to the crime against humanity. International law imposes both positive as well as negative obligation, according to which states are not only obliged to grant unintervened access to abortion services, rather state is also obligatory to not arbitrarily intervene with the women's reproductive rights.

In this scenario, present piece of literature conceptually analyses the foundation of reproductive autonomy along with the evolution of abortion rights in the domain of international law. It also explores the recognition of denial of abortion rights as crime against humanity in the circumstances of forced pregnancy, armed conflict, humanitarian crisis, etc.⁵ State's obligation to safeguard reproductive justice and international safeguard pertaining to reproductive autonomy has also been elaborately studied.

II. CONCEPTUAL FOUNDATION AND EVOLUTION OF ABORTION RIGHTS

Domain of international law suggests the gradual evolution in the meaning and understanding of reproductive autonomy, abortion rights, etc. Originally, laws governing termination of pregnancy exclusively fall within domestic jurisdiction of respective nations as international law remain silent on the issue of abortion laws. Legal discourse has witnessed the major

⁵ Rome Statute (n 2) arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

transition in consequence of the Second World War, which led the emergence of international human rights law, ensuring the legal recognition as well as international acceptance of women's bodily and reproductive liberty.⁶ International institutions made integral contribution in ascertaining the acknowledgement of uninterrupted abortion right as part and parcel of fundamental human rights. This result into the significant evolution of abortion rights, witnessing the shift from state centric laws to human right based approach emphasizing the dignity, liberty, reproductive autonomy, equality, etc. Mid twentieth century has witnessed the emergence of human rights declarations and conventions, recognizing all aspects of human life from cradle to grave in terms of rights. Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and International Conference on Population and Development⁷ are determining steps that have been attempted to shape the reproductive jurisprudence.

Universal Declaration of Human Rights witnessed inception of nations commitment to safeguard the intrinsic rights of humanity i.e., life, dignity, liberty, autonomy, equality, etc. 1948 declaration doesn't expressly mentioned the women's right to reproductive autonomy, but all other rights being part and parcel of reproductive rights have been guaranteed thereby, which laid down the path for subsequent legal developments. In furtherance of which, the time period of 1960s and 1970s witnessed the increasing recognition of reproductive health in international scenario. Subsequently in 1966 International Covenant on Economic, Social and Cultural Rights has been adopted which guarantees the right of everyone to the enjoyment of the highest attainable standard of physical and mental health under article 12.⁸ The aforesaid provision ensures to safeguard maternal as well as reproductive health. Unrestricted access to abortion healthcare have been viewed to be interpreted as an integral feature of right to health, by virtue of which states are obliged to ascertain the removal of hurdles which jeopardise women's reproductive health. International Covenant on Civil and Political Rights has also

⁶ UDHR (n 1) arts 1 and 3.

⁷ UDHR (n 1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Report of the International Conference on Population and Development, Cairo, 5–13 September 1994, UN Doc A/CONF.171/13/Rev.1, ch I, res 1, annex (ICPD Programme of Action).

⁸ ICESCR (n 7) art 12.

been adopted in 1966 which specifically ensures to grant life with dignity under article 6 and has been extended by the UN Human Rights Committee to guarantee the protection of maternal health.⁹ According to General Comment No 36 on article 6 of the ICCPR, states are under obligation to provide safe, effective and legal access to termination of pregnancy.¹⁰ As per General Comment No 28 on article 3 of the ICCPR, the UN Human Rights Committee has bound the states to enable the comprehensive measures for preventing unwanted pregnancies and to safeguard the pregnant women from opting life threatening and clandestine procedures pertaining to termination of pregnancy.¹¹ Thereafter, 1979 has witnessed the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that governs women's reproductive health under article 12, and mandates the states for ascertainment of the elimination of discrimination in providing reproductive healthcare services.¹² The CEDAW Committee, in General Recommendation No 24, has also recommended that legislation criminalising abortion be amended to withdraw punitive measures imposed on women who undergo abortion.¹³

International Conference on Population and Development 1994 acted as one of the most important milestones by introducing significant and scientific understanding of women's reproductive rights and health care.¹⁴ At the conference, the reproductive decision making has been adopted as an intrinsic component of individual dignity and personal freedom pertaining to women's reproductive choice. The conference's Programme of Action significantly discussed issues concerning maternal mortality, women's reproductive freedom and reproductive health care as central point of concerns in global development. In spite of such global recognition, right to abortion has not been expressly established as a guaranteed right. However, nations have been encouraged to address as well as redress the issue of unsafe abortion as matter of public health. Human rights instruments immensely contributed in recognizing and interpreting access to abortion as intrinsic cornerstone of human rights.

International monitoring bodies like-

- UN Human Rights Committee

⁹ ICCPR (n 7) art 6.

¹⁰ UN Human Rights Committee, 'General Comment No 36: Article 6 (Right to Life)' (3 September 2019) UN Doc CCPR/C/GC/36, para 8.

¹¹ UN Human Rights Committee, 'General Comment No 28: Article 3 (The Equality of Rights between Men and Women)' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10, para 10.

¹² CEDAW (n 7) art 12.

¹³ CEDAW Committee, 'General Recommendation No 24: Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1, ch I, para 31(c).

¹⁴ ICPD Programme of Action (n 7) paras 7.2–7.3 and 8.25.

- CEDAW Committee
- Committee on Economic, Social and Cultural Rights have persistently played the decisive role in interpreting the provisions of international instruments to oblige the states for securing reproductive justice and eliminating the hurdles in the way of attaining the same.¹⁵

Hence, all the above mentioned international legal instruments as well as committees prioritise to oblige the states to guarantee accessibility to reproductive health care services and ensure non-criminalisation of reproductive decision making.

III. INTERNATIONAL CRIMINAL LAW AND RIGHT TO ABORTION

In contemporary legal discourse, the nexus between right to abortion and international criminal law is intrinsically linked and significantly complex. Developments in international human rights law and international criminal law have played role of significance in recognising the necessity of international legal responsibility for addressing the topic of reproductive justice, specifically in the situations of armed conflict, systematic violence and crime against humanity.¹⁶ Understanding of reproductive rights violations have been gradually expanded with the evolution of international criminal law. In furtherance of the aforesaid development, forced pregnancy has been categorised as international crime. Consequently, shift has been witnessed from the issue of legality of abortion to the ascertainment of criminal accountability in preventing the commission of reproductive violence and ensuring the reproductive justice. Regarding abortion jurisprudence there is a broad line of demarcation between the domestic and international law. Domestic legislations govern the crime of forcible abortion as an independent crime. State civil laws regulating the termination of pregnancy considers the issue of abortion independently. However, international law only seeks to highlight issue of jeopardising reproductive rights, where violations result into war crimes, systematic gender based violence or crime against humanity. International criminal law targets to prevent the commission of such offences which threaten the international community and entire mankind. In this pretext, reproductive harm comes under scrutiny when such harm is committed in the form of systematic attack against right holders in the course of armed conflict. Hence, it can be conclusively determined that international criminal law does not criminalise abortion per se,

¹⁵ UN Human Rights Committee, General Comment No 36 (n 10) para 8; CEDAW Committee, General Recommendation No 24 (n 13) para 31(c); Committee on Economic, Social and Cultural Rights, 'General Comment No 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc E/C.12/GC/22, para 28.

