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ASIAN YEARBOOK OF INTERNATIONAL LAW

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INTRODUCTION BY THE GENERAL EDITORS

With the publication of this, the eleventh volume, the *Asian Yearbook of International Law* has entered its second decade. Its appearance is based on an awareness of the need to assist Asian perspectives on international law to become known to other parts of the world, as well as among Asians themselves. Such awareness underlay the launch of this Yearbook in 1991, and has ever since been its guiding principle.

It is true that modern international law originated in Western European Christendom, spread in the late eighteenth century through the Western hemisphere with the Independence of the United States of America, then further expanded its sphere of application through Turkey and Western Asia to the Far East in the mid-nineteenth century. On its way towards its present manifestation, international law has faced various challenges, including Marxist-Communist-oriented theory, yet has grown to be a well established global body of law today, having survived numerous experiences in the meantime.

Indeed, it was during the 1960s and 1970s that international law acquired its truly global character with the advent of a great number of new States in Asia and Africa. Acceleration in the process of decolonization changed the nature of international relations and the world's power balance from Euro-American-centric to global. Consequently, the Euro-American States are no longer the sole central constituents of international law. The "new States", outnumbering the "old States", have wanted to see their interests, especially economic ones, more equitably advanced. Some of their claims, presented in terms of international law in the forum of the United Nations, for example, have now been realized to constitute a significant element of international law.

Such a course of developments has in turn helped to develop a thought among Asian international lawyers that Asian perspectives might more extensively be presented to the world's international lawyers. The thought seems to have been inspired in part by the highly active law-making process within the framework of the European Union. Other European institutions, including the European Court of Human Rights, have in their respective ways contributed to the development of international law. The Asian States have also witnessed the contribution to the development of international law of the United States, especially through its laws of extra-territorial application

which are perceived to be 'filling the gap' in international law. Given this nature of international law-making, it has been argued in some quarters that Asia as a region could also from its perspective offer a more effective input to the development of international law. In such a context this Yearbook, including as it does articles discussing various issues of international law from Asian perspectives, as well as the State practice and other legal materials of the Asian countries, has been making its own contribution to that cause.

It is the Editorial Board's sincere hope that readers and prospective contributors will continue both to show their interest in this Yearbook and to work with us for the cause of the development of international law in Asia. We are pleased that the Governing Board of the Foundation for the Development of International Law has appointed Professor Thio Li-ann of the Faculty of Law of the National University of Singapore as a new General Editor to replace Professor Surya Subedi of the University of Leeds, following his wish to stand down from that capacity after serving the Yearbook for six full years. He will, nevertheless, continue to serve as a member of the Editorial Board of the Yearbook.

The General Editors

ABBREVIATIONS

AJIL	-	American Journal of International Law
All ER	-	All England Law Reports
Arizona JICL	-	Arizona Journal of International and Comparative Law
Brooklyn JIL	-	Brooklyn Journal of International Law
BYIL	-	British Yearbook of International Law
CAA	-	Civil Aeronautics Administration
CAHAR	-	Ad Hoc Committee of Experts on the Legal Aspects of Refugees
CAT	-	Convention Against Torture and Other Cruel Inhuman or
	-	Degrading Treatment or Punishment
CCX	-	Chicago Climate Exchange
CJIL	-	Chinese Journal of International Law
CLP	-	Chinese Law and Practice
ECHR	-	European Court of Human Rights
ECX	-	European Climate Exchange
EIA	-	Environmental Impact Assessment
FCO	-	Foreign and Commonwealth Office [England]
FLR	-	Family Law Reports
Fordham ILJ	-	Fordham International Law Journal
GEF	-	Global Environmental Facility
GEP	-	Group of Eminent Persons
GHG	-	Greenhouse Gas
HKLJ	-	Hong Kong Law Journal
Houston JIL	-	Houston Journal of International Law
HRC	-	Human Rights Committee
HRLJ	-	Human Rights Law Journal
ICCPR	-	International Covenant on Civil and Political Rights
ICJ	-	International Court of Justice [The Hague]
ICLQ	-	International and Comparative Law Quarterly
IFC	-	International Finance Corporation
IHRR	-	International Human Rights Reports
IJIL	-	Indian Journal of International Law
IJWI	-	International Journal of World Investment
ILM	-	International Legal Materials

ILO	-	International Labour Organization
ILR	-	International Law Reports
IMF	-	International Monetary Fund
IPR	-	Intellectual Property Rights
IPS UN Journal	-	International Press Service United Nations Journal
IRO	-	International Refugee Organization
JALC	-	Journal of Air Law and Commerce
JALS	-	Journal of Air Law and Space
LNHCR	-	League of Nations High Commissioner for Refugees
LQR	-	Law Quarterly Review
MLJ	-	Malayan Law Journal
MLR	-	Michigan Law Review
NATO	-	North Atlantic Treaty Organization
NGO	-	Non-Governmental Organization
NSWR	-	New South Wales Law Reports
OAS	-	Organization of American States
OECD	-	Organization for Economic Cooperation and Development
Penn State ILR	-	Penn State International Law Review
QBD	-	Queen's Bench Division [England]
RAN	-	Rainforest Action Network
SAARC	-	South Asian Association for Regional Development
SACR	-	South African Law Commission
SADF	-	South Asian Development Fund
SIL	-	Studies in International Law
Sing.YBIL	-	Singapore Yearbook of International Law
SJLS	-	Singapore Journal of Legal Studies
SLR	-	Singapore Law Reports
Texas ILJ	-	Texas International Law Journal
TJAIL	-	The Japanese Annual of International Law
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNDP	-	United Nations Development Programme
UNEP	-	United Nations Environment Programme
UNHCR	-	United Nations High Commissioner for Refugees
UNTS	-	United Nations Treaty Series
Virg.JIL	-	Virginia Journal of International Law
WLR	-	Weekly Law Reports
WWF	-	World Wildlife Fund
Yale JIL	-	Yale Journal of International Law
YILC	-	Yearbook of the International Law Commission

ARTICLES

NON-RECOGNITION OF PUTATIVE FOREIGN STATES (TAIWAN) UNDER SINGAPORE'S STATE IMMUNITY ACT

C.L. Lim*

1. INTRODUCTION

The power to conduct the foreign affairs of Singapore is vested in the President yet may be exercised by the Executive.[1] To that extent, Parliament in Singapore exercises ultimate control over the conduct of Singapore's external relations. Much else also remains the same as the case in the United Kingdom. The Government of the day cannot seek to alter the laws of Singapore; only Parliament can. Treaties entered into by the executive branch cannot, therefore, be applied by the courts without an enabling Act.[2] Thus, where a treaty may have as one of its effects an

* Of the Faculty of Law, National University of Singapore. I am grateful to Dr. O.A. Elias and Dr. Yeo Tiong Min for their helpful comments on an earlier draft. I should also like to thank my able student, Mr. Toh Shin Hao, for engaging me in the various legal developments in Singapore and Canada. The views expressed herein are my own, however, as are any mistakes and omissions. E-mail: lawlimcl@nus.edu.sg

[1] Constitution of the Republic of Singapore, Articles 23 & 24.

[2] *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR 943, para. 74 ("…until ratified and enacted as an Act of Parliament, no international treaty can be binding on our courts", *per* Karthigesu J.A.); *Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos (Deposition Proceedings)* [1989] SLR 591 (Singapore, High Court) ("It is not disputed that the word 'agreement' used as an alternative to the word 'treaty'… refers to an agreement between states that creates obligations in international law and not under the domestic laws of the countries concerned", *per* Chan Sek Keong J., as he then was). *See* also *PP v Salwant Singh s/o Amer Singh* [2003] SGDC 146 (Singapore Subordinate Courts, unreported), para. 36, citing *JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418. Mention should be made that, in respect of the decision in *Salomon v Commissioners of Customs & Excise* [1967] 2 QB 143, 144 (*per* Diplock L.J., as he then was), the position in Singapore is that the Act must *expressly* refer to the treaty in question for the latter to be called upon in aid of the interpretation of the former; Interpretation Act (Cap. 1), section 9A(3)(e); Lim, C.L., "Executive lawmaking in compliance of international treaty", [2002] *Singapore Journal of Legal Studies* 73, at 88, note 31.

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alteration in the laws of Singapore, Parliamentary sanction would be required.[3]

Conversely, the courts cannot exercise the power to conduct Singapore's external relations, for the courts do not have that power. It is in light of this rule, and the rule that the power to conduct Singapore's external relations is vested in and is exercisable by the executive branch, that we might best approach the recent case of *Anthony Woo v Singapore International Airlines*.[4] This is the first substantive judicial pronouncement by the Singapore courts on the scope, effect and role of executive certification under Singapore's State Immunity Act of 1979,[5] which resembles closely the United Kingdom's State Immunity Act of 1978.

Singapore Airlines had sought to join the Civil Aeronautics Administration (CAA) of Taiwan[6] as a third party in proceedings brought by the plaintiff, Anthony Woo. The circumstances leading to the case concern the crash of Singapore Airlines flight SQ006 in Taipei's Chiang Kai Shek Airport. Before Choo Han Teck J., the Taiwanese CAA argued either (a) that it was entitled to state immunity should Taiwan be a recognized state *de jure* for the purposes of Singapore's 1979 State Immunity Act, or (b) that if it is not recognized *de jure*, then the courts should nonetheless enquire whether it is at least recognized *de facto* for the purposes of the Act.[7] The case was brought on appeal to Singapore's Court of Appeal in *Civil Aeronautics Administration v Singapore Airlines Ltd*,[8] and it raises the question of what principles of construction the English courts would ordinarily apply to an executive certificate under Section 21 of the United Kingdom's State Immunity Act of 1978, a provision substantially similar to Section 18 of the Singapore Act of 1979. More specifically, should the Executive be taken, ordinarily, to wish to determine the availability of immunity to a putative foreign state from domestic legal process?

2. THE *"CARL ZEISS"* DOCTRINE REVISITED

It is said that the state must speak with one voice; meaning that the courts ought not to contradict the view of the executive branch in conducting the external relations

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[3] In the context of English law, this last statement of doctrine has caused a further distinction to be drawn between treaties which have the incidental effect of altering English law and treaties which are intended to alter English law. It is said that only the latter sort of case would require Parliamentary sanction, and that is presumably also why such treaties are invariably to be brought before Parliament today under the Ponsonby Rule. *See* Mann, F.A., *Studies in International Law* (Oxford: Clarendon, 1973), at 393-394.

[4] [2003] 3 SLR 688.

[5] (Cap. 313).

[6] This is how I shall hereafter refer to the Republic of China to avoid confusion with the People's Republic of China.

[7] [2003] 3 SLR 688, para 4.

[8] *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570 (C.A.) (Chao Hick Tin J.A.; Woo Bih Li J.).

of the nation.[9] However, today, English law is more unclear on this point of singular importance. In the *Carl Zeiss* case, in response to the then German Democratic Republic's attempt to apply its own legislation, the question there was whether the GDR could make such laws as would be recognized in the eyes of the English courts. The simple answer, taking as an example the conduct of Her Majesty's Government, was clearly "no". The Foreign and Commonwealth Office (FCO) had left a loophole, if only a slight one, through which the courts were subsequently to enter. That "loophole" was couched in the following words of Lord Reid, paraphrasing the certificate of the FCO in that case:[10]

> "From the zone allocated to the USSR Allied forces, under the Supreme Allied Commander … withdrew at or about the end of June, 1945. Since that time and up to the present date Her Majesty's Government have recognized the state and government of the USSR as *de jure* entitled to exercise government authority in respect of that zone … and … have not recognized either *de jure* or *de facto* any other authority purporting to exercise governing authority in or in respect of the zone."

The House of Lords could have inferred both from the terms of the certificate and from the nature of the relationship between HMG and the Government of the GDR that HMG did not at all, either *de jure* or indeed *de facto*, recognize any authority other than the USSR purporting to exercise governing authority in the particular zone. This the House of Lords did. The House could have adhered also to the spirit of the "one voice" doctrine, which no one seemed to question at that time. It could have concluded that the GDR Government was therefore not an "independent" governing authority. This the House of Lords also did. The difficulty that arose instead was that the House of Lords had also gone on to conclude that while the Government of the GDR was not an independent Government, it was nonetheless the *delegatus* of one; the *delegans* being the Government of the USSR.

With this fiction of a delegation of governmental authority, the House proceeded to recognize the legislation in question as, in the ultimate analysis, that of the Government of the USSR itself, and therefore valid. That decision has rather severely been criticized for the alleged mockery it makes of the doctrine that judicial notice will be taken of executive certificates.[11] According to this criticism, if the "one voice" doctrine is (truly) to be upheld, such certificates should in almost all cases be treated as conclusive on the question asked, barring a few well-known exceptions today, such as where the matter is not truly one within the sole knowledge of the executive branch, or where the construction of a statutory term is therein involved, for example. At the very least, this must be so in respect of the British Government's view on

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[9] *Republic of Spain v SS "Arantzazu Mendi" (The Arantzazu Mendi)* [1939] A.C. 256, 264 ("Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another").

[10] [1966] 2 All E.R. 544 (*per* Lord Reid).

[11] *See* for example Greig, D.W., "The Carl-Zeiss case and the position of an unrecognised government in English law", 83 *LQR* (1967), at 96.

whether it recognizes a foreign state (and until 1980, in respect of the recognition of foreign governments, too), for the simple reason that no one ought to know better than HMG.

Yet we will recall that the House was undaunted when, subsequently, it faced a similar situation in 1986, this time involving the "Bantustanization policy" of the Government of South Africa.[12] In *GUR Corporation v The Trust Bank of Africa Ltd*,[13] the Government of South Africa had sought to alleviate criticism of its apartheid policies by granting "independence" to the several "Bantustans", one of which was to have been the "Republic of Ciskei". The plaintiff had built a hospital and two school buildings on behalf of the Department of Public Works of the Republic of Ciskei (DPWRC) and sought the return by the defendant (the Trust Bank of Africa) of a deposit given by it to the building owners (DPWRC). The defendant bank sought to join the building owners as third parties. Steyn J. (as he then was) adhered to the "one voice" doctrine in holding that the building owners could not by virtue of being the apparatus of an unrecognized Government be sued in the English courts. Nor was common sense abandoned here, for it is well understood that businessmen should be wary even in their dealings with a *de facto* Government, let alone one that was recognized as neither *de facto* nor *de jure*.[14] The Court of Appeal reversed the decision and applied the "*Carl Zeiss* doctrine"; namely, that the DPWRC was acting on behalf of the Republic of South Africa itself. That the facts (namely, the terms of South Africa's 1981 Status of Ciskei Act) did not bear this out (purporting, after all, to have granted the Republic of Ciskei independence) was considered inconsequential to the point. Again, criticism followed, and justifiably so,[15] notwithstanding that in both this case and in *Carl Zeiss*, the result was in all probability highly convenient for all concerned, including the UK's Foreign and Commonwealth Office (FCO). Dr. Lawrence Collins has recently highlighted this convenient outcome in *Carl Zeiss*.[16] Similarly, the late F.A. Mann had, in the past, pointed out the convenient outcome in the *GUR Corporation* case.[17]

In any event, the form of judicial activism witnessed in both *Carl Zeiss* and *GUR* appears to have caught on. The fact that judges both within and outside the United Kingdom closely examine executive certificates today should not surprise us.[18] In

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[12] For that policy, *see* Heunis, Jan C., *United Nations versus South Africa: A Legal Assessment of United Nations and United Nations Related Activities in respect of South Africa* (Johannesburg: Raand Afrikaans University, 1986).

[13] [1986] 3 WLR 583.

[14] More will be said below.

[15] *See* Mann's case-note on this, reprinted as "The judicial recognition of an unrecognized state" in Mann, F.A., *Further Studies in International Law* (Oxford: Clarendon, 1990), at 386; 36 *ICLQ* (1987), at 348.

[16] Collins, Lawrence, "Foreign relations and the judiciary", 51 *ICLQ* (2002), at 485, 491-492.

[17] Mann, *op. cit.*, n. 15, at 388.

[18] *Re Al-Fin Corporation's Patent*, [1970] Ch 160; *Reel v Holder*, [1981] 1 *WLR* 1226, 1228 (*per* Lord Denning MR). A recent example from Malaysia is *MBF Capital Bhd & Anor v Dato' Param Cumaraswamy*, [1997] 3 *MLJ* 300 ("I find that there is compelling ground to resist judicial self-restraint", *per* Zainun Ali J.C.).

Chen Li Hung & Others v Ting Lei Miao & Others, involving the recognition of a judicial order of the Taiwanese courts, the Hong Kong Court of Final Appeal may be seen recently to have chosen to follow the broad approach taken in *Carl Zeiss* and *GUR*.[19] *Chen* had also resulted in a highly pragmatic result as a factor that would otherwise have been disastrous, namely, the non-recognition by Hong Kong Courts of the orders of the (non-recognized) Taiwanese courts involving private rights, was thereby avoided. The reasons given by the Hong Kong Court were that the recognition issue can be side-stepped where private rights are concerned, or where justice, the dictates of common sense, and the needs of law and order require to be met, and (finally) where giving effect to such orders would not be inimical to the forum state's sovereign interests or would otherwise be contrary to public policy.[20] Lord Cooke also went further, pointing out that the outcome in *Chen* was, in fact, entirely in the sovereign interests of the People's Republic of China, saying:[21]

> "I think that reunification will tend to be promoted rather than impeded if people resident in Taiwan, one part of China, are able to enforce in Hong Kong, another part of China, bankruptcy orders made in Taiwan."