¹⁶ Rome Statute (n 2) art 7(1)(g).

rather than it safeguards women's reproductive autonomy by penalising the coercive practices that violates the freedom of reproductive decision making.

Rome Statute of the International Criminal Court is the most important legal instrument which has expressly recognised numerous gender based crimes that implicate grave violation of reproductive rights. There are several crimes that have been specifically categorised as gender based violence (GBV) under article 7 of the Rome Statute, such as-

- rape
- sexual slavery
- forced pregnancy
- enforced prostitution, etc¹⁷

Abovementioned offences have been statutorily recognised as crime against humanity under article 7 of the Rome Statute, where such offences are committed as a systematic attack against the civilians. Forced pregnancy has been defined under the statute as 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.¹⁸ The gravity of offence of forced pregnancy can be understood by virtue of the aforesaid definition, in furtherance of which article 8 of the statute has recognised the crime of forced pregnancy as war crime when committed in course of international or non-international armed conflict. The statutory definition of forced pregnancy gives the reflection of international community's legal acceptance that women's reproductive autonomy is integral aspect of life, liberty and dignity and coercive reproductive practices act as a stigma upon entire civilisation. Rome Statute of the International Criminal Court also acknowledges that subjecting the victims of forced pregnancy under compulsion to continue such pregnancies through coercion or violence, violates the underlying objective of international law. The statute does not establish right to abortion as a distinct right, however the issue of reproductive autonomy and barriers in the way of attaining the goal of reproductive justice is the matter of paramount consideration. Rome Statute of the International Criminal Court plays a decisive role in securing the prevention of commission of the offence of forced pregnancy and enables the pregnant women to access uninterrupted abortion services. It may be argued that state laws imposing restriction upon abortion fulfil the constituent elements of 'forced pregnancy' under the legal blanket order of legitimising the compulsion to continue the entire term of pregnancy against the right holder's

¹⁷ Rome Statute (n 2) art 7(1)(g).

¹⁸ Rome Statute (n 2) art 7(2)(f).

will. The ‘unlawful confinement of a woman forcibly made pregnant’ is mentioned as the chief constituent element of the forced pregnancy under article 7(2)(f) of the statute.¹⁹ Similarly, restrictive state abortion laws imply to constitute state sponsored legal confinement, abolishing the women’s accessibility to reproductive autonomy. Hence, criminalising the termination of pregnancy in the domestic jurisdiction legally enables the state health care machinery to forcibly continue the pregnancy while jeopardising the essence of right holder’s bodily autonomy. Systematic domestic restriction upon abortion is potent to meet the threshold of ‘crime against humanity’ under article 7(1)(g) of the statute. As under article 8(2)(e)(vi) of the statute, domestic abortion restricting laws act as weapon to empower the state actors in the scenario of non-international armed conflict to unlawfully deprive the pregnant women from their reproductive liberty by committing the offence of ‘forced pregnancy’. On this argument, a systematic domestic abortion ban could fulfil the statutory composition of ‘forced pregnancy’ under Rome Statute. Conclusively, there are three core elements which need to be fulfilled by the state abortion legislation to constitute ‘forced pregnancy’; otherwise state law criminalising termination of pregnancy is legally distinct. Firstly, perpetrator needs to put the forcible pregnant women within unlawful confinement so as to statutorily snatch her reproductive liberty. This depicts the conduct element. Secondly, above mentioned act must be committed against the civilian population as an intrinsic part of systematic attack. This symbolises the contextual element. Lastly, mental element depicts that perpetrator’s action must be accompanied with ‘mens rea’ to affect the ethnic composition of a population or to carry out other grave violations of international law.

These significant developments are witnessed in the form of various judicial pronouncements delivered by the International Criminal Court, wherein legal and judicial understanding of reproductive autonomy and criminal accountability has been significantly shaped to ensure reproductive justice. In the case of *Prosecutor v Dominic Ongwen*,²⁰ commander of Lord’s Resistance Army has been convicted by the International Criminal Court (ICC) on account of committing forced pregnancy and compelling the victims to continue the pregnancies with the intent of carrying out other grave violations of international law, including rape, sexual slavery and enslavement. In this case, ICC has affirmed the statutory recognition of women’s reproductive as well as bodily autonomy.

¹⁹ Rome Statute (n 2) art 7(2)(f).

²⁰ *Prosecutor v Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15-1762-Red (4 February 2021); *Prosecutor v Dominic Ongwen* (Decision on the Confirmation of Charges) ICC-02/04-01/15-422-Red (23 March 2016) paras 99–101.

The intersection between international criminal law and right to abortion signifies the transitional shift in international legal norms from a restrictive concept of criminal accountability towards broader acceptance of reproductive justice. Universally, abortion right has not been recognised as a matter of right per se. Significantly, international criminal law has contributed in ensuring the protection of reproductive rights by recognising forced pregnancy and coercive means to continue such pregnancies as international crimes. However, definition of forced pregnancy²¹ is subjected to criticism on the ground of being immensely restrictive and acting as a shield to the domestic legal framework. Article 7(2)(f) of the Rome Statute expressly provides that the definition ‘shall not in any way be interpreted as affecting national laws relating to pregnancy’.²² Hence, by virtue of such demarcation the domestic laws restricting termination of pregnancy gets away without any scrutiny and jeopardises the international human standards. Secondly, the definition of forced pregnancy is confined to a specific intent, namely affecting the ethnic composition of a population or carrying out other grave violations of international law, ultimately negating to recognise the impact of forced pregnancy upon the bodily integrity and reproductive autonomy of the right holder per se. In the pretext of the above mentioned limitations, article 7(2)(f) needs to re-define the forced pregnancy in terms of the violation of right holder’s reproductive autonomy along with its criminalisation as a crime against ethnic composition of the population of particular state. Aforesaid provision also needs to eliminate its limiting clause which acts as a legal shield to the domestic laws imposing unreasonable restrictions upon abortion so as to ensure uniform reproductive safeguards under international criminal law.

International human rights law and domestic abortion laws have acted complimentary to international criminal law to ascertain the goal of reproductive justice and to eradicate the barriers in attaining reproductive autonomy.²³ Nevertheless, there are significant hurdles in harmonising domestic abortion laws with international legal obligations, such as- limited enforcement mechanisms, restrictive legal recognition of abortion rights in the states, lack of gender sensitization, etc. However, human rights based approach remains one of the most important and indispensable way of securing reproductive justice within the statutory framework of international criminal law.

²¹ Rome Statute (n 2) art 7(2)(f).

²² Rome Statute (n 2) art 7(2)(f).

²³ Office of the United Nations High Commissioner for Human Rights, *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions* (United Nations 2014) 28.

Despite reproductive rights recognition and legal developments, there are numerous challenges which act as barriers in the way of ensuring reproductive autonomy, which are as follows-

- First and the foremost hurdle are in the form of divergent domestic legal regime. State always retains the supremacy to govern the abortion laws on the basis of cultural, regional, constitutional and political considerations which creates substantial differences in legal standards. Doctrine of sovereignty is the matter of paramount consideration, which always acts as a shield for states to mitigate its accountability arising from their failure to safeguard reproductive rights.
- Another significant challenge is the absence of expressed provision governing right to abortion. Rome Statute of the International Criminal Court criminalises forced pregnancy as crime against humanity²⁴ but no binding obligation is imposed to compulsorily enable the access to abortion. Hence, international criminal law addresses the limited aspect of reproductive rights.
- Thirdly, enforcement mechanism to ensure the accountability remains difficult. In the pretext of armed conflict, access to reproductive justice is jeopardised due to political considerations, legal and governance instability and indecisive investigations.
- Emergence of various humanitarian crises play a decisive role behind exposing the right holders to conflict induced gender based violence, specifically sexual crimes. In furtherance of which accessibility to reproductive healthcare services, safe and legal abortion, emergency contraception, etc are blatantly denied resulting into the gross infringement of reproductive rights.

IV. STATE RESPONSIBILITY AND REGULATION OF ABORTION

Laws regulating abortion are traditionally governed by the sovereign authority of respective states, conferring the regulatory and statutory power upon the government to determine the issue of legitimacy of abortion. However, contemporary legal developments in the domain of international law have recognised the state's obligation to regulate the issues pertaining to abortion rights in consistent with their responsibility under international laws. This results into the inception of doctrine of states responsibility to evaluate the effectiveness of domestic abortion laws in adherence to the international obligation of securing reproductive justice. The International Law Commission (ILC) has codified the law of *state responsibility* in the Articles

²⁴ Rome Statute (n 2) arts 7(1)(g), 7(2)(f).

on Responsibility of States for Internationally Wrongful Acts (ARSIWA).²⁵ Principles embodied under ARSIWA become applicable where domestic laws governing reproductive healthcare breach obligations conferred under international laws. State is held accountable wherein its own organs commit the reproductive violations, jeopardising the pregnant women's bodily liberty and integrity by refusing to address the viable reproductive necessities. Judiciary, legislature and health care institutions are basic state pillars to uphold the international human rights standards by enabling the uninterrupted accessibility to reproductive services. Articles on Responsibility of States for Internationally Wrongful Acts attribute legal responsibility upon the states committing breach when it acts or omits to act causing reproductive violation. State action or omission includes- imposing absolute restriction upon abortion services, refusing or failing to enable accessibility to emergency contraception leading to rise in maternal mortality. Aforesaid actions or omissions cause immense violations to treaty obligations securing the protection of right to health, bodily integrity, and liberty from being subjected to cruel and inhuman treatment. Consequent to the establishment of the breach, states need to take the following steps:²⁶

- a) Firstly, reparation by repealing the infringing law and restoring the situation prevailing before arbitrary abortion enactment.
- b) Secondly, by compensating the right holders regarding their actual and moral damages.
- c) Thirdly, ensuring the guarantee of non-repetition by virtue of introducing reproductive healthcare reforms.

Regional human rights institutions, committees and courts have played the role of significance in changing the dynamics pertaining to reproductive rights and ascertaining state responsibility. European Court of Human Rights laid down the emphasis upon procedural safeguards and intrinsic requirement of enabling unrestricted accessibility to safe and legal abortion. In *Tysiāc v Poland*,²⁷ European Court of Human Rights has laid down the landmark judgement by stating that absence of legal and effective procedures to enable the accessibility to safe and legal abortion causes grave violation of applicant's rights granted under article 8 of the European

²⁵ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) II(2) Yearbook of the International Law Commission 31, UN Doc A/56/10 (ARSIWA).

²⁶ ARSIWA (n 25) arts 30, 31 and 34–37.

²⁷ *Tysiāc v Poland* App no 5410/03 (ECtHR, 20 March 2007).

Convention on Human Rights.²⁸ In *P and S v Poland*,²⁹ the applicant was a pregnant minor who faced severe challenges in accessing the lawful medical termination of pregnancy after commission of rape. European Court of Human Rights (ECtHR) held designated authorities accountable for infringing victim's dignity, reproductive autonomy. State also held liable for creating unnecessary procedural barriers. Another significant judgement wherein European Court of Human Rights has recognised the states obligation to safeguard reproductive rights is delivered in *A, B and C v Ireland*.³⁰ In aforesaid judicial decision, European Court of Human Rights held that state is legally obliged to secure effective mechanism for ensuring access to unrestricted abortion services. In Ireland, the right to abortion has not been in inception until and unless there was the mass upsurge in 2012 against the anarchic law imposing strict ban on abortion. In *Mellet v Ireland*,³¹ the UN Human Rights Committee addressed the state accountability in violating abortion rights. In the aforesaid case, the UN Human Rights Committee held the state of Ireland liable for committing the violation of international obligation conferred under the International Covenant on Civil and Political Rights. Committee held that compelling the applicant to move abroad for terminating the foetus suffering from foetal abnormalities is not only subjecting her to cruelty and degrading treatment but also violating her fundamental claim to access abortion services within country itself. In *Whelan v Ireland*,³² it has been held that restrictive abortion laws not only cause hurdle in discharging state responsibility to secure reproductive justice, additionally it also causes arbitrary interference with the right to dignity and liberty.

By virtue of article 51(c) of the Indian Constitution, a Directive Principle of State Policy, the State is directed to foster respect for international law and treaty obligations, including the obligations India has undertaken as a signatory to international conventions.³³ In furtherance of the aforesaid constitutional directive, amendment took place in MTP laws in 2021 which has significantly modified the judicial discourse that is clearly reflected in the judgement of the *X v Principal Secretary*.³⁴ In the aforesaid case court held that any sort of distinction that has been made between the abortion rights being exercised by the individual based solely on the

²⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

²⁹ *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012).

³⁰ *A, B and C v Ireland* App no 25579/05 (ECtHR [GC], 16 December 2010).

³¹ *Mellet v Ireland* Communication No 2324/2013, UN Doc CCPR/C/116/D/2324/2013 (31 March 2016).