Turning to our present case, the first question before the Singapore court in *Anthony Woo* was how far it would be willing to see beyond a certificate issued by the Singapore Ministry of Foreign Affairs. In this article, I shall generally refer to this last as the question of "*de facto*" recognition, by which I mean the implied recognition of the Singapore Government. Purists may object that there is no such thing as "*de facto* recognition" as such, but simply recognition of the *de facto* existence of a foreign state. Nevertheless, most would admit that in practice the term "*de facto* recognition" has not been used with total strictness, and it does not seem to have been used in this way by the Singapore courts. Where such reference is intended to mean recognition of *de facto* statehood, the context in which the particular reference appears should reveal the intended meaning. I would also argue that *de facto* recognition of Taiwanese statehood by Singapore would be sufficient to show the acknowledgement of the authority in Taipei as an entity that currently exercises effective governmental authority over the territory in question.

3. "NON-CERTIFICATION" AND "NON-RECOGNITION"

The facts are as follows. A request was made of the Singapore Ministry for a certificate under section 18 of the Singapore State Immunity Act; namely, for a "con-

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[19] [2000] *HKLRD* 252; Collins, *op. cit.*, n. 16, at 492-493. *See* also *Re James (an insolvent) (A-G intervening)*, [1977] Ch 42, 70G, quoted with approval by Bokhary P.J. in *Chen*, at 261E-G and Lord Cooke of Thorndon NPJ, at 265F-I.

[20] *Ibid.*, at 262J-263D.

[21] *Ibid.*, at 267D.

clusive" view by the Executive of the status of Taiwan as a "state" defined therein. The Ministry replied in the following terms:

> "I wish to inform you that we are unable to issue the certificate pursuant to S. 18 of the State Immunity Act."

There were, in theory, two broad approaches open to the learned judge, Choo J., at this juncture. One was the view taken by Dr. Lawrence Collins, and indeed the UK and Singapore Acts, that the enforcement of private rights (in this case, a tort action) should not be held hostage to public international law principles, and the other that of the late F.A. Mann, who would tend to favour close adherence to the "one voice" doctrine instead. Without over-simplification, the former view would generally involve a greater tendency to see beyond the executive certificate, or to side-step it in some other way, whereas the latter would be minded to steer the courts away from what is properly seen to involve the exercise of the prerogative in foreign affairs. The real achievement, however, is to serve both ends, which I believe is what the Singapore courts have done ultimately.

Much turned on the precise formulation adopted by the Singapore Ministry in its reply, and it is of course a matter usually of decisive importance in these sorts of cases. For example, Dr. Mann saw the matter in *GUR* simply as one requiring a different formulation in future FCO certificates should the FCO wish to avoid the outcome therein and *Carl Zeiss*,[22] to wit:[23]

> "No State is recognized by Her Majesty's government as exercising any governing authority in the territory occupied by the organization describing itself as the Republic of Ciskei."

In the context of the *Carl Zeiss* case, the words "no State" (if used instead) would similarly have precluded the authority both of the GDR *and* the USSR to legislate in respect of the territory in that case. There would have been no loophole for the courts.

In *Anthony Woo*, Choo J. concluded on the terms of the Ministry's reply that "couched in polite and diplomatic terms", the answer given by the Singapore Ministry was, in effect, that Taiwan was not a "state" for the purposes of the Act.[24] Did the certificate actually say that and, if it is unclear what the Ministry has said, should not the question have been returned to the Ministry for clarification? Choo J. expressed his preference for this latter suggestion only over that of counsel that, alternatively, the court should independently inquire into the facts of the relationship between Singapore and Taiwan. In any event, the learned judge did not think such a return of the question to the Ministry necessary in this case.[25]

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[22] Which is not to say that the FCO necessarily did; Collins, *loc. cit*., n. 16, at 492.
[23] Mann, *op. cit.*, n. 15, at 388.
[24] [2003] 3 SLR 688, para. 7.
[25] *Ibid.*, paras. 4 and 7.

It would have been helpful at least to know what policy on the recognition of governments Singapore follows here if the conclusion drawn by Choo J. should be seen to have been unarguably justified. For example, if it were established in curial terms that the Singapore Government considers no state to be recognized unless it is formally recognized, then it would have provided a more solid basis for the inference drawn here that the Singapore Government was really, in a diplomatic manner of speaking, saying, "No, Taiwan is not recognized by Singapore". As I shall discuss below, Choo J. went on instead to pursue a different course of reasoning based on the determination that the reply of the Ministry was, in fact, clear.

4. DECLINING THE "*CARL ZEISS*" DOCTRINE

Counsel had raised the first of a two-pronged argument.[26] The first "prong" is essentially an argument based on the *Carl Zeiss* doctrine. The argument goes: Even if it cannot be said (which Choo J. did say, however) that a Section 18 certificate under Singapore's State Immunity Act of 1979 is available in respect of the putative Taiwanese state, it is at least uncontroversial that the People's Republic of China is a "state" for the purposes of Section 3(1) of the Singapore Act (i.e., a state entitled to the protection of the Act). This was nothing short of an invitation to the judge to follow the precedent in *Carl Zeiss*, *GUR* and, most recently, *Chen* in the Hong Kong courts. In response, the judge asked simply if that was, in fact, Taiwan's (or at least the Taiwanese CAA's) argument – that the Government of Taiwan was merely the *delegatus* of the Government of the PRC (the *delegans*). Unsurprisingly, counsel clarified that this was not the Taiwanese Government's position. This clarification, as far as Choo J. was concerned, dispensed with the first argument raised by counsel, but it leaves another and more serious difficulty.[27]

Counsel had also asked (the second "prong"): What if, clearly, the Taiwanese Government and state were recognized, albeit simply *de facto,* by the Singapore

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[26] I have, for the sake of clarity of presentation, inverted the actual order of the two "prongs" of the argument as they appear in the judgment of Choo J.

[27] [2003] 3 SLR 688, para. 8. As Choo J. observed: "First … [counsel, Mr. Loo, had] … argued that if Taiwan is not a state because, in Mr. Lok's submission, the Singapore government recognizes it as part of the People's Republic of China (Mainland China), then it must have immunity under the Act since the People's Republic of China has immunity and it is a recognized state, *de jure* and *de facto***.** If the third party, claiming to be a department of the government of the Republic of China (Taiwan) advances this as a serious argument then it will obviously be a strong argument, but unless it does so, I am not bound to consider this argument seriously. Mr. Loo prefaced this submission with a strong *caveat* that that was not Taiwan's stand." It may be observed that in the *Carl Zeiss* and *GUR* cases, too, the parties would have disagreed with the position that they were mere subordinate bodies of the USSR and South Africa, respectively. It may therefore be contended against the view taken by Choo J. that it is not ultimately the position of the parties that is relevant. Instead, it is the factual situation in the eyes of the court that would be relevant. The conclusion drawn by Choo J. is instead consistent with his view that an independent judicial inquiry was not warranted as to the situation existing *de facto* in the *Anthony Woo* case.

Government? Should the Singapore courts not look into this, *independently* of what the Executive says in its certificate? Alternatively, should not a certificate be constructed in light of what is known (through independent judicial inquiry) about the policy of the Singapore Government (thus ensuring adherence to the "one voice" doctrine)?[28] According to counsel, Taiwan and Singapore had entered into a bilateral tax treaty, for example. Is this not proof of *de facto* recognition? The answer, according to Choo J. was "yes, but *only if* the executive should so certify" (i.e., in express terms).[29] The learned judge added that the suggestion that *de facto* recognition is of "equal importance" for the purposes of the Act may also be something of "an exaggerated idea".[30] With respect, it is not clear that Choo J. would have had the last word on this, for here we enter treacherous waters.

5. CERTIFICATION OF *DE FACTO* STATEHOOD

Choo J. had in effect, though not expressly, chosen the "one voice" doctrine as his guide. Having, as we have seen, expressed some scepticism towards the entity of a *de facto* recognized state, the learned judge was nonetheless reluctant to preclude the executive branch from ever wishing to certify that a state is only recognized *de facto* (i.e., should the Executive ever wish to do so).

On the face of it, this sentiment is understandable to the extent that the Singapore courts could otherwise be in danger of usurping the executive function. It is the Executive, after all, whose function it is under Section 18 of the Singapore Act (couched in terms similar to those in Section 21 of the UK Act) to provide a certificate on the recognition issue. Moreover, Section 18 says that such a certificate "shall be conclusive evidence", and thus if a Singapore judge were to preclude the mere possibility of the Executive wanting perhaps to distinguish between *de facto* and *de jure* recognition of a foreign state or government, that would be unwarranted.

It is nonetheless hard to imagine that the executive branch would normally be minded to distinguish expressly between certification of recognition as amounting only to recognition of the putative foreign state as a *de facto* state and not a state existing *de jure*, and indeed *vice versa*.[31] Having said that, cases of the sort Choo J. may have had in mind could exist, even if they may be very rare. An apparent example is the certificate given in *Luther v Sagor* where, having said that the USSR Government was indeed a "State Government of Russia", the letter went on to say:

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[28] Section 3(1) is in *pari materiae* with the UK's State Immunity Act of 1978, section 1(1).

[29] [2003] 3 SLR 688, paras. 7, 10, 11.

[30] *Ibid.*, para. 6.

[31] *See* Talmon, Stefan, *Recognition of Governments in International Law* (Oxford: OUP, 1998), at 90. In effect, this may also be due to the fact that, logically speaking, recognition is best considered recognition of a state of affairs that exists either *de jure* or *de facto*, and that it is not the recognition itself that distinguishes between the two situations; McNair, Sir Arnold Duncan, *The Legal Effects of War* (Cambridge: CUP, 1944), at 353, note 1; Chen, Ti-Chiang, *The International Law of Recognition* (London: Stevens, 1951), at 274.

> "I am also to add that His Majesty's Government have never officially recognized the Soviet Government in any way."[32]

However, that case can be distinguished. In *Luther v Sagor*, the British Government had not sought to preclude recognition of *de facto* governmental authority, but simply to preclude any intimation of recognition of *de jure* governmental authority. Moreover, *Luther v Sagor* was concerned with the recognition of a foreign *government*. As we shall see, matters become far more complicated if what is (in actual fact) sought to be precluded by the Executive is *also* recognition of *de facto* statehood. In principle, however, I accept that there is no logical reason for thinking that the Singapore Government could be precluded from recognizing a putative foreign state only as a *de facto* state under Section 18 of the Singapore Act.

In any event, could Choo J. have straightforwardly assumed "*obiter*-wise" that returning the issue to the Executive for a clearer certificate is likely in future to produce the results required? In the present case alone, it is difficult to see how else the Ministry could be approached so as to elicit a more useful response. There will almost certainly be cases in the future where the Singapore courts may therefore have to do just what counsel in this case sought, which is to enter into the facts of the relationship between the forum state and the foreign state, the consequent risks inherent therein to the "one voice" doctrine notwithstanding.[33] Indeed, the Singapore Court of Appeal, while agreeing with Choo J. that such an independent judicial inquiry was not necessary in the *Anthony Woo* case, went on to conduct just such an inquiry on appeal in a lengthy aside.

The potential difficulty with the construction ultimately placed on the "non-certificate" by Choo J. is the inherent distinctively legal point. One recognizable exception to the "one voice" doctrine in England (ostensibly because Parliament is supreme) is that the English courts will not always accept a statutory construction proposed by the executive branch.[34] To put it differently, this is because provisions such as Section 18 of the 1979 Singapore Act cannot ultimately be construed by the

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[32] Quoted in Symmons, C.R., "U.K. abolition of the doctrine of recognition of governments: A rose by another name?" [1981] *Public Law*, at 249, note 51, 256. An incidental point here is that the certificate pertained to the recognition of a foreign Government, not a foreign state, but, simply put, we should be satisfied with the observation that there is, simply, no state if there is no Government (as there is no Government if there is no state, as Mann observed. Mann, *op. cit.*, n. 15, at 388). At the very least, even if we could contend against Mann that the conclusion that there is no state without a Government is generally untrue, Mann would nonetheless be correct if the issue that arises is one of state immunity, for who then would press that right? *See* further, on recognition of statehood taking the form of the recognition of a foreign government, Brownlie, Ian, *Principles of Public International Law* (Oxford: OUP, 6th ed, 2003), at 90, citing the 1919 recognition by the British Government of the Estonian National Council.

[33] It still remains to be seen whether, should a suitable test case present itself, the Singapore courts would be willing to adopt the approach suggested recently by Dr. Collins, and even earlier by Lord Denning, or would be willing instead to stick to the view long held by the late F.A. Mann. *See* further, *Rahimtoola v Nizam of Hyderabad*, [1958] AC 379, 418 (PC, *per* Lord Denning).

[34] *See Re Al-fin Corporation's Patent*, [1970] Ch 160.

Executive, or even by reference to the Executive; this can be done only by the courts acting alone (with no reference at all to the Executive).

6. SOME LIMITATIONS ON EXECUTIVE CONTROL

Arguably, the very enactment of the State Immunity Act in Singapore shows a clear Parliamentary intent, in line with that which other countries who have thought fit to enact similar legislation have done: that the *substantive* legal issue of immunity should be removed from Executive hands altogether. As far as Sections 18 and 21 of the Singapore and United Kingdom Acts, respectively, are concerned, they lie at odds with the remainder of the Singapore and United Kingdom Acts since they encapsulate the view that there are some questions of fact nonetheless peculiarly within the knowledge of the executive branch – and not of the courts. Therein lies the problem although, in practice, any real tension between Section(s) 18 (and 21) and the remainder of the Singapore (and United Kingdom) Act(s) is avoided where the United Kingdom FCO is known, for example, to therefore steer clear of what could be pronouncements not on questions of fact, but on questions of law.[35] This

[35] Evidence of this view, taken by the British Foreign Office (hereafter, "FCO"), may be found in various places. Most recently, Dr. Lawrence Collins reported that the records made available under the United Kingdom's thirty-year rule for declassifying documents show a conversation taking place between Dr. F.A. Mann, who was representing the *Stiftung* in the *Carl Zeiss* case and who had pressed the FCO for help when he anticipated the judgment of the House of Lords going against the *Stiftung* on the non-recognition point (that the East German decrees were really decrees of the USSR as the *de jure* authority in the territory) and the FCO. The Foreign Office official wrote: "On 15 December, Dr. F.A. Mann, a senior partner in the firm of solicitors acting for the West German Zeiss, came to see me late in the evening, told me that the House of Lords seemed very much against his clients on the 'non-recognition' point and left with me a note of certain questions which it was proposed to move the House of Lords to address the Foreign Secretary next day. I may say that the proposed questions went to the very limit (if not over it) of the matters which the Foreign Secretary can properly certify to a court"; Collins, *loc. cit.*, n. 16, at 491. It seems from the nature of the FCO memorandum to have survived that what Dr. Mann wished the FCO to pronounce upon would have been to seek to dissuade the House of Lords from the view that "the acts (legislative, judicial and administrative) of the East German authorities will be held to be legally valid acts, at least within their proper sphere…", while allowing the Foreign Office to maintain nonetheless "that the East German authorities are merely puppets of the Soviet Union"; *ibid.*, at 492. *See* further, for the proposition from the viewpoint of an FCO Legal Adviser that there are cases involving questions of law therein that the FCO will, by virtue of its prerogative power, refuse to issue a certificate at all, Wilmshurst, Elizabeth, "Executive certificates in foreign affairs: the United Kingdom", 35 *ICLQ* (1986), at 157, 168. The proposition is a sound one, so that in *Carl Zeiss*, the House of Lords spoke of the "conclusive information provided by Her Majesty's Government", for example ([1966] 2 All ER 536, 544), and even in cases such *as Luigi Monta of Genoa v Cechofracht Co. Ltd*, which appear to go against the conclusiveness of an FCO certificate, Sellers J. had simply considered there that the evidence furnished by Her Majesty's Government (attesting to the non-recognition of the "Formosa Government") would nonetheless permit the phrase "any government" in a clause in a charter party to be construed according to evidence other than an FCO certificate; [1956] 2 Q.B. 552; discussed in Symmons, *loc. cit.*, n. 32, at 255. But compare the

distinction between questions of law and of fact in executive certificates has thereby caused *Oppenheim*, for example, to observe that where the issue is not purely one of fact, an executive certificate is not necessarily conclusive for the purposes of the English courts.[36] Moreover, in the Singapore context, the Constitution (in Article 93) clearly differentiates between executive and judicial powers, causing a recent pronouncement by a District Judge that he cannot take judicial notice of a purported agreement between the Singapore and Indian Governments that may affect the sentencing discretion of the courts.[37] If all of this is correct, we should therefore conclude that the "one voice" doctrine ceases to have the same significance where there is an Act such as the current one in place, placing the substantive question of legal immunity in the hands of the courts.

The letter from Singapore Airlines to the Ministry in *Anthony Woo* reads, for example:[38]

> The CAA made an interlocutory application to set aside the action on the basis that, as a department of the Ministry of Transport and Communication of the Republic of China, it is immune from the jurisdiction of Singapore courts pursuant to Section 3 of the State Immunity Act (Chapter 313)("the Act")
>
> Under Section 18 of the Act, a certificate by or on behalf of the Minister for Foreign Affairs is necessary to conclusively indicate whether any country is a 'state' for the

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somewhat different approach taken by the U.S. State Department to certification involving questions of law in *The Republic of Vietnam v Pfizer, Inc. et al,* 556 F.2d 892, C.A. Minn. 1977, June 15, 1977 (United States Court of Appeals, Eighth Circuit, Gibson, Chief Judge; Bright and Henley, Circuit Judges). In *Pfizer*, the State Department, after certifying that: "[t]he Government of South Vietnam has ceased to exist and therefore the United States no longer recognizes it as the sovereign authority in the territory of South Vietnam" and that "[t]he United States has not recognized any other government as constituting such authority", went on to state that "[t]he Department of State would not advise any requests to the Court to suspend, rather than dismiss, the proceedings".