³² *Whelan v Ireland* Communication No 2425/2014, UN Doc CCPR/C/119/D/2425/2014 (17 March 2017).

³³ Constitution of India, art 51(c).

³⁴ *X v Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi* 2022 SCC OnLine SC 1321.

marital status is unconstitutional. However, In *X v Union of India*,³⁵ hon'ble court has applied the jurisprudential concept of balancing of interest by adopting the principle of foetal viability in order to strike the balance between women's right to reproductive autonomy and rights of unborn child, in the course of applying the Medical Termination of Pregnancy (Amendment) Act 2021.³⁶ Concept of foetal viability signifies that once the presence of viable foetus is established then reproductive autonomy should not override the special legislation. Conception of foetal viability became the decisive concept in the US in 1973 in the judgement rendered in *Roe v Wade*,³⁷ wherein right to abortion held to be linked with the aforesaid concept. However, the right to abortion guaranteed in the abovementioned case overturned in 2022 in the case of *Dobbs v Jackson Women's Health Organization*,³⁸ by virtue of which the right pertaining to the termination of pregnancy is narrowed down in the USA, which has ignited the debates and discussions in the judicial and legislative discourse. In *Artavia Murillo v Costa Rica*,³⁹ the doctrine of balancing of interest applied while interpreting the right to life to strike a balance between the issues of protecting prenatal life and reproductive liberty of women seeking approval for termination of pregnancy. Similarly, in Great Britain, there is no absolute right to abortion.⁴⁰ The registered medical practitioner can only give the due permission on certain grounds while acting in good faith. In the historic consequence of events France attained the status of being first nation which has constitutionally recognized women's bodily autonomy by guaranteeing women's freedom to have an abortion as a constitutional freedom on 4 March 2024.⁴¹ Both houses of the French Parliament adopted the bill, and Parliament convened in Congress approved the amendment to article 34 of the French Constitution, which now guarantees the freedom of women to have recourse to abortion under conditions set by law.

Right to abortion has not been universally recognized as right per se by the international law. However, the growing recognition of reproductive justice has created a significant legal transition across the jurisdictions. International laws have also started to recognize as well as safeguard reproduction rights of the right holders by obliging the states to discharge its responsibilities under the integral concept of *parens patriae*. Latin phrase designate the states

³⁵ *X v Union of India* 2023 SCC OnLine SC 822.

³⁶ Medical Termination of Pregnancy (Amendment) Act 2021.

³⁷ *Roe v Wade* 410 US 113 (1973).

³⁸ *Dobbs v Jackson Women's Health Organization* 597 US 215 (2022).

³⁹ *Artavia Murillo v Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 257 (28 November 2012).

⁴⁰ Abortion Act 1967, s 1.

⁴¹ Loi constitutionnelle n° 2024-200 du 8 mars 2024 relative à la liberté de recourir à l'interruption volontaire de grossesse (France).

as ‘parent of nation’ and strengthen them with the power to act as guardian for mitigating the legal, social, political and economic vulnerability. However, by failing to address and redress the challenges of inaccessibility to the healthcare facilities, absence of required medical practitioners, delay in rendering judicial decisions, lack of reproductive rights awareness and procedural delays, states fail to discharge its onus as ‘parent of nation’. States failure jeopardises the reproductive rights by exposing the right holders to below mentioned structural and judicial vulnerabilities.

a) Inaccessibility to the healthcare facilities

Significantly, objective of the international criminal law and international human rights law ensuring abortion services as part of healthcare system to pregnant women irrespective of caste, creed, region and religion, social and economic status. But the reality is far from the ideology, as the underdeveloped and developing countries lack the required healthcare facilities to secure the safe abortion which forces the women to opt for the unsafe practices. Such compulsion is not only exposing their lives to greater risk rather the objective of the *parens patriae* is also getting futile.

b) Absence of required medical practitioners

Most of the contemporary legislations prevailing in the countries pertaining to medical termination of pregnancy are more doctors centric, rather than being right based. For example- India’s Medical Termination of Pregnancy (Amendment) Act 2021 requires approval from the registered medical practitioner for the required procedure. However, the ratio of doctor patient is quite uneven, that result into the delay in granting approval.⁴² The issue pertaining to termination of pregnancy is not a legal issue rather it’s a medico-legal, due to which any such delays mostly results into denial of justice.

c) Delay in rendering judicial decisions

Laws regulating medical termination of pregnancy are special legislations, dealing with the issue of termination of pregnancy. However, most of the country’s legislations do not contain any provision for the constitution of special courts. Issue of termination of pregnancy is not purely a legal issue; it’s a medico-legal matter which needs speedy trial considering the nature

⁴² Lok Sabha Debates, ‘The Motion for Consideration of the Medical Termination of Pregnancy (Amendment) Bill, 2020’ (17 March 2020) <<https://indiankanoon.org/doc/93517402/>> accessed 10 October 2026.

of the complexities. The absence of this critical provision results into the denial of justice, especially in the cases where woman is rape victim.

d) Lack of reproductive rights awareness

Lack of awareness is another most significant barrier due to which attaining the goal of reproductive justice is far lagging behind. A systematic review found that, in nine of the sixteen studies measuring general awareness, fewer than half of the women surveyed correctly knew their country's abortion law.⁴³ By virtue of lack of awareness the issue of forced conception and forced child bearing is highly prevalent, especially in the countries wherein literacy rate is also on lower side.

e) Procedural delays

In several countries medical termination of pregnancy laws require approval from the medical board in case of seeking termination beyond the gestational limit. However, such approval is so time consuming that it results into pushing the pregnancy beyond the permissible timeframe which ultimately results into the denial of approval for termination of pregnancy.

V. CONCLUSION

Right to abortion is part and parcel to the goal of reproductive justice, which cannot be attained without state cooperation and recognition. The point of intersection between international criminal law and abortion rights signifies the legal evolution of international abortion jurisprudence from a restricted focus on criminal accountability to the international acceptance of reproductive justice. This transition is intrinsically linked with the growing acknowledgement of doctrine of state responsibility. States are subjected to international legal obligation to secure reproductive justice by providing uninterrupted access to abortion healthcare. However, international legal recognition of various reproductive harms, such as forced pregnancy, sexual slavery and forcible continuation of pregnancy after rape, as crime against humanity has significantly highlighted the issue of reproductive justice. Consequently, states are obliged to ensure their adherence to international conventions and treaties to discharge the obligation of ensuring reproductive rights to right holders. Rome Statute of the International Criminal Court is the significant international legal instrument, which recognises reproductive rights and various reproductive harms as barrier in securing reproductive justice.

⁴³ AR Assifi and others, 'Women's Awareness and Knowledge of Abortion Laws: A Systematic Review' (2016) 11(3) PLoS ONE e0152224.