[36] Jennings, Sir Robert and Watts, Sir Arthur (eds.), *Oppenheim's International Law*, Vol. 1 (Harlow: Longman, 9th ed, 1992), at 1049. For what is perhaps a slightly different view, however, see Vallat, Sir Francis, *International Law and the Practitioner* (Manchester: University Press, 1966), at 54 where he says: "It is believed that the test of a true certificate is not whether the facts are peculiarly within the knowledge of the Foreign Office or such as the Foreign Office may reasonably be expected to know or which the Foreign Office ought to know in the conduct of its business, but the presence of some element of recognition by Her Majesty's Government…When, however, it comes to a matter of recognition, there is no source which can state with equal authority what is or is not recognized by the Government." This last must be true, but only provided the FCO actually states its policy in clear terms – which I argue here that the Singapore Ministry did not do.

[37] *PP v Salwant Singh s/o Amer Singh*, [2003] SGDC 146 (Singapore Subordinate Courts, unreported). Article 93 of the Constitution of the Republic of Singapore reads: "The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force."

[38] [2003] 3 SLR 688, para 3. We are told simply in the judgment of Choo J. that: "The third party had, similarly, applied for a s 18 certificate and was also given the same reply".

> purposes of Part II of the Act. Enclosed herewith are extracts of Part II and Section 18 of the said Act for your easy reference.

That letter is, therefore, concerned with whether Taiwan would *qualify* for treatment under the Act, and not whether if Taiwan did qualify it would (necessarily) possess such immunity. Consider two points, both of which, I consider, suggest that Choo J.'s comments on the intended import of the Executive (i.e., that Taiwan is not recognized internationally by Singapore), even if correct as a matter of construction, could not have led automatically to the conclusion that the Executive has thereby determined the legal conclusion to be reached.

Firstly, the Singapore Act, following the UK Act, has adopted the approach of stating a complex number of sometimes interlocking rules intended to determine the question of immunity by way of the application of legal principle. It cannot, for example, be supposed then that the Taiwanese CAA in *Anthony Woo* was asking the Ministry in Singapore to apply the law to the facts.[39] If this is correct, even if the Executive had pronounced on non-recognition *de jure*, it remains open to the Singapore courts to find that an entity such as the Taiwanese CAA was, in fact, exercising *de facto* sovereign authority. Coupled with the fact that subject-matter jurisdiction over the kind of exercise of power in this case would more likely than not be precluded under the Act (see below – personal injury occasioned outside Singapore), the courts should be cautious about short-circuiting the entire process by their simply finding that the foreign state is not even recognized *de facto*.

As Professor Ian Brownlie and others have observed in the English context, the rise of the restrictive theory of immunity (which the Singapore Act embodies) has since encroached on immunity *ratione personae* and consequently brought greater attention to bear on subject-matter jurisdiction instead (i.e., immunity *ratione materiae*). Accordingly, there has, in this regard, been a noticeable tendency for the English courts on occasion to reduce the effect of the restrictive theory of immunity simply by declining to find subject-matter jurisdiction instead. While this remains an admittedly controversial proposition,[40] Brownlie has suggested that:

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[39] Generally speaking, the Singapore and UK Acts, as does the Australian Foreign States Immunities Act 1985, take the approach of having a general rule of immunity first (i.e., that sovereign states are accorded immunity), and only thereafter listing a number of exceptions to that general rule. Ordinarily, in cases involving commercial disputes, the courts would still have to determine whether, for example, a "commercial transaction" within the meaning of the Act is involved, in which case the courts may have to decide whether the "transaction" or "activity" is one "into which a State enters or in which it engages otherwise than in the exercise of sovereign authority". *See* Section 5(3)(c) of the Singapore Act, which is almost identical to Section 3(3)(c) of the UK Act. For the immunity of "separate entities", see section 16(2) of the Singapore Act and section 14(2) of the UK Act, and *Kuwait Airways Corporation v Iraqi Airways Co.* [1995] 1 WLR 1147 (HL). In *Anthony Woo*, however, the Taiwanese CAA claimed to be a department under the Taiwan Government, and this claim was not contested.

[40] Fox, Hazel, *The Law of State Immunity* (Oxford: Oxford University Press, 2002), at 477-502. In any event, Lady Fox's criticism appears to be based on the continued utility of status-based immunity, something which is not denied here.

> "A connected question of considerable significance [therefore] is the distinction … between immunity as a plea based upon the status of the defendant as a sovereign state (*ratione personae*), and immunity *ratione materiae*, which affects the essential competence of the local courts in relation to the particular subject-matter. The immunity *ratione personae* (procedural immunity) is a bar to the jurisdiction of the state of the forum which would exist (or be presumed to exist) but for the existence of a title of immunity. In fact the proponents of the principle of restrictive immunity, by reducing the role of status as a basis for conferring a title to immunity, have inevitably given greater prominence to the nature of the subject-matter and the issue of the essential competence of the judicial organs of the forum state."[41]

This question of subject-matter jurisdiction may be considered relevant where, as I shall further maintain below, the Singapore courts are ordinarily to be precluded from questioning the acts or omissions of a sovereign authority abroad by the courts of the forum state. While this might appear subject to qualification as a state under the State Immunity Act, there is room for debate in respect of the way the Singapore (and United Kingdom) Acts have been drafted. Singapore's 1979 State Immunity Act speaks in Section 18 of conclusive certification of recognition by the executive branch for the purposes of the application of the Act, but one wonders if the Act is comprehensive in this regard; by this, I mean to ask whether it has replaced every aspect of the common law previously existing. In the case of personal injury occurring abroad, clearly the State Immunity Act 1979 envisages that a state for the purposes of the Act would enjoy immunity for such acts occurring abroad – indeed the fact that the Act in stating that personal injuries occurring in Singapore would not enjoy immunity would suggest this (Section 7). Under the Act, such immunity may seem to be tied to the question of status under Section 18. However, if the State Immunity Act seeks merely to codify the common law previously existing then, where the government is silent, the rule against entertaining actions for personal injury brought before the forum state's courts for acts or omissions of a (*de facto* or *de jure*) foreign sovereign occurring abroad becomes not simply a matter of whether the status of a foreign sovereign is one expressly recognized by the state of the forum courts as such.

As Lord Wilberforce famously pointed out in *Buttes Gas and Oil Co v Hammer* there is a *separate* element of immunity *ratione materiae*, for which *Buttes Gas* has since stood as good authority. Indeed, Lord Wilberforce emphasizes the distinction, where he says of the rule in *Duke of Brunswick v Hanover* that there were "two elements in this case, not always clearly separated": namely, the question *ratione personae* and the question *ratione materiae*. If we accept that a foreign "sovereign authority" may, for example, be acknowledged as such by way of an independent

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[41] Brownlie cites, *inter alia*, the Court of Appeal's decision in *Kuwait Airways Corporation v Iraqi Airways Company*, 71 *BYIL* (2000), at 408 (CA), as an example. The case is one part of a string of such decisions following *Littrell v United States*, (No. 2) [1995] 1 WLR 82 (CA). *See* Brownlie, *op. cit.*, n. 32, at 326-327. But compare the view taken by the House of Lords in the *Kuwait* case, [1995] 1 WLR 1147.

judicial inquiry where the Executive is simply silent (which I maintain was the case in *Anthony Woo*), the fact that the present case involved "acts … performed in the territory of the sovereign concerned" (*per* Lord Wilberforce) should perhaps have been taken perhaps to suggest that an independent inquiry into the sovereign status of Taiwan was especially important in the present case (I propose to return to this issue in Section VIIB, below).[42]

Secondly, the "certification clause" in Section 18(a) of the Singapore Act and 21(a) of the UK Act does not preclude the earlier (pre-State Immunity Act) *dicta* in *Duff Development v Kelantan*.[43] According to the *Kelantan* doctrine, at common law the courts would still decide on the question of the status of the foreign putative state in the event of non-certification by the executive.[44]

What is striking is that Choo J. had gone on to construe the "non-certification" in that case to mean that the putative foreign state *cannot* be immune. Arguably, this last is properly a question of law for the judge, not a question of fact suitable for Executive determination. Choo J. had reasoned that:[45]

> "… [T]he definition of a *de facto* state is necessary solely for the purposes of giving effect to the State Immunity Act. The incongruous situation of having an entity that looks like a state, behaves like a state, and yet not be recognised by a court of law as a state, is in my opinion, the lesser contradiction. It is a greater contradiction to have an entity given immunity when its existence is recognised *de jure* or *de facto*, and also when it is not recognised at all. "

Singapore's Court of Appeal appears, on the other hand, to have come closer to addressing these issues on appeal in *Civil Aeronautics Administration v Singapore Airlines Ltd*.[46] While the Court of Appeal affirmed the learned High Court judge's view that, in effect, the Ministry of Foreign Affairs was saying that Singapore does not recognize Taiwan,[47] Chao Hick Tin J.A. (who delivered the judgment of the court) went on to provide two notable clarifications.

Firstly, the Court of Appeal appears to have acknowledged that certification under the Singapore Act is merely certification *as to whether* Taiwan is a recognized State *for the purposes (only) of the application of the Act*. In other words, the Executive

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[42] *Buttes Gas and Oil Co. and Another v Hammer and Another*, [1982] AC 888 (*per* Lord Wilberforce).

[43] [1924] AC 797 (HL).

[44] Professor David Harris must be correct in this regard; Harris, D.J., *Cases & Materials on International Law* (London: Sweet & Maxwell, 5th ed, 1998), at 331.

[45] [2003] 3 SLR 688, para. 10.

[46] *Civil Aeronautics Administration v. Singapore Airlines Ltd*, [2004] 1 SLR 570 (C.A.) (Chao Hick Tin J.A.; Woo Bih Li J.).

[47] *Ibid.*, paras. 13-14.

cannot certify the point of law therein involved; ultimately, whether Taiwan was immune under Singapore law.[48]

The terms of Section 18 of the Singapore Act (Section 21 of the UK Act), properly construed, militate against allowing the Government such power of "substantive" certification.[49] Section 18 (Section 21 of the UK Act) states that a certificate "shall be conclusive evidence" only as to "whether any country is a State" for the purposes of the Act.[50] These words could in the particular manner in which a request is framed refer to the general rule granting immunity, to one of the "exceptions", or indeed to both. It is also worth recalling that, if the purported views of the Ministry are put aside, subject-matter jurisdiction would arguably have been absent under the Singapore and UK Acts on the facts of the *present* case, since damage to or loss of tangible property and personal injury caused outside Singapore would *ordinarily* attract immunity by falling outside one of the "exceptions" to immunity under the Act.[51] This is simply a legal question that, even if the executive branch could have decided indirectly by expressing its policy of recognition, need not perhaps be taken as one which the Executive would ordinarily wish to decide.

True, Section 18 speaks of the conclusiveness of a certificate on "any question … whether any country is a State for the purposes of Part II…", but here the words "any question" must refer to a question of fact and not of law, since a certificate shall be conclusive "evidence" only. The courts must still decide the legal consequences flowing from such "evidence", conclusive though that evidence may be, since it is precisely where such (legal) questions are involved: wherein what is to be attested to is not a question of fact about the Government's policy but a question of law, that Parliament by virtue of its statutory enactment should be taken to have preferred to have it brought to the courts instead.[52] In sum, the Executive can certify as to whether a putative foreign state qualifies for treatment under the Act; in other words, whether that foreign state is recognized *de jure*, or even in those exceptional cases that it does not recognize the *de facto* statehood of a putative foreign state,

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[48] Although this clarification arose in the context of the question of whether Taiwan can be sued before the Singapore courts. The Court of Appeal relied heavily on the persuasive force of American authorities to the effect that the non-recognition doctrine cannot be taken to its full logical conclusion, and that non-recognition did not (therefore) mean that the Taiwan CAA could not therefore be sued before the Singapore courts; *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, paras. 43, 50 (*per* Chao Hick Tin J.A.).

[49] According to section 18: "A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question –

(a) whether any country is a State for the purposes of Part II, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;

(b) whether, and if so when, a document has been served or received as mentioned in section 14 (1) or (5)."

[50] Part II of the Singapore Act, and Part I of the UK Act.

[51] Section 7 of the Singapore Act, and Section 5 of the UK Act.

[52] Wilmshurst, *loc. cit*., n. 35, at 168.

but beyond that it is a matter for the courts alone (i.e., without necessarily referring back to the Executive).[53]

Secondly, Chao J.A. also considered (*obiter*) that, in any event, the dealings between Singapore and Taiwan do not, on the facts, evince the *de facto* recognition by Singapore of Taiwan. According to Justice Chao, Singapore's "one China" policy is clear: Singapore had never intended to afford Taiwan international recognition, including *de facto* recognition.[54] If the inquiry shows that there is not even *de facto* recognition, then, arguably, no question of immunity in the form "*either* of a privilege derogating from a subject-matter jurisdiction which would otherwise exist *or* a privilege to be recognized on a contingency basis *in case* subject-matter jurisdiction exists"[55] could arise under the Singapore and UK Acts. While this is a more attractive view than that of Choo J., the Court of Appeal's clarification still falls short, for the reasons discussed below.

7. IS STATE IMMUNITY ABOUT STATUS (ONLY)?

Brownlie has argued further that:[56]

> "Even if there is no basis for immunity *ratione personae*, and a basis for subject-matter jurisdiction exists, the question still remains whether the courts of the forum have an essential competence (in terms of general international law) in respect of the issue."

For example, since general international law probably precludes the arrest, attachment or execution of the property of a foreign sovereign,[57] the courts would

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[53] The only exception to this appears to be that stated in section 17 of the Singapore Act. That provision appears to be an exception to the general scheme of the Act which in any event is not to be found in the United Kingdom Act. Compare, however, *Praptono Honggopati Tjitrohupojo & Ors v His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj*, [2002] 4 SLR 667, para. 36 (*per* M.P.H. Rubin J.).

[54] *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, paras. 15-16 (*per* Chao Hick Tin J.A.).

[55] Brownlie, *op.cit.*, n. 32, at 327.

[56] *Ibid.*

[57] It appears that the practice of domestic courts generally would uphold this rule under international law. In his discussion of section 13(4) (exception to non-attachment of state property rule in section 13(2)(b)) of the UK State Immunity Act of 1978, Professor Greig points out, after surveying the legislative provisions in various countries that would appear to uphold the distinction drawn in section 13 between (1) property used exclusively for settling liabilities incurred in the course of commercial transactions which would fall within the exception in section 13(4), and (2) those which in the words of Lord Diplock in the *Alcom* case and non-earmarked accounts ([1984] AC 580, 604), that: "In countries where there is no legislation specifically defining the status of a foreign property of a foreign state in relation to execution, the purpose to which the property might be put is often a crucial issue" for the purposes of applying the restrictive theory of immunity; Greig, D.W., "Forum state

lack subject-matter jurisdiction in such cases. The Act in fact recognizes the situation just described, and also precludes penalties, injunctions and orders for specific performance, excepting only enforcement of property for the time being in use or intended for use for commercial purposes with the further exception of the property of a central bank or monetary authority.[58] Yet another sort of situation is that found in *Alcom Ltd. v Republic of Colombia*, concerning the bank account of the Colombian Embassy in London.[59] In *Alcom*, Lord Diplock drew the court's attention to Article 25 of the Vienna Convention on Diplomatic Relations of 1961, concerning the obligation of host states to accord full facilities for the performance of the functions of foreign missions. Clearly, such a rule of diplomatic immunity could also preclude the competence of the forum courts, especially where the status of the foreign sovereign is recognized by the forum state. Another example given by Professor Brownlie involves a pronouncement on the Constitution of Sierra Leone in *Buck v A-G*.[60] Similarly, we might add, the Singapore Court of Appeal has had occasion to consider it inappropriate to pronounce on what the Malaysian Constitution might be taken to mean in a case involving the constitutional competence of Parliament in Singapore to legislate extra-territorially.[61] It must be asked whether *all* these examples depend necessarily on the availability of the recognition of the forum state.

The question is concerned in part with whether the State Immunity Act, when properly construed, grants such extensive discretion to the executive branch beyond stipulating that a foreign state is recognized for the purposes of the application of the Act, or that it is not so recognized. If not, would the Executive always be able to preclude legal immunity in this way? If the Government can do that, would it always wish to do so? Clearly, *Anthony Woo* shows that there are instances wherein the Government may wish to have the entire matter put before the courts, and would also seem to suggest that the executive branch is not always as keen on Lord Atkin's "one voice" doctrine as the courts may have assumed insofar as the Government (arguably) opted for non-certification. What this leaves the courts with is essentially an issue of judicial policy. The difficulty here is highlighted by the fact that the Act speaks only of whether a foreign state enjoys the recognition of the Singapore Government for the purposes of (the application of) the Act. It does not say that the Executive can determine what it means in law to enjoy such recognition. Conversely, it could (and, I think, should) mean that the Executive cannot in strict legal terms

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jurisdiction and sovereign immunity under the International Law Commission's draft articles", 38 *ICLQ* (1989), at 243, 264-265.

[58] *See* sections 15(1), (2) and (4) and 16(4) of the Singapore Act, and sections 13(1),(2) and (4) and 14(4) of the UK Act. Sir Hersch Lauterpacht first brought the matter to light; 28 *BYIL* (1951), at 220, 241. *See* Fox, Hazel, "State immunity: The House of Lords' decision in *I Congreso del Partido*", 98 *LQR.* (1982), at 94, 99 *et seq*.

[59] [1984] 2 WLR 750. *See* Jones, David Lloyd, 43 *CLJ* (1984), at 222; Gandhi, Sandy, 47 *MLR* (1984), at 222. *See* further Fox, Hazel, "Enforcement jurisdiction, foreign state property and diplomatic immunity", 34 *ICLQ* (1985), at 115.

[60] [1965] Ch 745, 770, 771 (*per* Diplock L.J.).