The statute defines forced pregnancy as ‘the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law’.⁴⁴ Rome Statute plays a decisive role in obliging the perpetrators to mandatorily prevent the commission of the offence of forced pregnancy. The significant developments are evidenced in the form of various judicial pronouncements delivered by the International Criminal Court, wherein legal and judicial understanding of reproductive autonomy has been significantly shaped to ensure reproductive justice. In spite of the legal recognition and acceptance of abortion rights as the basic human rights to be exercised by the pregnant women, states are far lagging behind attaining the goal of reproductive justice. The anarchic laws regulating termination of pregnancy in numerous countries adversely restrict the right holders to access safe and legal abortion.

⁴⁴ Rome Statute (n 2) art 7(2)(f).

THE DEEFAKE DILEMMA: PROTECTION, EXPRESSION AND THE CONSTITUTIONAL LIMITS OF INDIA'S AI REGULATION

- Vanshika Setia*

ABSTRACT

Synthetic audio, images and video can facilitate fraud, sexual abuse, electoral deception and injury to dignity, but the same technologies also support satire, accessibility, education and artistic production. This paper aims to examine whether India's legal response protects individuals without imposing disproportionate restraints on expression. It corrects the earlier chronology by treating the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2026 as enacted law in force from 20 February 2026. The Rules define synthetically generated information, require preventive technical measures against unlawful synthetic media, and impose labelling and provenance duties for permitted material. They operate alongside the Information Technology Act 2000, the Bharatiya Nyaya Sanhita 2023, the Bharatiya Sakshya Adhiniyam 2023, copyright, data-protection and electoral law. The paper further evaluates this framework under articles 14, 19 and 21 of the Constitution. It highlights that rapid victim protection is legitimate, but automated prevention, compressed decision periods and broad categories of deception require transparent standards, human review and effective challenge mechanisms. It proposes a harm-based, risk-tiered model that allocates duties according to the seriousness of harm and the institutional capacity of the regulated actor. This model combines labelling and provenance for lawful synthetic media with expedited removal for intimate abuse, child sexual exploitation, fraud and election-related deception, while preserving satire, research, accessibility and good-faith creative uses.

Keywords: Preventive technical measures, data protection, harm-based model, synthetic media

I. INTRODUCTION

Deepfakes are synthetic or materially altered audio-visual representations that can appear to depict a real person or event. Their legal significance lies not in the use of artificial intelligence by itself but in the capacity of realistic fabrication to distort identity, consent and public understanding. A cloned voice may be used to obtain money; a fabricated intimate image may violate bodily privacy; and a false video of a candidate may influence political judgment before its falsity can be established. At the same time, synthetic techniques are routinely used in dubbing, visual effects, parody, education and assistive technology. A constitutionally sound legal framework must therefore distinguish harmful deception from lawful creation rather than treating every computer-assisted alteration as equivalent.

* 3rd year Law Student, School of Law, Christ(Deemed to be University), Delhi-NCR

The constitutional issue herein has two sides. Articles 21 and 14 require meaningful protection against invasions of privacy, dignity and equal citizenship. Article 19(1)(a), however, protects the creation, publication and receipt of expression, subject only to the grounds enumerated in article 19(2). Restrictions on synthetic media must consequently have legal authority, pursue a constitutionally permitted aim and remain proportionate. This inquiry becomes particularly important when intermediaries use automated tools to prevent publication or when lawful material is removed before its creator receives a meaningful opportunity to respond.

India's position changed materially on 10 February 2026, when the Central Government notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2026. The amendment came into force on 20 February 2026 and inserted a specific framework for synthetically generated information.¹ Earlier drafts and commentary should not be confused with this enacted text. In particular, the final framework does not use the draft proposal that a label occupy ten per cent of the visual display. It instead requires clear and prominent labelling, together with permanent metadata or another technically feasible provenance mechanism.²

The paper first explains the harms and legitimate uses of synthetic media. It then analyses the Indian statutory framework before and after the 2026 amendment, including blocking, intermediary liability, criminal law, electronic evidence, data protection, copyright and electoral regulation. It applies articles 14, 19 and 21 and the Supreme Court's proportionality jurisprudence before comparing selected foreign approaches. The principal contribution of the paper is a hybrid, harm-based model combining automated triage with human decision-making, differentiated response periods, accessible reasons and appeal, and duties calibrated to the power and capacity of creators, generation services and dissemination platforms.

II. SYNTHETIC MEDIA HARMS AND LEGITIMATE USES

Synthetic media can intensify familiar legal injuries because it is inexpensive to produce, easy to replicate and capable of circulating before verification. Non-consensual intimate imagery attacks dignity, sexual autonomy and bodily privacy. Identity simulation can support cheating, extortion or financial fraud. Fabricated recordings may damage reputation or generate public

¹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2026, GSR 120(E), 10 February 2026, in force 20 February 2026.

² Ministry of Electronics and Information Technology, 'Frequently Asked Questions on the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2026' 14–15.

disorder. False political media is especially time-sensitive because correction after polling may not restore the informational conditions in which votes were cast.

These harms should not obscure legitimate uses. Film-makers may alter voices or images with consent; museums and teachers may create reconstructions; persons with disabilities may rely on synthetic narration; and political speakers may use parody to criticise public figures. The 2026 Rules recognize part of this distinction by excluding routine or good-faith editing, enhancement, document preparation and accessibility uses that do not materially distort the underlying content. Labelled satire and creative works may also remain lawful where they do not violate another law.³ Hence, the important regulatory question is whether particular synthetic media creates legally cognizable harm, not whether artificial intelligence was present anywhere in the production process.

III. THE INDIAN LEGAL FRAMEWORK BEFORE THE 2026 AMENDMENT

Information Technology Act and intermediary liability

Before the specific 2026 framework, the Information Technology Act 2000 addressed parts of the problem through several offences. Section 66C concerns fraudulent or dishonest use of another person's electronic signature, password or unique identification feature. Section 66D punishes cheating by personation through a communication device or computer resource. Section 66E protects privacy in images of a private area. Sections 67, 67A and 67B address obscene, sexually explicit and child sexual material respectively.⁴ These provisions may apply to particular deepfakes, but none provides a complete civil and procedural framework for every form of synthetic deception.

Section 79 grants conditional immunity to intermediaries that satisfy its requirements. In *Shreya Singhal v Union of India*, the Supreme Court read down the intermediary rules then in force so that 'actual knowledge' meant knowledge through a court order or notification by the appropriate government or its agency relating to the subjects in article 19(2).⁵ A private complaint is therefore not automatically equivalent to the legally specified actual knowledge that triggers the statutory removal obligation. The distinction protects intermediaries from

³ Ministry of Electronics and Information Technology (n 2) 5–7.