[61] *Public Prosecutor v Taw Cheng Kong*, [1998] 2 SLR 410, 422E-F.

determine what it means *not to* enjoy such recognition. As we shall see, this last reflects the approach taken by the American courts towards recognition since the 1930s, an approach that merits serious consideration.[62]

8. EXECUTIVE (NON-) RECOGNITION UNDER THE SINGAPORE ACT

8.1. The test of "effective control"

The straightest route, it would seem, is that the Singapore Act (and the UK Act, too, for that matter) should ordinarily be read to permit the Executive to say only that a foreign state is not recognized by it *de jure*; however, it should not usually be read, or at least should not lightly be read, so as to suggest that the Executive would typically be assumed to be saying that it does not also recognize the foreign state *de facto*.[63] This last typically requires a separate and independent inquiry by the courts.

The Court of Appeal had noted that a Canadian court had, in a similar application by Taiwan in Canada, inquired into whether Canada affords *de facto* recognition to Taiwan and found that the Canadian Government did.[64] Significantly, Chao J.A. distinguished that case by saying that while such an inquiry into *de facto* recognition may be open to the Canadian courts, it would not similarly be open to the Singapore courts to do the same:[65]

> (a) The Canadian Ministry's response was vague, while the Singapore's Ministry of Foreign Affairs' response was not;
>
> (b) The terms of Singapore's statute do not permit the Singapore courts as much latitude, since the certification of the Executive is conclusive, whereas this is not the case under the Canadian statute, properly construed.

With the highest respect, it is not wholly apparent that there is a substantial difference in terms of the (proper) construction of the two Acts,[66] even if the letter

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[62] *Salimoff v Standard Oil Company*, 262 N.Y. 220; 186 N.E. 679 (1933) (Court of Appeals of New York).

[63] Sir Francis Vallat took the opposite view. Vallat, *op. cit.*, n. 36, at 54.

[64] *Parent v Singapore Airlines Limited* (judgment of Marie St-Pierre JSC of the Superior Court of Quebec dated 22 October 2003).

[65] *Civil Aeronautics Administration v. Singapore Airlines Ltd*, [2004] 1 SLR 570, paras. 40-41 (*per* Chao Hick Tin J.A.).

[66] As Olufemi Elias has argued: "While section 14 of the Canadian Act provides that a certificate from the Minister '*is admissible in evidence as conclusive proof* as to whether a country is a foreign state', section 18 of the Singapore Act states that a certificate '*shall be conclusive evidence on any question* … whether any country is a state for the purposes of the Act'. It would appear that the effect of both provisions is the same in the most important respect; namely, that the certificate, where issued by the Minister, is conclusive evidence"; Elias, O.A., "The International status of

from the Ministry may be considered clear and unequivocal. It is therefore important to note Justice Chao's caveat in this regard. After saying that "the wording in our Act is narrower", Chao J. added nonetheless that:[67]

> "This is not to say that under our Act, the approach taken by the Canadian court may not be adopted in our courts in any circumstances."

A more attractive reading of what the Court of Appeal has said *obiter* would therefore be that where an independent judicial inquiry is called for, *the absence of legal immunity need not "automatically" be determined by what the Ministry did or did not say*. Granted, the actual basis on which the Court of Appeal's decision rests in the present case is on the terms of the Ministry's letter, and which the court took to mean non-recognition. Yet all that the Court of Appeal has said here is that, as a result, "[i]t is incongruous to say that a State is required to accord sovereign immunity to another State when the latter is not recognised by the former".[68] That would be right, but in the *Arantzazu Mendi* the English House of Lords also went so far as to consider that an authority recognized only *de facto* can mount a claim of immunity even against the *de jure* sovereign as plaintiff.[69] Incongruous though that, too, may seem at first sight, no less an authority than the then Judge Cardozo (and whose sentiments the Singapore Court of Appeal itself has accepted in approving terms) has acknowledged in another (American) case, *Sokoloff v National City Bank*, that while "[j]uridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it", it should also (always) be considered that"[i]n practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness".[70] Perhaps this has since reflected a distinctively American view of the matter. Beginning with a line of cases in the late nineteenth century where the rigidity with which the English courts had held to the "one voice" doctrine was questioned, those exceptions had by the 1920s become the rule instead. Thus, in *Nankivel et al. v Omsk All-Russian Government et al.*, the New York Court of Appeals upheld its earlier pronouncement in the *Wulfsohn* case, and said:[71]

Taiwan in the courts of Canada and Singapore", 8 *Sing.YBIL* (2004), at 93, 97.

[67] *Civil Aeronautics Administration v. Singapore Airlines Ltd*, [2004] 1 SLR 570, para. 41 (*per* Chao Hick Tin J.A.).

[68] *Ibid.*, para. 25 (*per* Chao Hick Tin J.A.).

[69] *Republic of Spain v SS "Arantzazu Mendi" (The Arantzazu Mendi)*, [1939] A.C. 256.

[70] *Sokoloff v National City Bank* 145 N.E. 917 (1924); (1923-4) 2 A.D., Case No. 19; cited with approval in *Civil Aeronautics Administration v. Singapore Airlines Ltd*, [2004] 1 SLR 570, para. 44 (*per* Chao Hick Tin J.A.).

[71] (1923) 237 N.Y. 150; *Wulfsohn v Russian Socialist Federated Soviet Republic*, (1923) 234 N.Y. 372.

> "Lack of recognition by the United States Government, we have recently held, does not permit an individual suitor to bring a *de facto* Government before the bar…To sue a sovereign state is to insult it in a manner which it may treat with silent contempt. It is not bound to come into our courts and plead its immunity."

In case there is any doubt as to what is meant by "*de facto* Government" in this case, the New York Court of Appeals went on in *Salimoff v Standard Oil Company* to say:[72]

> "The courts may not recognize the Soviet Government as the *de jure* Government until the State Department gives its word. They may, however, say that it is a government, maintaining internal peace and order, providing for national defense and the general welfare, carrying on relations with our own government and others. To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality which they do not deserve."

The test is almost singularly one concerned with the exercise of effective control over the territory in question.[73] The suggestion here involves the extent to which the matter is one of law and not executive policy. *Prima facie*, the Act grants executive policy some measure of weight. The key question, however, is this: How much weight should be accorded to the Executive's views?

8.2. Is state immunity a special case?

According to Justice Chao:[74]

> "A question such as that which arises in the present case, whether an entity is a State so as to enjoy sovereign immunity in Singapore, is eminently a matter within the

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[72] (1933) 262 N.Y. 220. This and the other cases I have just mentioned are discussed in these terms by Sir Hersch Lauterpacht in his influential work on the subject. Lauterpacht, H., *Recognition in International Law* (Cambridge: CUP, 1948), at 146-150. *See*, however, the discussion by Jaffe, who seeks to reconcile this latest turn with a perceived change of heart in the Administration, with direct communication having been established at the highest level, and a change in the composition of the court. Jaffe, Louise L., *Judicial Aspects of Foreign Relations, in particular of the Recognition of Foreign Powers* (Cambridge, Mass.: Harvard University Press, 1933), Appendix.

[73] If it is objected that these examples involve the question of the recognition of a *de facto* government of an existing and recognized sovereign State, that the question of the statehood of (Soviet) Russia was never in question, and that the same is not true, however, of Taiwan (which has never been recognized as a sovereign State), it may, I think, be replied that Taiwan had for long (i.e., for the better part of Singapore state practice) claimed to be a government of an existing and recognized sovereign state. As Professor John Dugard wrote in 1987: "Taiwan has many of the attributes of statehood but prefers to see itself as simply part of greater China". Dugard, John, *Recognition and the United Nations* (Cambridge: Grotius, 1987), at 77.

[74] *Ibid.*, para. 22.

> exclusive province of the Executive to determine, as what are involved in the question are not only matters of fact but also matters of policy. The courts are not in the best position to decide such a question."

I have argued that there remains a line to be drawn nonetheless between the conclusiveness of an executive certificate on a question of fact (whether or not a foreign state is recognized explicitly by the Executive) and the legal consequences that should flow from that. It would have been less than extraordinary to assume that Singapore's State Immunity Act of 1979 was not actually intended to regulate the status of legally anomalous entities like Taiwan. If we are prompted to think that it does, a conservative approach to statutory construction could become hostage to every drafting ambiguity and would eschew perspectives based on judicial policy instead, whereas the truth may simply be that the (British) draftsman's elliptical language about that of which an executive certificate is *truly* conclusive leaves a residual role for cautious but informed judicial development of the law in the future. However, Singapore's Court of Appeal took the view instead that:[75]

> It is really not for the courts to get themselves involved in international relations. The courts are ill-equipped to deal with them. If the answer of the Executive to a query is not clear enough, the proper recourse would be for the court to seek further clarification and not to second-guess the Executive or to determine the answer independently based on evidence placed before it.

The Court of Appeal appears, therefore, to have considered that Parliament intended from the outset that the Executive should play a decisive role in determining whether events occurring within the territory of a putative foreign state should be amenable to Singapore's domestic judicial process.[76] It appears to have relied on Lord Esher's *dictum* in *Mighell v Sultan of Johore*, which is that "once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive".[77] They were words that have unfortunately become an immovable starting-point of analysis in this area of law in England, including the decision in *Duff Development v Kelantan* wherein what the Executive said there was given to prevail even over clear evidence of Kelantan's patently subservient status. Similarly, in *R v Secretary of State for Foreign Affairs, ex parte Trawnik*, Forbes J. considered that: "The fact that the certificate is conclusive marks its content out as the exclusive sphere of the Foreign Secretary and prohibits the courts from intruding into that sphere".[78]

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[75] *Civil Aeronautics Administration v. Singapore Airlines Ltd*., [2004] 1 SLR 570, para. 27 (*per* Chao Hick Tin J.A.).

[76] *Ibid*., *see* generally paras. 15-28.

[77] [1894] 1 QB 149, 158.

[78] The case involved an action for nuisance on account of the noise arising from a shooting range employed by the British armed forces in Berlin. There, the Secretary of State had certified that "Germany is a State for the purposes of Part I of the State Immunity Act of 1978" and that the

All of this nevertheless rests more on hallowed doctrine than anything else. The Vice-Chancellor, Sir Lancelot Shadwell, had taken the view in 1828 that "sound policy requires that the courts of the King should act in unison with the Government of the King", and the English common law has not looked back since.[79] While that has cast a long shadow, our Act says (in Section 18) only that:

> A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question –
> (a) whether any country is a State for the purposes of Part II…

Could the Singapore Act, then, be taken to mean that the Executive shall have the last word on non-immunity through the simple device of non-recognition? Following from our earlier discussion (above), where death or personal injury, or damage to or loss of tangible property are involved, the Singapore and United Kingdom Acts both *preclude* the enjoyment of state immunity where it is caused by an act or omission "in Singapore" or "in the United Kingdom" under Sections 7 and 5, respectively. Conversely, the intent (it could be argued) appears to have been not to preclude immunity where the events occur outside the forum state, presumably because this was the common-law position before the United Kingdom Act was passed and remains the position under customary international law.[80] Still, this was precisely the outcome in *Anthony Woo*, on the considered basis that the Executive had actually said so. The Court of Appeal had based its conclusion (that the Taiwanese CAA is not immune) on the construction of the executive certificate; specifically, that the Government of Singapore does not recognize Taiwan. In consequence, the Singapore Act is now read so as to tie the rule in Section 7 of the Singapore Act to the enjoyment of formal recognition. One wonders therefore whether it could have been argued that the position at common law and under public international law is that the Singapore courts would not have subject-matter jurisdiction in such cases, or would lack com-

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British Military commandant was a part of the Government therein. *The Times*, 18 April 1985 (QBD).

[79] *Taylor v Barclay*, [1828] 2 Sim. 213. On these older cases, *see* Mann, F.A., *Foreign Affairs in English Courts* (Oxford: Clarendon, 1986), at 38 *et seq*.

[80] For the customary position, see Article 11 of the European Convention on State Immunity, 16 May 1972, Cmnd 5081; ETS No. 74; Article 12 of the ILC Final Draft Articles and Commentary on Jurisdictional Immunities of States and their Property (1991), *YBILC* (43rd session, 1991), Vol. II, Pt. 2, 13; Article 12 of the Draft Articles on Jurisdictional Immunities of States and their Property, Annex I, Report of the Ad Hoc Committee on Jurisdictional Immunities of States and their Property, 24-28 February 2003, GAOR, Fifty-eighth Session Supplement No. 22 (A/58/22); Article III.F of the International Law Association's Revised Draft Articles for a Convention on State Immunity, 14-20 August 1994, ILA, *Report of the Sixty Sixth Conference* (1994), 21-27, 452-499; Article 2(2)(e) of the Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991, at <http://www.idi-iil.org/index.html>. For these and accompanying commentary on the UK provision, *see* Dickinson, Andrew, Lindsay, Rae and Loonam, James P., *State Immunity: Selected Materials and Commentary* (Oxford: Oxford University Press, 2004), paras. 1.036 and 1.102, 2.025-2.026, 2.064, 2.081, and 2.116, respectively.

petence in some other way, regardless of the question pertaining to Taiwan's status.[81] Traditionally, the recognition aspect has not been as widely concerned with when there would *not* be immunity, but whether immunity would be available. In respect of this last, the courts would (because of the "one voice" doctrine) say "yes" if the Government of the forum state were, for example, expressly to recognize the foreign state as a sovereign. However, the Act of 1979 does not today encourage judicial rule application. Whether the established practice of deferring to the Executive should remain wholly unchanged is certainly an interesting issue now confronting us. Would it, with the greatest respect, be "incongruous" to say – as does the Court of Appeal (below) – that "a State is required to accord sovereign immunity to another State when the latter is not recognised by the former"? At the very least, the question may be seen to be inseparable from that of whether the courts should entertain a suit brought in respect of a governmental act or omission to have occurred in the territory of that which, to all appearances, is a foreign state.[82] Would it be true to say that if the answer should be "no" that should in turn be due *only* to the fact that the specific foreign state is formally recognized by the Singapore Government (i.e., solely a question of status)? After all, it is not to be supposed that non-recognition here must mean that all Taiwanese marriages should be treated as being invalid, for example. The law must draw a line somewhere, but, unlike the marriage example in private international law, should not the application of public international law principles in the Singapore courts draw a similar line? Viewed from where a foreign court stands, there seems no logical basis for accepting the validity of legislative, judicial and administrative acts done by an effective governmental authority within its own territory while, at the same time, upholding the liability (non-immunity) of such an authority for acts or omissions committed within its own territory.[83]

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[81] It may be countered, however, that the Canadian courts appear recently to have considered the personal injury rule to be a purely legislative device and (therefore) does not reflect a previous common-law position; *Schreiber v Canada (Attorney-General)*, 2002 SCC 62; [2002] 3 S.C.R. 269 (Canada), para 31; Sienho Yee, "Foreign Sovereign Immunities, *Acta Jure Imperii* and *Acta Jure Gestionis*: A Recent Exposition from the Canadian Supreme Court", 2 *Chinese JIL* (2003), at 649, 651. Nonetheless, it appears that the point was not fully argued there. The Canadian court was concerned with whether the *acta jure gestionis/acta jure imperii* distinction applied in that context. At the very least, the Canadian pronouncement is not conclusive of the position at common law in England and Singapore, and of the position under customary international law.

[82] It may also be countered here that such questions go to the merits of the case and need not occupy a court which is merely called upon to consider the point of certification. However, it may be replied that the 1979 Act should be taken as a whole in considering what its true intent might be.

[83] *See Adams v Adams*, [1971] P. 188; 3 All. ER 572. *See* also the view taken by Lord Denning MR in *Hesperides Hotels v Aegean Holidays Ltd.*, [1978] QB 205 (CA). But this case admits the problem with which Choo J. was faced in the lower court in *Anthony Woo*. Choo J. had said ([2003] 3 SLR 688, para. 9):

> "In the present case, there is, in my view, no danger of deracinating Taiwanese companies trading here. Nonetheless, the fears expressed by the Law Lords in *Carl-Zeiss-Stiftung*, particularly Lord Reid and Lord Upjohn, who said at 569 that it would be 'a most deplorable result in respect of any highly civilized community, with which we have substantial trading relationships I believe, which should be avoided unless our law compels that conclusion' need to be

addressed. In short, if the CAA is a department of a government that is not given *de jure* or *de facto* recognition by this state, then what is it? It is an entity that is real but is not a state recognizable for the purposes of the State Immunity Act."