⁴ Information Technology Act 2000, ss 66C–67B.

⁵ *Shreya Singhal v Union of India* (2015) 5 SCC 1 [117]–[119].

being compelled to adjudicate every contested speech claim, but it can delay relief where an intimate or impersonating deepfake spreads rapidly.

Section 69A separately authorises the Central Government or an authorised officer to direct blocking on specified grounds, including sovereignty and integrity, defence, security of the State, friendly relations with foreign States, public order and prevention of incitement to cognizable offences related to those grounds. The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009 prescribe examination by a designated officer, committee scrutiny, reasons and review.⁶ In *Shreya Singhal*, the Court sustained section 69A partly because these safeguards accompany the narrowly stated grounds. Blocking is therefore a public-law process distinct from an intermediary responding to an ordinary user grievance.

Criminal law and evidence

The Bharatiya Nyaya Sanhita 2023 may apply where synthetic media forms part of cheating, forgery, intimidation, defamation, obscenity or conduct affecting public tranquility. The application of the said provisions depends on the elements of the specific offence, including intention, deception, threatened injury and use of a false electronic record. It is inaccurate to state that artificial intelligence cannot fall within these provisions merely because a computer generated the output. Liability ordinarily attaches to persons who direct, publish or use the system with the required mental element; the computer is not treated as an autonomous offender.

Authenticity is also an evidentiary question. Sections 61 and 63 of the Bharatiya Sakshya Adhiniyam 2023 recognize electronic or digital records and prescribe conditions for their admissibility. Expert opinion may assist a court, but a bare assertion that a recording is a deepfake should not determine its weight.⁷ Preservation of the original file, provenance metadata, chain of custody, device information and the method used for forensic examination may all be relevant. Therefore, the framework needs to protect victims without reversing the ordinary burden of proving contested electronic material.

⁶ Information Technology Act 2000, s 69A; Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009, rr 7–14; *Shreya Singhal* (n 5) [108]–[114].

⁷ Bharatiya Sakshya Adhiniyam 2023, ss 39, 61 and 63.

Gendered harm and indecent representation

Sexualized deepfakes disproportionately expose women and children to humiliation, harassment and loss of control over their identities. The Indecent Representation of Women (Prohibition) Act 1986 regulates indecent representation in advertisements and publications, although its terminology predates networked synthetic media.⁸ Sections 67A and 67B of the Information Technology Act are more directly relevant to sexually explicit and child-related material, while rule 3(2)(b) of the intermediary rules supplies an expedited complaint mechanism for specified intimate, impersonating and morphed content. The overlap between these provisions needs to be understood as complementary rather than presented as a single deepfake offence.

IV. THE 2026 SYNTHETICALLY GENERATED INFORMATION FRAMEWORK

Definition and scope

The 2026 Amendment Rules define ‘audio, visual or audio-visual information’ broadly and define ‘synthetically generated information’ as such information artificially or algorithmically created, generated, modified or altered using a computer resource so that it appears real, authentic or true and depicts a person or event in a manner likely to be perceived as indistinguishable from a natural person or real-world event.⁹ Text-only output is outside this special definition, although ordinary due-diligence rules may still apply if the text is unlawful.

The definition is narrower than a rule covering every AI-assisted work. Routine good-faith editing, technical correction, colour adjustment, noise reduction, transcription, compression, translation, accessibility enhancement and ordinary preparation of documents or educational materials are excluded where they do not materially alter or misrepresent the substance, context or meaning. This provides an important protection for everyday editing and creative practice. However, uncertainty continues to exist in evaluative expressions such as ‘materially’ and ‘indistinguishable’, which require transparent platform standards and consistent review.

Preventive duties and labelling

New rule 3(3) applies to intermediaries that enable or facilitate the creation, alteration, publication or dissemination of synthetically generated information. Covered intermediaries

⁸ Indecent Representation of Women (Prohibition) Act 1986, ss 2(c), 3 and 4.

⁹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, rr 2(1)(ca) and 2(1)(wa), inserted by GSR 120(E), 10 February 2026.

must deploy reasonable and appropriate technical measures, including automated tools or suitable mechanisms, to prevent unlawful synthetic media. The listed high-risk categories include child sexual exploitation, non-consensual intimate imagery, obscene or sexually explicit material, false documents, certain arms-related material and deceptive false depictions of a person or event.¹⁰

Synthetic media that is not prohibited must be clearly and prominently labelled. It must also carry permanent metadata or another technically feasible provenance mechanism, including a unique identifier capable of identifying the material as synthetic and the computer resource used to create or alter it. Intermediaries must take reasonable measures against removal or suppression of these indicators.¹¹ The said approach facilitates transparency regarding the source, but metadata is not conclusive proof of truth or falsity: it can be absent, stripped or forged, and legacy or foreign material may not comply.

Three different response periods

The Rules herein contain different timelines that should not be collapsed into a single ‘takedown deadline’. First, after actual knowledge through a court order or reasoned intimation from an authorised government officer, rule 3(1)(d) requires removal or disabling of specified unlawful information within three hours. Secondly, the special grievance period for certain removal requests under rule 3(2)(a)(i) is thirty-six hours. Thirdly, rule 3(2)(b) requires action within two hours on qualifying complaints concerning nudity, sexual material, impersonation and morphed imagery.¹² The difference exists because each timeline is based on a different legal trigger, but the shorter periods intensify the need for accurate notice, records and post-decision review.

Safe harbour and procedural accountability

The amendment clarifies that an intermediary does not violate section 79(2)(a) or (b) merely because it removes information in compliance with the Rules or uses reasonable technical measures to identify violations.¹³ This protects moderation undertaken in good faith. It does

¹⁰ Information Technology Rules 2021, r 3(3)(a)(i)(I)–(IV); Ministry of Electronics and Information Technology (n 2) 12–14.

¹¹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, rr 3(3)(a)(ii) and 3(3)(b).

¹² Information Technology Rules 2021, rr 3(1)(d), 3(2)(a)(i) proviso and 3(2)(b); Ministry of Electronics and Information Technology (n 2) 10–12.

¹³ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 2(1B).

not, however, resolve every constitutional concern. A creator may lose audience, income or political relevance even if content is later restored. Significant social media intermediaries already have duties concerning notice and an opportunity to dispute certain voluntary removals, but an effective system should provide intelligible reasons, preservation of contested material, prompt human reconsideration and an independent escalation route.

V. DATA PROTECTION PRIVACY AND THE DATA PROTECTION BOARD

A deepfake can involve processing digital personal data when an identifiable person's image, voice or other data is collected or used. The Digital Personal Data Protection Act 2023 regulates processing for a lawful purpose and contains requirements concerning notice, consent, legitimate uses, security safeguards, breach notification and children's data.¹⁴ It does not create a general intellectual-property right in every representation of a person, nor does it automatically provide the rapid public takedown mechanism needed for viral content.