With respect, this still begs the question in so far as the common law (as applied in Singapore) would still require a logical basis for treating an "unrecognized" state as a source of the validity of private law rights. According to Singapore's Companies Act (Cap. 50), the word "corporation" is simply defined as:

"any body corporate formed or incorporated or existing in Singapore or outside Singapore and includes any foreign company but does not include –

(a) any body corporate that is incorporated in Singapore and is by notification of the Minister in the *Gazette* declared to be a public authority or an instrumentality or agency of the Government or to be a body corporate which is not incorporated for commercial purposes;

(b) any corporation sole;

(c) any co-operative society; or

(d) any registered trade union;"

What would the words "formed or incorporated or existing … outside Singapore" mean in this context? In the United Kingdom, Parliament has since sought to avoid the problem with the Foreign Corporations Act of 1991; *see* Chedyne, Ilone, "The Foreign Corporations Act", 40 *ICLQ* (1991), at 981. In Singapore, the courts would have to turn to the common law. According to Lord Denning in *Hesperides*, for example, the proper view, more broadly, is that "If it were necessary … I would unhesitatingly hold the courts of this country can recognize the laws or acts of a body which is in effective control of a territory even thought it has not been recognized by Her Majesty's Government *de jure* or *de facto*: at any rate, in regard to the laws that regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth." [1978] QB 205 at 218. According to Professor Dugard, "[s]uch actions are designed to do justice in individual cases affecting the ordinary lives of citizens and are not intended to imply recognition of a State by the judicial arm of government"; Dugard, *op. cit*., n. 73, at 124. What is clear from Lord Denning's and Professor Dugard's statements here, however, is that there nonetheless would exist a legal anomaly at common law to be addressed in the present type of situation. The difficulty as far as Singapore is concerned appears to be this. In *Hesperides*, Lord Denning had made it plain where his preference lay in terms of the proper courses of action, but these courses of action had been rejected by Choo J. in *Anthony Woo* since the executive certificate was clear. Lord Denning had said in *Hesperides*: "The court may consider several possibilities: (1) that the autonomous body is not recognized, so that our courts pay no regard to it or its laws; or (2) put further questions to Her Majesty's Government about the present state of affairs; or (3) look at the new evidence and make up its own mind". [1978] QB 205, 213. One argument that could be advanced in the sort of case envisaged by Choo J. in *Anthony Woo* is that the statement of the International Court of Justice in the *Namibia* Advisory Opinion, that (compulsory) non-recognition of South-Africa's official acts "cannot be extended to … the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory*"* forms a common-law rule by reception. *South West Africa Cases (Second Phase, Ethiopia v South-Africa/Liberia v. South-Africa)*, ICJ Rep. 1966, at 6, para. 125. The recent approach of the Hong Kong courts in the *Chen* case, discussed earlier, could also point to a principled exception to the seemingly logical view that an unrecognized entity cannot ultimately be a source of recognizable legal rights and obligations. [2000] HKLRD 252, 262J-263D (i.e., where justice, the dictates of common sense and the needs of law and order require to be met, and where giving effect to private rights would not be inimical to the forum state's sovereign interests, or would otherwise be contrary to public policy). *See* also *post*, note 90. Nonetheless, how this matter is to be resolved *logically* as a matter of common law doctrine, and how, for example, the Namibia Opinion and the Hong Kong doctrine could be

8.3. The clear policy of the United States Act of 1976: a comparison

A strong policy consideration which, on the other hand, clearly underlies the United States Foreign Sovereign Immunities Act of 1976 was well-expressed by the US State Department's then Legal Advisor, Mr. Monroe Leigh. A future Singapore court, as I shall argue further below, may wish to consider its application in the Singapore context regardless of the true scheme of the United Kingdom legislation which the Singapore Act resembles so closely.

Leigh had explained, in connection with the line to be drawn between commercial and governmental acts, that "[w]e … thought it was the better part of valour … to have it to the courts with very modest guidance".[84] More generally, however, the Act was also intended to "depoliticize" claims to immunity, and Monroe Leigh testified that the prime object of the Act was really to "return decisions of legal questions of sovereign immunity to the courts where they properly belong".[85] Subsequent judgments in the United States courts have considered that Leigh's sentiment was upheld by Congress with the passage of the Act:[86]

> This theory of absolute sovereign immunity remained in force until 1952 when the now-famous Tate Letter was issued by the Department of State. The Tate Letter expressed a "restrictive" theory of sovereign immunity … This theory of restrictive

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reconciled in logical terms with the apparent rule that an unrecognized entity cannot enjoy immunity, remain open questions in the absence of legislative intervention. Professor Greig has argued instead that the English courts should either limit such cases as *Adams v Adams* above and *Madzimbamuto v Lardner-Burke*, [1969] 1 AC 645 to their facts, or explore the possibilities of the *Carl Zeiss* doctrine. Greig, D. W., *International Law* (London: Butterworths, 1976), at 145. Yet more important than that is the need (as the judge in *Anthony Woo* appears also to agree with) to question the "misleading generalization, which becomes even more inaccurate when used as the premise for logical reasoning, to base the rules of private international law on mythical "recognition" by the United Kingdom Government of the rights of other Governments to legislate with regard to matters occurring within their territory". *See* Greig, *loc. cit*., n. 11, at 113-114. Still, I propose to take the entire question one step further – should we treat questions involving sovereign immunity differently, on account here of an arbitrary distinction between private and public international law? I do not believe so for, in the eyes of a foreign court, there seems no logical basis for accepting the validity of legislative, judicial and administrative acts done by an *effective* governmental authority within its own territory while, at the same time, upholding the liability (non-immunity) of such an authority for acts or omissions committed within its own territory.

[84] *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R..11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary, 94th Cong., 2d Sess*. (1976) (Testimony of Monroe Leigh), at 31, 53.

[85] *Ibid*., 29.

[86] *Frolova v. Union of Soviet Socialist Republics, United States District Court*, 558 F. Supp. 358, ND Ill, 26 January 1983 (United States District Court, ND Illinois, E.D. Roszkowski, District Judge), citing H.R.Rep. No. 94-1487, 94th Cong., 2d Sess., 7 (1976) ("House Report"), U.S. Cong. & Admin. News 1976, at 6604. *See* also *Behring Intern., Inc. v. Imperial Iranian Air Force*, 475 F.Supp. 383, DNJ, 24 July 1979 (United States District Court, D. New Jersey, Clarkson S. Fisher, Chief Judge).

> sovereign immunity was adopted by the United States courts, but difficulties arose … courts tended to decide questions of sovereign immunity based on State Department suggestions rather than treating the question of immunity as a purely judicial function. With these problems in mind, the United States Congress passed the Foreign Sovereign Immunities Act of 1976 … the bill insured that immunity would be strictly a judicial rather than an executive determination.

The continued significance of a "one voice" doctrine, particularly where the Executive has in the plain terms of its letter said that it has felt "unable" to issue a certificate, would therefore bear close judicial scrutiny. Parliament itself has after all provided scant guidance. On the one hand, the Singapore Act was "based on the United Kingdom State Immunity Act, 1978" (albeit "modified to suit our needs and circumstances"). On the other hand, Parliament in Singapore was clearly aware of and referred also to the United States legislation, and indeed the Singapore Act was motivated by the perceived need to address the fact that "[a]s there are certain provisions in the United Kingdom Act which are not appropriate to Singapore … it is preferable to enact our own legislation so as to preclude the application of the United Kingdom Act to Singapore".[87] Admittedly, too much cannot be read into these statements, especially since there is no evidence that the last statement concerns the provision presently in question. Indeed, the provision in question (Section 18) is virtually identical to the equivalent United Kingdom provision (Section 15 of the United Kingdom Act). Moreover, the explanatory statement in respect of Clause 18 of the Bill (Section 18 of the Act) fails also to shed further light in respect of the matter. It states only that: "Clause 18 provides that a certificate by or on behalf of the Minister for Foreign Affairs is to be conclusive evidence for certain purposes".[88] But what are these purposes?

Such legislative ambiguity arguably leaves room for judge-made law. How much room is a matter for the courts, but the courts may have reason in future to treat the present case as limited to its extraordinary facts, and in future to consider that having the 1979 Act is (arguably) the antithesis of a felt need to adhere rigidly to a "one voice doctrine", considering after all that codification indicates a preference for principled rule application in place of executive determination.

8.4. The tension between doctrine and realism

Admittedly, Chao J.A. took a diametrically opposed view in distinguishing a notable English case which was cited by the CAA to demonstrate the distinction just referred to between questions of law and those of fact, saying that:[89]

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[87] Singapore Parliamentary Debates, Official Record, 7 September 1979, Co. 409 (Mr. E.W. Barker).

[88] Explanatory Statement, State Immunity Bill, Bill No 20/79.

[89] *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, para. 25 (*per* Chao Hick Tin J.A.).

> "It is incongruous to say that a State is required to accord sovereign immunity to another State when the latter is not recognised by the former. Bearing in mind the pre-eminence given to recognition by virtue of s 18 of the Act, the question of sovereign immunity clearly stands on a different footing from other questions in which the existence of a State comes into issue."

This passage seems almost to suggest that the policy of the Executive in respect of Taiwan has thus far actually been concerned with the rights and duties of private litigants in the Singapore courts, which if true must mean that the Singapore Government considers Taiwanese marriages to be invalid, too.[90] A strong reason for actually thinking so in the case of Taiwan's present claim rests, of course, on the fact that the response of the Executive (which the Court of Appeal construed to be a negative response) was a response to the request by the Taiwanese CAA for a certificate under the State Immunity Act. That may be sufficient for us to conclude that the decision in this case is unassailable as far as legal principle was concerned. Still, the sort of approach taken by Choo J. and with which the Court of Appeal remained largely in agreement does present greater risks in venturing into matters of executive policy by attributing non-recognition of sovereign immunity to the Executive in the present sort of situation (even admitting that Choo J. is to some extent supported by the late F.A. Mann in this respect).[91] Perhaps, and I say this with the highest respect, the Court of Appeal should have been slow to confirm the reading given by Choo J. to the letter from the Ministry, who took it in fact to be a negative certification. The Court of Appeal had taken the view of counsel for Singapore Airlines that Singapore "has always been careful to maintain the stand of not recognising, whether formally or informally, Taiwan's status in any way that may suggest that it is a State, consistent with its one-China policy".[92] Could it not perhaps be said, equally, that for

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[90] *See* further the Northern Cyprus cases in the United Kingdom – *DAG v Secretary of State for the Home Department*, [2001] Imm. AR 58 (citizenship of Northern Cyprus unrecognized); *contra B v B (Divorce: Northern Cyprus)*, [2000] 2 FLR 707 (non-recognition of Northern Cypriot divorce); *Caglar v Billingham (Inspector of Taxes)*, [1996] STC (SCD) 150 (claim to diplomatic immunity in respect of income tax not upheld); but compare *Emin v Yeldag*, [2002] 1 FLR 956 (Northern Cypriot divorce decrees should nonetheless be recognized unless contrary to statute). *See* n. 83 above.

[91] Mann, *op. cit*., n. 15, at 401-405. However, compare Collins, *loc. cit*., n. 16, at 510 for the sharper distinction drawn here between "sensitivity to foreign policy interests" and "the views or objectives of the executive" than does Mann, who at 404 merely acknowledges that "While it is certain that the practice of applying to the Executive is in many respects a useful device, it should not be overlooked that it may sometimes be more embarrassing to the Executive than an independent decision of the courts …"). This is but another way of asking the uncomfortable question here: Does the Singapore Government not recognize Taiwan as a *de facto* State, and that the Taiwan Government at least the *de facto* authority in those territories? *See* further the highly practical approach taken by Hobhouse, J. in *Somalia (A Republic) v Woodhouse Drake & Carey (Suisse) SA*, [1993] 1 All ER 371 (HC), albeit a case that takes place in light of the current policy of the UK Government of not according formal recognition to any foreign government.

[92] *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, para. 36 (*per* Chao Hick Tin J.A.).

there to be a refusal to recognize a foreign state for the limited purposes of private litigation, there should be no doubt as to the intention to refuse it?

8.5. Bilateral relations as evidence of recognition?

Moreover, it could be asked whether the intent underlying Singapore's actions counts (i.e., whether or not to grant *de facto* or *de jure* recognition), or the fact that "various agreements or memoranda of understanding with similar entities in Taiwan on specific areas, ranging from air services agreements to avoidance of double taxation, the promotion and protection of investment, and tourism" exist.[93] As far as international law is concerned, the latter counts,[94] not the former, yet the Court of Appeal (citing *Oppenheim's International Law*) was apparently concerned with the former question only:[95]

> As recognition is a matter of intention and as important legal consequences follow from the grant or refusal thereof, care must be taken not to imply recognition from actions which, although amounting to a limited measure of intercourse, do not necessarily reveal an intention to recognise…

With the greatest respect, the real question in respect of such memoranda, letters and "agreements" ought to be the well-known one instead of whether such a document evinces an intention to conclude a treaty under the law of treaties (not, as the Court of Appeal has suggested, whether there is therein an intention to recognize the other party).[96]

8.6. Distinguishing executive recognition from executive non-recognition

In light of these difficulties of construction, and of possible future difficulties of the same sort, the better view may be to consider that even under the Tate Letter itself,[97] which had established the restrictive theory in the United States in 1952:[98]

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[93] *Ibid.*, para. 35.

[94] *See* Petersen, M.J., *Recognition of Governments* (Basingstoke and London: MacMillan, 1997), at 111.

[95] *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, para. 35 (*per* Chao Hick Tin J.A.), citing Jennings, R. and Watts, A. (eds.), *op. cit.*, n. 36, at 169–171.

[96] *See* Aust, Anthony, *Modern Treaty Law and Practice* (Cambridge: CUP, 2000), at 27.

[97] Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Phillip B. Perlman, 26 *Department of State Bulletin* (1952), at 984, also reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 US 682, 711-15 (1976).

[98] *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002**)** (United States Court of Appeals, 5th Circuit, Texas, Emilio M. Garza, Circuit Judge).

> … [T]he State Department would continue to recommend immunity in suits concerning a foreign state's sovereign, public acts. The Department, however, would recommend denying immunity in suits based on a foreign sovereign's strictly commercial activities.

In other words, the "one voice" doctrine, at least in the United States, was intended to apply to recommendations of immunity in respect of public acts and to recommendations of denial of immunity in respect of commercial activities. It was not – indeed, it seems was never -intended to allow the Executive (as opposed to the courts) to recommend denial of immunity in respect of public or governmental acts.[99] The United States Act of 1976 was (subsequently) meant to reinforce this sentiment; namely, to shield the Executive from foreign political pressure to grant state immunity and to have this instead for the courts to do so:[100]

> I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures. And to my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.

In short, the "one voice" doctrine does not really speak to cases of non-recognition as clearly as it might to cases of recognition, and foreign office legal advisors may also feel compelled to steer away from questions concerning the legal consequences of non-recognition.[101]

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[99] Presumably, it was the Appellant's contention in this case that the conduct called into question did not fall within one of the exceptions to immunity in the Act and therefore involved (loosely speaking) a "governmental act". Why would it matter otherwise whether Taiwan is a recognized state for the purposes of the Act?

[100] Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on HR 11315 before the Sub-committee on Administrative Law and Governmental Relations of the House Committee of the Judiciary, 94th Cong., 2d Sess. (1976) (Testimony of Monroe Leigh), 35. *See* further Ederington, L. Benjamin, "In memoriam: Monroe Leigh: 1919-2001", 43 *Virg.JIL* (2003) 589, 593-597.

[101] It is at least interesting to note, moreover, that the United Kingdom Act does not seem opposed to taking the same view, for at best there is no clearer indication of the intent underlying the enactment of the 1978 UK Act than for a need to "keep up" with New York, and to apply the restrictive theory of immunity by way of statute. As Mr. Gardiner points out, in a revealing passage: "The factors favouring legislation in the UK were a need to make legislative provision if the UK was to become a party to the European Convention and to the Brussels Convention 1926, a desire to respond to the uneven progress towards restrictive immunity through judicial law-making and, perhaps most important, the fear that the financial position of London could be lost to New York if a more stable legal framework there for transactions involving states proved a powerful attraction". Gardiner, Richard K., *International Law* (Harlow: Pearson/Longman, 2003), at 370. Mr. Gardiner was formerly a legal adviser at the UK FCO.

9. CONCLUSION

It may be argued that the Court of Appeal's finding that the facts in any case evince the absence of *de facto* recognition of Taiwan should (1) not have been reached in such a straightforward fashion, and (2) even if it should, need not require the absence of immunity simply because of the "incongruity" of an unrecognized yet immune foreign state, given that non-recognition might be more closely concerned with a range of foreign policy considerations wholly unrelated to the question of private legal rights. The English courts have managed to avoid the issue thus far, due in part to the application of the *Carl Zeiss* doctrine, whose application was declined both by counsel in *Anthony Woo* and, it would appear, by the Singapore courts in the present case. In future cases, however, either the *Carl Zeiss* doctrine, or if not, some of the arguments suggested here could prove to be to the Singapore courts more attractive than the present case has shown. In particular, the seemingly more realistic approach of the United States courts may commend itself.

Firstly, it may be hoped that the Singapore courts would not in any event have become set on the sort of standard witnessed here for a finding of *de facto* non-recognition under Section 18 of the 1979 Act. Should we step away from the long shadow cast by the "one voice" doctrine in Section 18 cases, there is no other reason in legal principle to suppose that *de facto* non-recognition should be discovered through the same route as *de jure* recognition, which is to look at the incidents and behavioural facts of the conduct of Singapore's foreign policy and bilateral relations with the aim of eliciting an "intent" on the part of the Executive "to recognize".[102] An objective test exists under international law for the acquisition of statehood, and it is capable of relatively precise application. To rely on a presumed "constitutive" effect of subjective recognition by the executive branch where the Executive has avoided any direct pronouncement on its own policy would seem to be doing both too little and too much. Close consideration may perhaps also be given to the difference between the case where the Executive has taken a (clear) position in response to a request for a certificate (i.e., a question involving the construction of the terms of such a response), on the one hand, and where an independent inquiry by the court itself is made, on the other. If it is (truly) the latter, an objective test, based on whether the putative foreign state fulfills the international law criteria for statehood, could be applied directly to the case at hand unless manifestly inconsistent with either Singapore law or executive policy.[103] If it is considered that, in fact, the Taiwanese

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[102] *Ibid*., paras. 29-36.

[103] This much of a nod should be given in the direction of the "one voice" doctrine. *See* the discussion of this issue by Dr. Elias in section IV.D of his article, "The International Status of Taiwan in the Courts of Canada and Singapore", *loc. cit*., n. 66, with which, consequently, I am unable to agree in this small respect. As for which should prevail in the case of conflict between Singapore law and international law, there is no better pronouncement than that of Chao J.C. (as he then was): "I would … hasten to add that if indeed in a particular case there is a real conflict between international law and national law, national law must prevail … Lest I give the wrong impression that I am saying a state can flout international law with impunity, I should add that responsibility on

Government effectively controls the territory in question, what reason would there be for thinking that there is any such manifest inconsistency? As Brierly had observed in respect of "the practice of British courts in accepting information from the executive … In such cases the responsibility for ensuring the Court's decision conforms to international law rests with the executive and not with the court".[104] Nevertheless, it must be asked whether this is what the Act, or indeed the Executive, intends.

Similarly, evidence of executive policy has to be weighed and distinguished in appropriate cases. The proper legal question ought to be whether the exchange of letters and conclusion of memoranda of understanding and so forth evince an intention to conclude legally binding agreements, and if the answer is "yes", it may be considered that the conclusion of such treaties is inconsistent with a refusal to recognize the other party, at least for the purposes of private litigation.

Another possible consideration that ought for completeness to be mentioned is that the Singapore Act also contains a provision not to be found in the United Kingdom Act. Section 17 of the Singapore Act states the following principle of reciprocity:

> If it appears to the President that the immunities and privileges conferred by Part II in relation to any State –
>
> (a) exceed those accorded by the law of that State in relation to Singapore …
>
> … [T]he President may, by order, provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to the President to be appropriate.

Prima facie, the Singapore Act, unlike the United Kingdom Act, suggests therefore that Taiwan should at least enjoy such immunities in Singapore as those Singapore presumably enjoys in Taiwan. While the courts may not wish to question the Government's "one China policy", the Singapore Act could still require the courts to consider that a "one voice" doctrine could cut both ways in an unintended and far-reaching manner. Valid concern that Taiwanese companies in Singapore should not become "deracinated" stops short of considering this further issue, which does not appear to have been argued.[105]

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the international plane of a failure by a state to comply with international law is a distinct and separate matter"; *Tan Ah Yeo & Anor v Seow Teck Ming & Another*, [1989] SLR 257, affirmed on appeal in *Seow Teck Ming & Anor v Tan Ah Yeo & Another and another appeal*, [1991] SLR 169 (*per* Chan Sek Keong J. as the Honourable Attorney-General then was).

[104] Brierly, J.L., *The Law of Nations*, Sir Humphrey Waldock (ed.), (Oxford: Clarendon, 6th ed., 1963), at 90.

[105] For the concern that Taiwanese companies should not be "deracinated", *see* [2003] 3 SLR 688, para. 9 (*per* Choo J.).

Having come this far, I should venture to suggest the following sort of formulation for replies by or on behalf of the Minister in such cases in the future:[106]

> "I would wish to inform you that it is the view of the Government of the Republic of Singapore that the territories in question currently enjoy the exercise of effective governmental authority. The Government of Singapore considers, however, that the question in your request pertains to a legal issue currently pending before the courts with which it therefore does not consider it appropriate for the Government to enter into."

And then to have it brought to the courts.

[106] The second sentence is based on the practice, for example, of the United Kingdom Foreign and Commonwealth Office when responding to requests in respect of diplomatic immunity; *see* Wilmshurst, *loc. cit*., n. 35, at 168.

THE HEROIC UNDERTAKING? THE SEPARATE AND DISSENTING OPINIONS OF JUDGE WEERAMANTRY DURING HIS TIME ON THE BENCH OF THE INTERNATIONAL COURT OF JUSTICE

Duncan French*

1. INTRODUCTION

The purpose of this paper is to survey the work of Christopher Gregory Weeramantry while he was a judge at the International Court of Justice. The 1990s – the period during which Weeramantry served on the International Court – formed a significant decade for the judicial development of international law, and Judge Weeramantry was a notable member of the bench at this time. Rising to the position of Vice-President, Weeramantry made a significant mark on the jurisprudence of the International Court. While it is virtually impossible to ascertain his, as with any judge's, role in the deliberations of the wider Court,[1] Weeramantry frequently exercised his right under the Court's statute[2] and its rules[3] to append separate (sometimes known as "individual") and dissenting opinions. Though maybe not as frequent in his opinions and declarations[4] as some judges,[5] Weeramantry nonetheless left

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[1] Article 21(1), Rules of Court: 'The deliberations of the Court shall take place in private and remain secret'. *See* R. Higgins, "Reflections from the International Court" in M. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003) 3: "Only those present in the Deliberation Chamber can know what views were held, by whom, and on what grounds".

[2] Article 57, Statute of the Court: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion".

[3] Article 95(2), Rules of Court: "Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not … The same shall also apply to orders made by the Court". *See* also article 107(3) which provides, *mutatis mutandis*, for the attachment of individual opinions to an advisory opinion.

[4] Article 95(2), Rules of Court: "a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration." *See* also article 107(3) which provides, *mutatis mutandis*, for the issuing of a declaration as regards an advisory opinion.

Asian Yearbook of International Law, Volume 11 (B.S. Chimni *et al.,* eds.)

the International Court with a not insignificant list of separate and dissenting opinions.[6]

Although it is somewhat artificial to separate his understanding of international law whilst on the bench with his writings both before and after[7] his judicial career, the opinions nevertheless stand on their own merit and are worthy of analysis in their own right. In particular, this paper will focus upon certain general themes that can be discerned from his opinions. Ranging from the importance of fairness in dispute settlement to the role of law in international affairs and his belief in the centrality of international adjudication in this endeavour, the paper will show how Weeramantry's understanding of international law directly affected his legal analysis. It will also introduce the patterns of reasoning and methodology often employed by Weeramantry in reaching conclusions on the legal issues that came before the Court.

In conclusion, it will be argued that despite such a legacy – or possibly, those more critical might wonder, because of it – there is a very real risk that Weeramantry's time at the International Court is in danger of being either seriously misinterpreted or ignored altogether; that while it stretches the truth beyond all reasonableness to say Weeramantry attempted, in his time on the bench, to transform the International Court's understanding of international law (the so-called "heroic undertaking"[8]), it would nevertheless be foolish to neglect the very rich – if inchoate – jurisprudence that he left behind.

2. THE OPINIONS AND REASONING OF JUDGE WEERAMANTRY

Weeramantry was elected to serve as a judge on the International Court as from 6th February 1991; following his failure to be re-elected in 1999, his term of office

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[5] One instantly recalls Shigeru Oda. As has been written, "[a]s a judge he is a study in independence. His resolution is legendary. At the ICJ, he has produced an unmatched number of dissents and separate opinions … In none of them was he joined by another member of the Court." (M. Reisman, "Judge Shigeru Oda: A Tribute to an International Treasure", 16 *Leiden Journal of International Law* (2003) 61).

[6] *See* the attached annex for a list of Weeramantry's separate and dissenting opinions, as well as a separate list of his declarations.

[7] *See*, for instance, C. Weeramantry, *The World Court, Its Conception, Constitution and Contribution* (Sarvodaya, 2002) and *Universalising International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2004).

[8] A term devised from the following comment: "[T]hose with authority to interpret the law have an opportunity and responsibility to bring this utopic possibility a step closer to social and political reality … *an undertaking that Weeramantry has heroically sought to actualize in his career*, and with particular intensity during his brief period as a judge on the International Court of Justice." (R. Falk, "The Coming Global Civilization: Neo-Liberal or Humanist?" in A. Anghie and G. Sturgess (eds.), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (The Hague/London/Boston: Kluwer Law International, 1998) 17. Emphasis added).

as a permanent judge came to an end nine years after it had started.[9] During that period, Weeramantry and his colleagues were faced with an increasing workload, covering a myriad of legal issues. These included (i) the exceptionally important – if arguably somewhat abstract[10] – question of the legality of nuclear weapons; (ii) seemingly unexceptional bilateral disputes;[11] (iii) legal aspects arising from some of the most contentious political disputes of the period (the Lockerbie air crash,[12] accusations of genocide during the bloody break-up of former Yugoslavia,[13] and the NATO "humanitarian" intervention in Kosovo[14]), and (iv) those disputes that can only be described as legal "gems": cases[15] that provided the Court with an unexpected opportunity for the judicial development of international law.[16]

In many – though by no means all of the – cases decided between 1991 and 2000, Weeramantry issued a separate or dissenting opinion; declarations were less frequent. However, there were a number of cases when Weeramantry did not depart individually from the collective opinion,[17] and these included a number of the later cases where he was acting president[18] to the Court. It would be purely speculative to consider

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[9] Of course, he may still be appointed as a judge *ad hoc*, as he was in *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002).

[10] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *ICJ Rep.1996*, at 162, dissenting opinion: "a distinction must be made between a question which is abstract in the sense of being unrelated to reality, and one which is abstract in the sense of being theoretical, though related to reality … Few issues in the real world can be so live and cause such universal concern as the question whether or not the use of nuclear weapons is compatible with basic principles of State responsibility."

[11] For example, *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (1991). Although the case may have appeared rather pedestrian in comparison with many of the other disputes Weeramantry had to consider, the arbitral process on which the dispute before the International Court was based was anything but unexceptional, and Weeramantry's dissenting opinion is also interesting, particularly for the emphasis he placed on the "object and purpose" of a text in trying to establish the appropriate interpretation.

[12] *Cases concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Libyan Arab Jamahiriya v. United Kingdom)* (1992 & 1998).

[13] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (1993, 1996 & 1997).

[14] *See* the various *Cases concerning Legality of Use of Force, Request for the Indication of Provisional Measures* (1999).

[15] *See*, for instance, *Case concerning East Timor (Portugal v. Australia)* (1995), and *Case Concerning Gabèíkovo-Nagymaros Project (Hungary/Slovakia)* (1997)).

[16] Whether the Court always took full advantage of this opportunity is, however, another question.

[17] Without its being a complete list, one might cite *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) Jurisdiction and Admissibility* (1994 & 1995), *Case concerning Oil Platforms (Iran v. United States of America) Preliminary Objection* (1996), *Vienna Convention on Consular Relations (Paraguay v. United States of America) Request for the Indication of Provisional Measures* (1998), and *LaGrand (Germany v. United States of America) Request for the Indication of Provisional Measures* (1999).

[18] Article 32(1), Rules of Court: "If the President of the Court is a national of one of the parties in a case he shall not exercise the functions of the presidency in respect of that case."

why Weeramantry did not issue separate or dissenting opinions in these cases. In particular, as regards those cases for which he was acting president, one might wonder whether Weeramantry either was more able to persuade his colleagues of the strength of his arguments when performing that function (there was thus no need for such opinions or declarations) or that he felt himself under more of an institutional restraint when acting in this capacity.[19] Whatever the precise reasons for Weeramantry's choosing not to issue an opinion, including the possibility that he simply concurred with the reasoning of the majority in those cases, there is, nevertheless, more than enough cases from which to garner his opinions.

One should be aware, however, that there is an inherent danger in trying to identify certain general themes arising from the judicial writings of any judge.[20] Crass oversimplification is at all costs to be avoided. However, Weeramantry – both as an academic and a judge – helps the critic in this regard as he often wore his individual views, to misuse a colloquialism, "on his sleeve". Four key themes can be discerned. First, Weeramantry was constantly seeking to operationalize notions of justice and fairness within his opinions, both as regards the substantive outcome of the case and procedurally within the Court. Achieving a fair and balanced result was an overriding concern for him throughout his opinions. Related to this was Weeramantry's rejection of any approach that was unduly formalistic and/or overly rigid in its application of the rules.

Second, Weeramantry resolutely sought to affirm the imperative of the rule of law in international affairs, both as a virtue in its own right and as a means of constraining the conduct particularly of those States considered most powerful and influential. Connected to this was his belief in the role of international adjudication – particularly the International Court – in upholding international law. Weeramantry had a special regard for the Court which, he recognized, possessed a unique responsibility to promote the law, both within the UN system and more generally as regards the international community. His refusal to bow to political interests was particularly apparent. It may also be noted that Weeramantry was deeply concerned with the workings of the Court; he raised, in numerous opinions, various aspects of the Court's jurisdiction and operation.

Third, there was a clear desire in many of the opinions to develop the law beyond its current confines and extent in light of what Weeramantry saw as certain deep-

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[19] *Cf.* His dissent as regards the cases brought against Belgium, Canada, the Netherlands and Portugal by Yugoslavia in *Case concerning Legality of Use of Force, Request for the Indication of Provisional Measures* (1999). Note article 6(ii), 1976 Resolution Concerning the Internal Judicial Practice of the Court: "The President shall *ex officio* be a member of the drafting committee unless he does not share the majority opinion of the Court." This presumably includes the situation when the vice-president is acting president.

[20] *Cf.* Reisman, n. 5, at 58: "Every decision maker leaves material that can be studied, but judges, particularly dissenting or concurring judges, leave a distinctive record, a written corpus in which the evidence of how he or she reacted to events and then rationalized and incorporated those reactions can be examined in terms of the forces that worked on and in their personalities. Studying material can help the student better explain how decisions are made, how law evolves and how and why the judge conceived of him- or herself and the judicial function.

rooted values inherent within humanity: what Falk has referred to as the "embedded utopia".[21] However, as a counter-point – yet, Weeramantry would undoubtedly argue, not in contradiction – to this, he often sought to affirm that he was deciding disputes on the basis of *lex lata* and not *de lege ferenda*. Whether, and how, this tension between seemingly divergent judicial functions was bridged by Weeramantry will also be touched upon.

The fourth theme arguably underpins the previous three. It is Weeramantry's approach to legal reasoning; it is characterized by a broadness in perspective and scope that is clearly distinctive from most, if not all, of his fellow judges. This approach had a number of different facets. It included a significant reliance on the object and purpose of a treaty in seeking its proper interpretation,[22] it sought to utilize general principles from a range of domestic jurisdictions to help resolve legal issues,[23] it often relied on hypothetical examples[24] and reasoning by analogy,[25] it was rich in cross-disciplinary,[26] jurisprudential[27] and literary[28] material, and, arguably most idiosyncratic of all, was his use of "perspectives … which international law has not yet tapped",[29] including religious wisdom and the traditional practices of pre-Westphalian societies. It is on this last point that the final part of this paper will focus. Needless to say, Weeramantry roamed way beyond the Euro-centric standpoint for which international law and the Court as its representative has for so

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[21] Falk, n. 8, at 17.

[22] *See*, for instance, *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, *ICJ Rep. 1991*, at 133: "Context and objects and purposes will tell us where in that vast spectrum our choice will fall."

[23] *See*, for instance, *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Application by the Philippines for Permission to Intervene*, *ICJ Rep. 2001*, at 634: "In the context of the paucity of international legal decisions … [on intervention], any search for governing principles must draw heavily upon comparisons and contrasts with intervention principles in domestic legal systems."

[24] *See*, for instance, *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, *ICJ Rep. 1999*, at 1184: "I have already advanced the illustration … if it were expected in such hypothetical circumstances."

[25] *See*, for instance, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Counter-Claims*, *ICJ Rep. 1997*, at 291: "Analogies in domestic jurisprudence are plentiful."

[26] *See*, for instance, *Case Concerning Gabèíkovo-Nagymaros Project (Hungary/Slovakia)*, *ICJ Rep. 1997*, at 96-97: "[E]specially at the frontiers of the discipline of international law, it needs to be multi-disciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose".

[27] *See*, for instance, Weeramantry's reliance in various opinions on the work of Rawls, Hart, Hohfeld, and Julius Stone.

[28] *See*, for instance, *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep. 1996*, at 475: "H.G. Wells, in *The World Set Free*, visualized the creation of the bomb on the basis of information already known in 1913 resulting from the work of Einstein and others on the correlation of matter and energy."

[29] *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *ICJ Rep. 1993*, at 274.

long been criticized.[30] It is surely no surprise that Weeramantry named one of his first works subsequent to his career on the bench *Universalising International Law*; for this, one would suggest, is exactly what he sought to do as a judge.

A certain amount of academic comment has already been written on Weeramantry's contribution to international law, ranging from that which is little short of adulation,[31] the balanced view,[32] and the mildly sardonic[33] right through to the more critical.[34] While it may not always be possible to place oneself accurately on such a continuum, through an analysis of these four themes, it is hoped that a more rounded picture of Weeramantry's views may become clearer. Moreover, while it is very useful to be able to break up his opinions into these very rough categories, one must always remember that these are necessarily artificial divisions, particularly as Weeramantry's work, more so than that of many of his judicial contemporaries, is characterized by the existence of mutually supporting synergies between his interpretation of the substantive law and the reasoning by which he came to those conclusions.

However, before examining these themes in some detail, it may be worth pausing to consider what Weeramantry saw as his role as the *individual* judge, and what service he believed his separate and dissenting opinions could provide. Although these are clearly related to the judicial function of the Court as a whole, Weeramantry also recognized that the individual judge had a unique responsibility to speak his

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[30] *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, *ICJ Rep. 1999*, at 1163: "We must not look for indicia of occupation in terms of settled housing or ordered agriculture, burial sites, or schools, for the very nature of this terrain prevented settled habitation in the manner known to Western jurisprudence and tradition."

[31] R. Clark, "Review of C. Weeramantry, 'Universalising International Law'", 99 *AJIL* (2005), at 298: "As a judge on the ICJ, he was known for his separate and dissenting opinions, which were guaranteed to be scholarly and probing, informed by a cross-cultural understanding, and infused with a spirit of respect and decency."

[32] *See* Falk, both his comment, at n. 8 and further in the same paper: "[t]o this extent, I differ from Judge Weeramantry in his heroic and invaluable efforts to rely on international law to challenge some of the most dangerous and objectionable features of the existing world order." (at 32).

[33] A. Boyle, "The *Gabèíkovo-Nagymaros* Case: New Law in Old Bottles", 8 *Yearbook of International Environmental Law* (1997), at 14: "Judge Weeramantry's expansive and eloquent use of general principles of law will doubtless add to his reputation for creative and original perspectives on the legal process."