The Digital Personal Data Protection Rules 2025 were notified with staggered commencement rather than as a single immediately operative code.¹⁵ The paper therefore needs to identify which obligation is in force at the relevant time instead of treating every provision as simultaneously enforceable. The Data Protection Board is a statutory adjudicatory body under sections 18–27 of the Act; it is not a body that 'declared' the Act inoperative. Its role concerns inquiries, directions and monetary penalties within the statutory scheme. Data-protection remedies and intermediary takedown duties should be presented as separate but potentially overlapping mechanisms.

VI. COPYRIGHT PERFORMERS AND PERSONALITY INTERESTS

Synthetic media can implicate copyright even when it is not obscene or fraudulent. Reproduction of protected footage, music, photographs or performances may infringe section 51 of the Copyright Act 1957 unless an exception applies. Performers have economic rights under sections 38 and 38A and moral rights under section 38B. Authors may invoke section 57 against prejudicial distortion or mutilation of their works.¹⁶ These rights attach to protected works and performances; they do not convert a person's face or voice, standing alone, into copyright owned by that person.

¹⁴ Digital Personal Data Protection Act 2023, ss 4–10, 18–27.

¹⁵ Digital Personal Data Protection Rules 2025, GSR 846(E), 13 November 2025, r 1(2).

¹⁶ Copyright Act 1957, ss 38, 38A, 38B, 51, 52 and 57.

The legal questions herein need to be understood separately. Training on protected material raises questions different from reproducing a substantial part in an output. A consensual synthetic performance raises ownership and contractual questions different from a non-consensual imitation. Parody, criticism and review may engage statutory exceptions, but labelling alone does not cure infringement. Courts may also protect aspects of personality, publicity and passing off where false endorsement or commercial misappropriation is established. A complete remedy may therefore combine copyright, privacy, defamation, passing off and intermediary procedures.

VII. ELECTORAL DEEPFAKES AND DEMOCRATIC INTEGRITY

Synthetic political media can affect the voter's ability to form an informed judgment, especially when it is released shortly before polling. Section 123(4) of the Representation of the People Act 1951 addresses specified false statements of fact concerning a candidate's personal character or conduct when published with the requisite knowledge and electoral purpose. Section 126 regulates certain campaigning during the silence period.¹⁷ These provisions do not amount to a complete code for every AI-generated political communication.

The Election Commission has directed political parties to avoid deepfakes and patently false or misleading content and to remove offending material within the period stated in its directions after it comes to their notice.¹⁸ The 2026 Rules additionally identify a synthetic video falsely depicting an election candidate as an example of high-risk deception. Regulation in this aspect needs to remain connected with falsity, deception, harm and timing. Satire and criticism of public officials retain constitutional value and should not be removed merely because they use synthetic techniques.

VIII. CONSTITUTIONAL ASSESSMENT

Article 19 freedom of expression

Article 19(1)(a) protects not only agreeable factual speech but also political criticism, artistic expression and the circulation of ideas. In *Sakal Papers (P) Ltd v Union of India* and *Bennett Coleman & Co v Union of India*, the Supreme Court rejected indirect restraints that burdened

¹⁷ Representation of the People Act 1951, ss 123(4) and 126.

¹⁸ Election Commission of India, 'Responsible and Ethical Use of Social Media Platforms by Political Parties and their Representatives' (6 May 2024).

the freedom of the press.¹⁹ A legal obligation to label synthetic material is less intrusive than prohibition, but it is still a compelled disclosure affecting how speech is presented. Preventing publication through automated tools is more serious because it may operate as prior restraint.

Any restriction imposed needs to fall within article 19(2). Fraudulent impersonation may be connected with defamation, public order or incitement depending on the facts; sexual abuse may engage decency, morality and other offences; and false election media may implicate defamation or public order. Yet ‘misinformation’ or ‘deception’ is not by itself an independent ground in article 19(2). *Shreya Singhal* emphasises the constitutional distinction between discussion, advocacy and incitement.²⁰ The Rules should therefore be applied through the underlying law allegedly violated, not as a free-standing power to remove every false or unpopular representation.

Reputation is also constitutionally significant. In *Subramanian Swamy v Union of India*, the Court treated reputation as an aspect of article 21 while sustaining criminal defamation.²¹ In *Kaushal Kishor v State of Uttar Pradesh*, the Court reaffirmed that restrictions on speech must be traced to article 19(2), although rights may shape duties and remedies in disputes involving non-state actors.²² Together, these cases require a careful balance: reputational protection is legitimate, but it cannot create restrictions outside the constitutional text.

Article 14 arbitrariness and unequal burdens

Article 14 aims to prevent arbitrary state action and demands a rational relationship between classification and legislative purpose. Manifest arbitrariness, as discussed in *Shayara Bano v Union of India*, concerns action that is capricious, irrational or without an adequate determining principle.²³ A synthetic-media rule may be over-inclusive if it suppresses labelled satire that poses little risk, or under-inclusive if it catches only content made through a specified technique while equivalent deceptive editing escapes. The 2026 definition and its exclusions reduce some overbreadth, but the application of terms such as ‘likely to deceive’ must be supported by reasons and context.

19 *Sakal Papers (P) Ltd v Union of India* AIR 1962 SC 305; *Bennett Coleman & Co v Union of India* (1972) 2 SCC 788.

20 *Shreya Singhal* (n 5) [13].

21 *Subramanian Swamy v Union of India* (2016) 7 SCC 221.

22 *Kaushal Kishor v State of Uttar Pradesh* (2023) 4 SCC 1.

23 *Shayara Bano v Union of India* (2017) 9 SCC 1 [101].

The principle of equality also requires consideration of institutional capacity. A single creator does not control recommendation systems, repeat uploads or mass distribution in the way a large intermediary does. Uniform substantive standards may sometimes be justified, but compliance duties should be allocated according to function and capacity. Generation services can embed provenance; dissemination platforms can detect scale and coordinate repeat-upload controls; creators can declare synthetic alterations within their knowledge. Treating these actors as interchangeable would impose unequal burdens without improving victim protection.

Article 21 privacy dignity and due process

The nine-judge bench in *Justice KS Puttaswamy (Retd) v Union of India* recognised privacy as intrinsic to dignity, liberty and autonomy.²⁴ A non-consensual intimate deepfake interferes with bodily privacy even though the depicted event never occurred. Identity appropriation can likewise deprive a person of control over how their voice, image and conduct are presented. Effective and rapid remedies therefore advance article 21.