[34] *See* generally, V. Lowe, "Sustainable Development and Unsustainable Arguments" in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) who argues against Weeramantry's interpretation of sustainable development as a rule of customary international law. Lowe goes on to argue, however, that sustainable development possesses an "interstitial normativity" which he suggests "[i]f I read Judge Weeramantry's Opinion correctly, this (or something close to it) is the kind of normativity that he asserts is now possessed by sustainable development." (at 31) (*cf.* D. French, *International Law and Policy of Sustainable Development* (Manchester: Manchester University Press, 2005), at 71).

mind.[35] As he noted in *Case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the Indication of Provisional Measures* (1999), "[t]his is thus a seminal moment in judicial history and I cannot permit it to pass without some suggestions which, though I am in a minority, may still, I hope, be of some utility."[36] Of particular significance was his belief in the role of the individual opinion in elucidating legal ideas that went unaddressed or under-addressed in the principal judgment which, as he said, should be expressed, regardless of whether he was in the majority or the minority.

His often detailed discussion of such matters reflected his belief in the duality of the judicial function.[37] Moreover, for Weeramantry, such individual analysis was as vital on procedural matters as it was in the development of the substantive law. As regards the latter, this can be most clearly seen in his separate opinion in *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (1993) where he noted that "[w]hile not intended to be a comprehensive exposition, it could also serve the limited purpose of drawing attention to aspects of [equity's] operation *which, by remaining implicit, may remain unexplored*".[38] Similar reasoning and wording are used to justify individual pronouncements on the Court's procedure; as he notes in *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Application by the Philippines for Permission to Intervene* (2001), "I hope this separate opinion will be of some assistance in drawing attention to important aspects relating to intervention which will need further clarification in the procedural jurisprudence of the future".[39] In both cases, a combination of his understanding of the judicial function, his particular stance on many legal issues of the day, a certain frustration – one might surmise – with the collective drafting process, and a conviction in the usefulness of individual

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[35] *See Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *ICJ Rep. 1996*, at 170, dissenting opinion: "[a]n important feature of the tradition of judicial responsibility is that the judges 'will not hesitate to speak frankly and plainly on the great issues coming before them'." His steadfast refusal to accept the argument that the International Court should act timidly in the face of "the great issues" or deferentially in the face of entrenched political interests is arguably a constant feature of his opinions and, coincidentally, may – others would say, undoubtedly does – explain his failure to secure re-election for a second term of office.

[36] *ICJ Rep. 1999*, at 184.

[37] *Case concerning East Timor (Portugal v. Australia)*, *ICJ Rep. 1995*, at 219: "The *raison d'être* of the Court's jurisdiction is adjudication and clarification of the law". *See* also his dissenting opinion in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* (1995), in which Weeramantry quoted with approval Gerald Fitzmaurice who had previously noted that "[i]nternational tribunals at any rate have usually regarded it as an important part of their function, not only to decide, but, in deciding, to expound generally the law having a bearing on the matters decided." (*ICJ Rep. 1995*, at 362 quoting G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Vol. II) (Cambridge: Cambridge University Press, 1986), at 648).

[38] *ICJ Rep. 1993*, at 278. Emphasis added.

[39] *ICJ Rep. 2001*, at 651.

viewpoints led, I think, Weeramantry to exercise his judicial right to issue an opinion as often as he did.

2.1. Fairness and justice – the foundational goals?

It is probably no surprise that Weeramantry was motivated by such ideals as fairness and justice and sought to promote them actively within his individual opinions. His previous academic work had more than highlighted his very real concern with upholding and infusing certain basic values within the rule of law.[40] Earlier books included *The Law in Crisis: Bridges of Understanding* (1975); *Equality and Freedom: Some Third World Perspectives* (1976); *Apartheid: The Closing Phase?* (1980); *The Slumbering Sentinels: Law and Human Rights in the Wake of Technology* (1983); *Law: The Threatened Peripheries* (1984), and *Nuclear Weapons and Scientific Responsibility* (1987). Of particular note was Weeramantry's work as a member of the Commission of Inquiry on the Rehabilitation of Phosphate Lands in Nauru. In his subsequent book on the topic, his repudiation of the acquired rights doctrine (which, *prima facie*, supported the pre-existing extraction contracts so damaging to Nauru's natural resources) in favour of the interests of the people of Nauru was firmly based on his clear belief in the *juridical* notion of fairness. As he notes, "[t]o entrench such a contract – if indeed it was a contract – under the principle of acquired rights *would amount to a perpetuation of the very element of unfairness which international law seeks to avoid.*"[41]

This desire to achieve a fair and just result can be seen in almost all of his opinions; it was wide-ranging, applying not only to questions of the substantive law, but also in relation to the procedure of the International Court. As regards achieving fairness in the substantive law, this was as applicable to a "simple" bilateral dispute as it was to broader issues of global concern. In *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (1991), in which the validity of a arbitral decision was under consideration, Weeramantry in his dissent noted that,

> "In all these circumstances, one cannot conclude, unless compelled thereto by obligatory juristic principle, that an interpretation is legitimate which commits one party or the other to a situation so fraught with prejudice. Such a course neither offers a real solution to the solution before the Court nor ensures a fair determination for Guinea-Bissau of its exclusive economic zone and its fishery zone, which was among the principal purposes of the document under examination."[42]

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[40] This is not to neglect Weeramantry's career as an advocate and then justice (1967-1972) of the Supreme Court of Sri Lanka, nor any of his other professional responsibilities over the years.

[41] C. Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford: Oxford University Press, 1992), at 315. Emphasis added.

[42] *ICJ Rep. 1991*, at 172-173.

This is an example *par excellence* of Weeramantry's approach. Firstly, it highlights the sheer artificiality of subdividing his opinions into separate themes; the quotation touches upon his mode of legal reasoning and his understanding of the judicial function, as well as – our current focus – his desire to achieve a fair and just outcome. Secondly, the reference to "unless compelled thereto by obligatory juristic principle" highlights recognition by Weeramantry that there may be positivist restraints upon his discretion to achieve "an interpretation [that] is legitimate". Thirdly, it shows us that fairness and justice were not, for him, merely abstract notions to be decided by a judiciary hermetically isolated from the "real world". The reference to "[s]uch a course neither offers a real solution … nor ensures a fair determination" (*sic*) touches directly upon Weeramantry's view that the International Court should endeavour, whenever possible, to see as an integral whole the dispute before it, together with the practical consequences of its decisions. As he noted in his dissent in *Legality of the Threat or Use of Nuclear Weapons* (1996),

> "By their very nature, problems in humanitarian law are not abstract, intellectual inquiries which can be pursued in ivory-tower detachment from the sad realities which are their stuff and substance. Not being mere exercises in logic and black-letter law, they cannot be logically or intellectually disentangled from their terrible context. Distasteful though it be to contemplate the brutalities surrounding these legal questions, the legal questions can only be squarely addressed when those brutalities are brought into vivid focus."[43]

Grounding a legal issue within its factual reality arguably serves three functions. Firstly, it re-connects law to community values and aspirations; for Weeramantry, law loses something very precious if it is divorced from the broader context from whence it came. Secondly, if law is ever to be an effective instrument of social control, it must be incisive in tackling the issues for which it was initially created. As he notes, to be "squarely addressed", the law can only truly be understood when the attendant "brutalities are brought into vivid focus". Thirdly, the authority and esteem of international law, and the Court which is its ultimate guardian, is significantly lowered if law is simply conceived as an exercise in "logic and black-letter law". This connexion between law and fact also raises difficult questions over the precise relationship between international adjudication and political power, on which Weeramantry has had much to say and on which, see below.

This concern for fairness is also present in his understanding of the mechanisms and purposes of international adjudication. It manifested itself most acutely in his opinions arising out of those aspects of the *Cameroon v. Nigeria* dispute in which Weeramantry was involved. Most significantly, Weeramantry dissented from the finding of jurisdiction in the Court's 1998 judgment on preliminary objections. Now, in the light of other opinions illuminating Weeramantry's rather expansive understanding of the jurisdiction of the Court, this seems rather out of line.[44] However, for Weeramantry, although consensual jurisdiction, particularly under the optional clause,

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[43] *ICJ Rep. 1996*, at 444.

[44] *See* below for a discussion on Weeramantry's approach to the role and jurisdiction of the Court.

is to be supported and strengthened whenever possible, the facts of this case raised a wider issue of fairness. The issue was the lodging by one party of an "optional clause" declaration with the UN Secretary General under article 36(4) of the ICJ Statute, but the subsequent failure of the Secretary General to transmit this to the Court with a minimum of sufficient haste. The question was whether a case could be brought against another party by the declarant "irrespective of that other party's knowledge that such declaration has been lodged".[45] The wording of article 36(4) certainly seems to require both the lodging *and* the communication of such a declaration. However, the view taken by the Court was that only the lodging of the declaration was required. As Weeramantry notes, "[i]t seems to me that such a proposition cannot be in conformity with either the express law or the essential philosophy governing the optional clause."[46]

Leaving aside the "express law",[47] the "essential philosophy" is of particular interest. As Weeramantry notes, to impose jurisdiction in such a case "is also in disharmony with the principles of equality, fairness good faith, and reciprocity."[48] Although Weeramantry was clearly minded as a judge to find jurisdiction whenever possible, the distinct unfairness in the current dispute and the consequent imbalance between the parties fell beyond that which could be accepted. Moreover, as with his dissent in *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (1991), this reliance on fairness was not for abstract reasons of jurisprudence, but for very practically-orientated reasons. As Weeramantry notes, "[t]he vesting of jurisdiction in the Court is an important juristic act with major repercussions on State sovereignty … This inequality can have practical repercussions."[49] This pragmatic justice, while derived from a juridical ideal, was clearly grounded in the realities of the actual process of international adjudication.

Such a belief in fairness was also evident in two other opinions surrounding the dispute between Cameroon and Nigeria. In the previous *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Request for the Indication of Provisional Measures* (1996), Weeramantry joined with Judges Shi and Vereshchetin in a declaration explaining their reasons for voting against part of the *dispositif*. Their principal concern was that the provisional measures indicated "in effect leaves it to each Party to determine" where each of the respective armed forces of the two parties were positioned prior to a particular date.[50] As the joint declaration continues, "[t]he positions may well be contradictory, thus leaving

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[45] *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Preliminary Objections*, *ICJ Rep. 1998*, at 362.

[46] *Idem*.

[47] *ICJ Rep. 1998*, at 376: "Other advantages of this view are that it would … bring the operation of declarations under Article 36 within the express terms of the article which fashioned them."

[48] *ICJ Rep. 1998*, at 362.

[49] *ICJ Rep. 1998*, at 375. *See* also *idem*., at *376*: "it would … ensure fairness and reciprocity between the parties."

[50] *ICJ Rep. 1996*, at 31.

open the possibility of confusion upon the ground."[51] Again, the concern is with being fair, in this case to both parties, in light of the factual difficulties raised by the Court's order. In addition, the declaration reflects a concern that the Court should avoid exacerbating with a vaguely-worded order an already precarious situation, but should rather be seeking to "dampen down" such conflicts.

Finally, Weeramantry was again in the minority in *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Preliminary Objections (Nigeria v. Cameroon)* (1999). Weeramantry in his dissent disagreed with most of his colleagues and would have found the request for interpretation of the judgment – as permitted under article 60 of the Statute – admissible. Once again, one of the key reasons for Weeramantry's coming to this conclusion was his belief that the parties involved in a contentious dispute must be treated fairly. As he says, "[t]he clarification … of the matter raised by Nigeria would also have achieved the *great practical advantage* of placing both Parties on clearer ground regarding the exact ambit of their future conduct of these proceedings."[52]

If the notion of fairness has been a governing theme in many of his individual opinions, one of the clearest manifestations of fairness, that of equity, has also received significant attention from Weeramantry. In his separate opinion in *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (1993), he conducted what he termed a "brief survey of a vast topic", namely, "the contribution of equity to an individual decision".[53] In fact, this separate opinion was over sixty-five pages long, and structured into three substantial parts: the general equitable jurisdiction of the Court, particular invocations of equity in maritime delimitation, and what he refers to as "equity viewed in global terms". Despite clearly being not unrelated to the dispute before him, it reads as much as an academic piece as it does a judicial decision. Critically, it is an excellent discussion of equity in all its manifestations, ranging through the sources of equity, the various types of equity, and an interesting discussion concerning *a priori* and *a posteriori* employment of equity. In particular, the final part on the global nature of equity is a wonderful foretaste of both his later opinions on environmental jurisprudence and how Weeramantry can intertwine legal, jurisprudential, cultural, and religious sources to construct a singular argument.[54] However, it is surely on the very edge of what a separate or dissenting opinion should be. Reminding oneself of Higgins' injunction that "judicial opinions should not be academic articles",[55] one cannot help but wonder whether Weeramantry has with this opinion crossed an unwritten rule.

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[51] *Idem*.

[52] *ICJ Rep. 1999*, at 42. Emphasis added.

[53] *ICJ Rep. 1993*, at 278.

[54] *ICJ Rep. 1993*, at 278: "International law throughout its history has been richly interwoven with equitable strands of thought."

[55] Higgins, n. 1, at 4. One might also add that a characteristic of many of Weeramantry's opinions, in contrast to the opinions of many of his contemporaries, was a heavy reliance on footnotes, as often used in academic papers.

Nevertheless, Weeramantry's focus on equity is a significant aspect of his understanding of fairness and justice as judicial tools. As he noted in the later case of *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)* (1999), "this is a court not only of strict law, but of equity as well."[56] An important aspect of this reliance on equity was a rejection of both formalism and an unduly rigid approach to legal rules. He noted in his dissent in *Legality of the Threat or Use of Nuclear Weapons* (1996) that "[i]f a glaring anomaly or absurdity becomes apparent and remains unquestioned, that discipline is in danger of being seen as floundering in the midst of its own technicalities."[57]

Although this rejection of formalism was most clearly related to his approach to legal reasoning (on which, see below), it was also relevant to his understanding of the role of the Court, especially in the pacific settlement of disputes involving international conflict. In a particularly contentious dispute brought by the remnant of Yugoslavia (Serbia and Montenegro) against those States of NATO involved in the humanitarian intervention in Kosovo and in which Yugoslavia sought provisional measures constraining further military intervention, Weeramantry made this very honest – some might say too honest – statement on his approach to the cases before the Court:

> "It may be that for jurisdictional reasons the Court is totally unable to respond in the majority of the ten cases that have been brought before it. But in the cases where the Court can respond – be it in only one – I believe it should, because the issues involved are central to international order and the international rule of law, and when defined and applied by the Court will have their influence beyond the confines of the particular case."[58]

Again, this quotation is an excellent example of numerous aspects of Weeramantry's approach. His belief in the imperative of the rule of law in international affairs and the Court's inherent right to promote international order will be considered later. However, what is also very striking about this statement is that although Weeramantry was prepared to accept – even if he did not agree entirely with – the Court's "jurisdictional reasons", he did not believe that this should necessarily hinder the Court, where it had the opportunity, "be it in only one [case]", to make its unique contribution to international peace. In particular, the clear policy element in the statement that a decision by the Court would have an "influence beyond the confines of the particular case" is in line with his rejection of a rather narrow jurisdictional remit for the Court. Returning to the first theme identified, fairness and justice were for Weeramantry overriding goals and, wherever possible, he felt that legal, operational, and jurisdictional restraints should be sufficiently malleable to accommodate and promote them.

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[56] *ICJ Rep. 1999*, at 1183.
[57] *ICJ Rep. 1996*, at 485.
[58] *ICJ Rep. 1999*, at 194.

2.2. International law and the International Court: bastions of legality?

If fairness and justice were key values for Weeramantry, the international legal system and, more specifically, international adjudication were central to the way such values were to be secured within the international community. In particular, in many of his opinions, Weeramantry sought to emphasize the centrality of the rule of law in international relations and the role of the Court: to promote this. Moreover, he was also very well aware that, given the nature of the international law being as it was,[59] the International Court was under an additional burden to reinforce the legality and integrity of the international system at every possible opportunity. This close connexion between international law and the International Court was clearly something that Weeramantry considered of utmost importance.

International law was worth defending, argued Weeramanty, because it was premised upon certain elementary values without which no society could live. These values were most vulnerable during times of conflict and stability. In *Legality of the Threat or Use of Nuclear Weapons* (1996), Weeramantry identified "[r]ationality, humanity and concern for the human future … [as being] built into the structure of international law".[60] In his later opinion in *Case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the Indication of Provisional Measures* (1999), he was more specific in noting that "the *peaceful* resolution of disputes, the over-arching authority of the United Nations Charter and the concept of the international rule of law" were the "fundamentals of the international legal order".[61] He went on to describe similar ideals as "the primordial principles underlying the Charter and the Statute",[62] highlighting once again his deep regard for such notions. Although all members of the Court would undoubtedly be able to agree with such rhetoric, it was Weeramantry's detailed reliance on such principles and his use of them to inform his understanding of the legal points at issue that often separated him from his peers.[63]

Ensuring respect for such principles was especially critical when human life was at risk. His separate opinion in the 1996 judgment on the preliminary objections in *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in which he argued for the automatic succession of the Genocide Convention to successor States, was ultimately premised, for instance, on the argument that any other approach "would grievously tear the seamless fabric of international human rights protections, endanger peace, and lead the law astray from the Purposes and Principles of the United Nations."[64] There was often a strong sense

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[59] *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, *ICJ Rep. 1991*, at 156: "International law, though still an infant science…".

[60] *ICJ Rep. 1996*, at 553.

[61] *ICJ Rep. 1999*, at 181. Author's emphasis.

[62] *ICJ Rep. 1999*, at 194.

[63] *See*, for instance, his very precise analysis of the opening words of the UN Charter in *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep. 1996*, at 441-442.

[64] *ICJ Rep. 1996*, at 655.

of international society within many of Weeramantry's opinions; and in this development of the globalizing society, international law had a clear constitutive role.