Article 21 also has an important role in the procedure followed. An affected creator should ordinarily receive notice of the legal ground, the content identified and the action taken. Emergency removal may precede a hearing where delay creates serious and irreversible harm, particularly in intimate-abuse or child-safety cases, but prompt post-decisional review must follow. The process should preserve evidence for investigation while limiting unnecessary retention and disclosure. Human review is especially important when detection tools produce uncertain results or when context determines whether a work is parody, news reporting or deception.

Proportionality

Modern Dental College and Research Centre v State of Madhya Pradesh requires a proper purpose, rational connection, necessity and balancing between the importance of the aim and the restriction imposed.²⁵ *Internet and Mobile Association of India v Reserve Bank of India* demonstrates that a restriction may fail where the decision-maker does not establish why less restrictive alternatives are inadequate.²⁶ *Anuradha Bhasin v Union of India* adds the

²⁴ *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1.

²⁵ *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353 [60]–[65].

²⁶ *Internet and Mobile Association of India v Reserve Bank of India* (2020) 10 SCC 274.

requirements of publication, reasons, temporal discipline and review where restrictions affect internet-based expression.²⁷

Applied to the 2026 Rules, legality is supplied by the Information Technology Act and the notified Rules, although each executive action must remain within the parent statute. Victim protection, child safety, fraud prevention and public order are legitimate aims. Labelling and provenance are rationally connected to transparency, and rapid action is connected to limiting irreversible dissemination. The necessity inquiry is more difficult. Automated prevention may be justified as triage at scale but should not be the sole basis for final decisions in contestable cases. The final balance improves when the system includes narrow high-risk categories, reliable notice, human review, restoration, and public information about error rates and outcomes.

IX. COMPARATIVE APPROACHES

The comparative position presents different models that can be considered for India. Article 50 of the European Union Artificial Intelligence Act establishes transparency duties for certain synthetic content while providing differentiated treatment for evidently artistic, creative, satirical or fictional works, subject to disclosure that does not hamper enjoyment of the work.²⁸ The United Kingdom's Online Safety Act 2023 uses risk-assessment and systems-based duties, with obligations varying by service and risk.²⁹ These approaches support calibrated duties but operate within institutional settings that cannot be copied without adaptation.

In the United States, the federal TAKE IT DOWN Act addresses non-consensual intimate depictions, including digital forgeries, and requires covered platforms to establish a notice-and-removal process.³⁰ California regulates materially deceptive election communications and provides remedies while recognising protected contexts and defences. China's deep-synthesis rules rely heavily on provider duties, verification and conspicuous labelling.³¹ The common

²⁷ *Anuradha Bhasin v Union of India* (2020) 3 SCC 637.

²⁸ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJL 2024/1689, art 50(4).

²⁹ Online Safety Act 2023 (UK), pts 3–4.

³⁰ Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act, Pub L No 119-12, 139 Stat 55 (2025).

³¹ Provisions on the Administration of Deep Synthesis of Internet-Based Information Services, (Cyberspace Administration of China, Ministry of Industry and Information Technology and Ministry of Public Security Order No 12, 25 November 2022, effective 10 January 2023). promulgated 25 November 2022, effective 10 January 2023).

principle that can be drawn from these models is that risk, consent, context and the function of the regulated actor should shape the legal response.

X. A HYBRID RISK TIERED REGULATORY MODEL

Risk classification based on harm

The model proposed by this paper avoids unsupported numerical thresholds and uses categories based on harm, consent, deception, reach and urgency. Tier One covers child sexual exploitation, non-consensual intimate imagery, credible fraud and synthetic material that creates an imminent threat to life or public safety. It permits immediate restriction followed by mandatory human confirmation and rapid notice. Tier Two covers deceptive impersonation, false endorsement, materially deceptive election content and serious reputational fabrication. It requires expedited assessment, preservation of evidence and a reasoned decision. Tier Three covers lawful artistic, satirical, educational, accessibility and entertainment uses. It ordinarily requires proportionate labelling and provenance rather than suppression.

Shared but differentiated responsibilities

The duties imposed should depend upon the control exercised by the concerned actor. A generation service should warn users, prevent clearly unlawful requests where technically and legally identifiable, and embed durable provenance in covered output. A dissemination platform should operate complaints, identify coordinated or repeated distribution, preserve evidence and provide human review. A creator should disclose realistic synthetic alteration where required and should not remove provenance information. Government authorities should issue reasoned and reviewable notices that identify both the legal provision and the specific material. This allocation is more precise than transferring every obligation to the least-resourced participant.

Human oversight and procedural safeguards

Automated systems should be used to rank or flag the concerned content, not finally determine contested legality without appropriate review. The reviewer should receive the original complaint, the content, the detection confidence, the applicable legal ground and contextual material supplied by the speaker. Every removal notice should state the reason, duration, review route and evidence-preservation policy. Successful appeals should produce prompt

restoration and, where technically possible, correction of recommendation or account penalties caused by the initial decision.

The scope of emergency procedures should remain narrow. Two-hour action on qualifying intimate complaints can be justified by the severity and irreversibility of harm, but complainants should identify the depicted individual and the basis of non-consent or impersonation. For political material, platforms should prioritise rapid authentication and conspicuous warning where removal is legally uncertain. Public transparency reports should disclose the number of synthetic-media complaints, legal grounds, automated flags, removals, restorations, average decision time and appeal success, without publishing personal data of victims.

Independent review and stakeholder participation

The Grievance Appellate Committee provides an administrative appeal within the intermediary framework, but high-impact or recurring disputes would benefit from specialised and publicly reasoned guidance.³² Standards should be developed with victims, creators, disability groups, child-safety organisations, intermediaries, forensic specialists and civil-society organisations. Consultation is not a substitute for legislative authority; it improves the evidence base for deciding what measures are feasible, accurate and least restrictive.

XI. CONCLUSION

India presently has an enacted synthetic-media framework rather than the purely proposed architecture described in the earlier manuscript. The 2026 Amendment Rules correctly recognise that realistic synthetic audio-visual material can cause urgent and irreversible harm. Their definition, good-faith exclusions, labelling obligations, provenance requirements and expedited victim procedures are important developments. They must nevertheless be read with the Information Technology Act, criminal law, electronic-evidence rules, data protection, copyright and electoral regulation rather than treated as a complete deepfake code.

The constitutional issue that arises herein is to protect privacy, dignity and democratic participation without turning technical uncertainty into routine suppression. Articles 14, 19 and 21 require clear legal grounds, rational classifications, narrow restrictions and fair procedures. The hybrid model proposed herein aims to fulfil these requirements by connecting regulatory

³² Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, r 3A.

intensity to demonstrable harm, allocating duties according to institutional control and combining automated triage with accountable human judgment. India's framework will be constitutionally durable only if speed is accompanied by reasons, review, restoration and continuing evidence-based evaluation.

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