The tension between the sheer might of international relations and the normative constraints of international law, on the one hand, and Weeramantry's belief that the latter must always triumph, on the other, are captured most eloquently in his dissenting opinion in *Legality of the Threat or Use of Nuclear Weapons* (1996). He notes that:

> "The forces ranged against the view of illegality are truly colossal. However, collisions with the colossal have not deterred the law on its upward course towards the concept of the rule of law. It has not flinched from the task of imposing constraints upon physical power when legal principle so demands. It has been by a determined stand against forces that seemed colossal or irresistible that the rule of law has been won."[65]

Is this idealistic rhetoric? Clearly. Is it realistic assessment of the twentieth century? This is debatable. Is it an affirmation, however, of the importance of the role of law in international politics? Unquestionably so. However, in seeking fully to contextualize this quotation, one should keep in mind that dissimilarly to many of his colleagues on the bench, Weeramantry had a very clear and simple understanding on the question of the legality of nuclear weapons. For him, international law provided a very definitive answer to the issue. As will be noted again later, Weeramantry was convinced that the current law was more than enough to justify his stance against nuclear weapons. However, the case also provided him with the opportunity to assert, more generally, the primacy of law *vis-à-vis* the threat and use of military force.[66] Arguments based on political considerations or the realities of international relations could not unseat the fundamental issue of illegality. As he notes in one of his most forthright statements on the matter, "[t]his Court cannot endorse a pattern of security that rests upon terror".[67] While it has already been suggested that Weeramantry often insisted on the grounding in factual reality of international law, such a contextual approach found its limit when the reality itself was a threat to human society. As he concluded his dissenting opinion in that case, "[n]o issue could be fraught with deeper implications for the human future, and the pulse of the future beats strong in the body of international law".[68] One might also note the strong intergenerational element to that sentence, considered further below.

If international law is laden with particular values, it is little wonder that Weeramantry considered international adjudication as having a significant role in upholding and promoting a certain vision of international society; the role of the International

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[65] *ICJ Rep. 1996*, at 440.

[66] *See* also *Case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the Indication of Provisional Measures*, *ICJ Rep. 1999*, at 200: "In a world of legal order based upon the pursuit of peace and peaceful settlement, the message that law can and should be used for avoiding the use of force is one which reverberates with special strength."

[67] *ICJ Rep. 1996*, at 551.

[68] *ICJ Rep. 1996*, at 554.

Court was paramount in this regard. He noted in his separate opinion in *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Application by the Philippines for Permission to Intervene* (2001) that "[t]he pre-eminent position of the International Court, situated as it is at the apex of the international judicial structure, attracts special recognition to its pronouncements, even in matters indirectly related to the particular dispute before the Court."[69] In a similar vein, if more colloquial, was his comment in *Case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the Indication of Provisional Measures* (1991) that "the Court … [is] the … upper guardian of the legal norms underpinning the structure of the international community".[70]

If one had to classify what Weeramantry saw as the overarching purposes of the Court, these would undoubtedly be the pacific settlement of disputes, preventing the escalation of conflict,[71] and the clarification and development of the law. There are too many instances in his opinions of where he has made mention of the judicial function to discuss them comprehensively in this paper. Two particularly contentious aspects of the judicial function, however, may be worth briefly mentioning; the inherent power of the Court to promote peaceful settlement and its ability to clarify the law. On both points, Weeramantry favoured a broad approach to the issue.

As regards his views on the Court's powers of pacific settlement, this can most clearly be seen in *Case concerning Legality of Use of Force (Yugoslavia v. Belgium), Request for the Indication of Provisional Measures* (1999). Weeramantry, arguably, went further than most of his colleagues when he argued that the Court had an inherent power to assist the respective parties towards the peaceful settlement of its dispute. Although Weeramantry would have indicated certain provisional measures in this particular case, he also argued that the Court's role in this area was not only because of formal inclusion of such authority in its Statute, but rather because the search for peace was intrinsic to the mandate and jurisdiction of a world Court. As he noted, "the Court also has an inherent jurisdiction arising from its judicial function, to lend such assistance as it can towards the process of peaceful settlement."[72]

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[69] *ICJ Rep. 2001*, at 641.

[70] *ICJ Rep. 1999*, at 200.

[71] Of particular note, in this regard, was Weeramantry's dissenting opinion in *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) Further Requests for the Indication of Provisional Measures* (1993), in which he argued that provisional measures were legally binding, something the Court itself agreed with in *LaGrand (Germany v. United States of America)* (2001). It should not, however, be presumed that Weeramantry was alone in his opinion in 1993 in arguing that provisional measures should be considered legally binding.

[72] *Case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the Indication of Provisional Measures*, *ICJ Rep. 1999*, at 195.

While it may be argued that Weeramantry was only drawing explicit attention to that which was already implicit in how the Court had acted,[73] it is unlikely that the Court as a whole would have subscribed to such a broad view of its jurisdiction. Intriguingly, Weeramantry relied not just on the express purposes of the UN Charter to come to this view, but on what he termed the "time-honoured conception of the judicial function in the world's main forms of civilization and principal legal systems".[74] This belief in the authority of the Court to act for the greater good was not, however, without its constraints. As will be explored further, below, Weeramantry recognized that there were limitations on what a court of law could do in this area. Nevertheless, within that sizeable zone of discretion, Weeramantry would have sought the greatest possible influence for the Court, particularly in those cases where conflict was ongoing or human rights were threatened. As he noted, speaking about the Court's approach in *Legality of the Threat or Use of Nuclear Weapons* (1996):

> "In that Opinion the Court spoke of the obligation of States to pursue and to conclude negotiations in good faith in regard to nuclear disarmament … advice which went beyond the traditional scope of an advisory opinion regarding the legality of such weapons. This the Court was clearly entitled to do as an organization functioning within the framework of the United Nations and pursuing the common aim of peace."[75]

The second aspect of the judicial function that Weeramantry held particularly strong views on was his belief in the Court's ability to clarify and develop the law.[76] Such clarification, he believed, was a fundamental aspect of its judicial role; its purpose being "an end in itself … When the law is clear, there is greater chance of compliance than when it is shrouded in obscurity".[77] Of course, attempts at clarification are often criticized as being nothing more than judge-made law. Weeramantry was acutely aware of such accusations. His defence, rather than simply denying the charge outright, was to be found in the very nature of the task the judiciary was called upon to undertake:

> "If the law were all-embracing, self-evident and specifically tailored to cover every situation, the judicial function would be reduced to a merely mechanical application of rules. By very definition, international law is not such a system any more than any domestic system is. Its inherent principles infuse it with vitality, enabling it to

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[73] Though the Court had refused to indicate provisional measures, it did make the following general statement in all ten cases: "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law … in this context the parties should take care not to aggravate or extend the dispute."

[74] *ICJ Rep. 1999*, at 203.

[75] *ICJ Rep. 1999*, at 198.

[76] *See* n. 37.

[77] *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep. 1996*, at 550.

> apply them to new situations as they arise and give them a specificity they lacked before … The Court is now being invited to exercise its classic judicial function. It is being asked to pronounce whether general principles already existing in the body of international law are comprehensive enough to cover the specific instance. To suggest that this is to invite the Court to legislate is to lose sight of the essence of the judicial function."[78]

This is a much more sophisticated argument than simply denying that judge-made law occurs; it highlights both the autonomy of the law and the judicial discretion essential to the Court to enable it to function properly. Of course, much revolves around what one means by "general principles already in existence in the body of international law". As Weeramantry holds a rather expansive view on this question,[79] incorporating both municipal law analogies and wisdom from religious teaching and past cultures, there is a certain risk of incongruity here. Thus, while Weeramantry is surely right to argue against the "mechanical application of rules", the very significant pool from which he finds such principles arguably militates against his defence of judicial creativity. This, however, raises the broader question as to whether one believes Weeramantry is right to utilize such far-flung principles. While this paper cannot answer that question, it does endeavour to say a little more on it later.

Of central importance for Weeramantry is the position of the Court as the principal judicial organ of the United Nations,[80] thus forming both a *conceptual* bond between the purposes of UN and the judicial function of the Court and, *institutionally*, between the Court and what he referred to as the wider "United Nations family".[81] In his dissent in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1996)* in which the World Health Organization's request for an advisory opinion had been turned down by the Court on the grounds of lack of competence to request an opinion on such a matter, Weeramantry felt duty bound to disagree. As he noted, "[i]t is not a Court existing outside the United Nations system, but one functioning from within. It is in a state of harmonious co-existence and co-operation with the other organs of the Organization in their common goal of the attainment of world peace and the high ideals set before them all by the United Nations Charter."[82] Although the link between the Court and the UN, particularly in relation to its advisory function, had long been recognized by the Court;[83] what Weeramantry arguably has done is to supplement this with a richer and more explicit understanding

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[78] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *ICJ Rep. 1996*, at 164-165.

[79] *See*, for instance, *Case concerning East Timor (Portugal v. Australia)*, *ICJ Rep. 1995*, at 211: "The dependence of international law for its development and effectiveness on principles, norms and standards needs no elaboration."

[80] Article 92, UN Charter and article 1, Statute of the Court.

[81] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Rep. 1996*, at 167.

[82] *Idem*.

[83] *See Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *ICJ Rep. 1950*, at 71: "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization and, in principle, should not be refused."

of the links between the UN Charter and the normative values underpinning the Court's work.[84]

If this is somewhat novel, it is certainly not particularly controversial. Contrast that with Weeramantry's views on the relationship between the Court and the Security Council: the issue as to the precise relationship between their respective roles, and in particular whether the Court could act, even when the Security Council had already done so, was considered in detail by a number of judges, particularly in the *Cases concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Request for the Indication of Provisional Measures* (1992). Weeramantry's opinion was, probably unsurprisingly, one of the most strident in asserting the role of the Court. While agreeing that a Security Council resolution adopted under Chapter VII "must be treated as binding on Libya as on all countries", he did not, unlike the majority, feel that this either prohibited or "render[ed] it inappropriate" to indicate provisional measures.[85] Although rather tentative in his reasoning and wording, Weeramantry was nevertheless clearly not overly deferential.[86] In fact, by asserting the role of law in resolving international conflict,[87] he placed the Court on parity with the Security Council.[88]

In his dissenting opinion in *Legality of the Threat or Use of Nuclear Weapons* (1996), Weeramantry went much further by noting that:

> "[E]ven if the Security Council had expressly endorsed the use of such weapons, it is this Court which is the ultimate authority on questions of legality, and ... such an observation, even if made, would not prevent the Court from making its independent pronouncement on this matter".[89]

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[84] *See*, for instance, *Case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the Indication of Provisional Measures*, *ICJ Rep. 1999*, at 203: "[requiring the Court to promote peaceful settlement] dovetails into the principle of peaceful resolution of disputes already referred to as a cornerstone of the United Nations Charter and the Statute of the International Court of Justice."

[85] *See*, for instance, *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) Request for the Indication of Provisional Measures*, *ICJ Rep. 1992*, at 50.

[86] *ICJ Rep. 1992*, at 69: "As with its failure to consider the Montreal Convention, so also resolution 731 (1992) fails to consider this well-established principle of international law." He is referring to the principle of *aut dedere aut judicare*.

[87] *ICJ Rep. 1992*, at 70: "A great judge once observed that the laws are not silent amidst the clash of arms. In our age we need also to assert that the laws are not powerless to prevent the clash of arms."

[88] *Idem*: "But in areas not covered by its binding decisions under Chapter VII, the Court is free to use its influence and authority to serve the purposes of international peace in which *it has as much an interest as any organ* of the United Nations." Emphasis added.

[89] *ICJ Rep. 1996*, at 519.

Although clearly *obiter*, both the tenor of this statement and the implications thereof go significantly beyond the views of other judges, both past and present.[90] Weeramantry clearly sees the Court as a *constitutional* court, endowed with ultimate authority on matters of law. This is a courageous position to hold in light of the current power relationships within the United Nations.

Beyond this important – if rather narrow and somewhat speculative – issue, Weeramantry also sought to ensure a broad understanding of the jurisdiction of the Court. It has already been noted that Weeramantry believed that basic notions of fairness should, in exceptional cases, preclude the Court from exercising jurisdiction in a particular case, yet his general approach was to find jurisdiction, whenever that was possible. As he noted in his dissent in *Case concerning East Timor (Portugal v. Australia)* (1995), in which Australia argued – and the Court concurred – that it should not exercise jurisdiction because of the absence of a necessary third party, *viz.*, Indonesia on the basis of the *Monetary Gold* (1954) principle, "[i]t is an important circumstance relating to all jurisdictional questions that this Court is the international system's *place of ultimate resort* for upholding the principles of international law, when all other instrumentalities fail".[91] Thus, he rejected, as an anathema to this judicial mandate, any interpretation of the Court's jurisdiction that unduly narrowed its scope and remit.[92] Moreover, as regards the argument that Indonesia's interests may well be affected, he suggested – relying, in part, on general juridical principle – that this was no barrier to jurisdiction and that such effects on third States are "manifesting themselves increasingly as the world contracts into a more closely interknit community."[93] Weeramantry's resolute dissent in this case, alone but for judge *ad hoc* Skubiszewski, also indicates both his willingness to voice an unpopular opinion and his determination to stand up for *his* understanding of the Court's jurisdiction.[94]

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[90] *See* the separate opinion of Judge Lachs in *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *ICJ Rep. 1992*, at 138: "[the Court] is the guardian of legality for the international community as a whole, both within and without the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction." Weeramantry quoted this in *Case concerning East Timor (Portugal v. Australia)*, *ICJ Rep. 1995*, at 220.

[91] *ICJ Rep. 1995*, at 161. Emphasis added.

[92] *ICJ Rep. 1995*, at 155: "the substantive and procedural principles governing this court's jurisdiction cannot operate so restrictively."

[93] *Idem*. *See* also *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Application by the Philippines for Permission to Intervene*, *ICJ Rep. 2001*, at 630, separate opinion: "The closely interknit global society of tomorrow will see a more immediate impact upon all States of relations of transactions between any of them, thus enhancing the practical importance of this branch of procedural law."

[94] Falk, n. 8, at 18: "In each of the three prominent legal controversies presented to the World Court during his tenure, Weeramantry, unlike the majority of his brethren refuses to strike what appears to be a tacit Faustian bargain with geopolitics, either in the form of a compromise that significantly defers to the practice of leading states, as in the majority opinion in *Nuclear Weapons* case, or by outright deference to the priorities of those political actors with predominant power and wealth,

A similarly reasoned approach to jurisdiction can be seen in his dissent in *Fisheries Jurisdiction Case (Spain v. Canada) Jurisdiction of the Court* (1998), which involved a Canadian reservation to its declaration under the optional clause scheme. For the majority, the reservation must be given effect as a manifestation of Canadian sovereignty, thus depriving the Court of jurisdiction in this particular instance. Weeramantry disagreed. He felt that within the jurisdiction granted to the Court by the existence of optional clauses between the parties a "haven of legality" existed.[95] As he argues, "[o]nce a State has entered the consensual system, submission to the basic rules of international law inevitably follows."[96] Not denying that a State could make reservations to its declaration, Weeramantry was nevertheless of the opinion that "the interests of justice are best served by taking a broader view where that is consistent with the terms of the declaration".[97] Moreover, as with *East Timor*, his support for the Court's jurisdiction was not simply for its own sake, but to ensure the Court played an ever fuller part in upholding the rule of law within the international community. As he notes,

> "The progressive contraction of that jurisdiction which could result could weaken the prospects for its continuing development … if the long and difficult road towards the goal of judicial settlement of international disputes is to be made easier, each stop along the way must offer the maximum judicial shelter it can provide."[98]

For Weeramantry, this ideal was all-important. It was for him a matter of judicial policy that international law and the International Court should constantly be progressing towards greater influence and authority. As will further be explored in the next part, Weeramantry believed that one of the principal functions of the international judge was to promote this constant evolution in the rule of law.

2.3. Weeramantry's Grotian quest?

It comes as little surprise that one of the themes underlying Weeramantry's time at the Court was his attempt to progress the law beyond its current state. There was in most of his opinions a degree of idealism as to what international law could become, particularly if released from the strictures of present-day global politics. In his clearest expression of this belief, Weeramantry associated himself with the

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as seems arguably to occur in *Lockerbie* and *East Timor* decisions." For information, Weeramantry was in fact in a minority of one on only one occasion, namely, his dissent in *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Counter-Claims* (1997).

[95] *ICJ Rep. 1998*, at 501.

[96] *ICJ Rep. 1998*, at 500.

[97] *ICJ Rep. 1998*, at 512.

[98] *ICJ Rep. 1998*, at 513-514.

view that "international law has clearly a commitment to the Grotian vision":[99] a global society governed by the rule of law. Both as judge and as academic, he focused upon the possibilities of international law and global institutions, rather than their limitations.[100] Of course, he was not the first judge of the International Court to foresee where international law might go,[101] although his opinions are undoubtedly some of the most wide-ranging and detailed on these issues. As Falk notes,

> "What sets Judge Weeramantry apart among international law specialists is his deep belief that these goals [of 'human survival in social and political conditions of harmony, dignity, and tolerance'] are not only integral to cultural identity, but have been long inscribed in the deep structures of international law, which prefigures a beneficial future for humanity as contrasted with the Hobbesian sense of fundamental antagonism and struggle as the permanent reality of the human condition…".[102]

Again, it is impossible to provide a comprehensive account of Weeramantry's opinions in this regard. Rather, two areas are briefly discussed; first, his attempt to entrench, more firmly within the international system, a global order clearly based on law and secondly, his contribution to the establishment of a new discrete area of international law, *viz.*, environmental law. This part will then conclude with an assessment of Weeramantry's approach and the inherent tension that undoubtedly exists with the formation of such views whilst a judge, and considers whether he has transgressed the positivist limitations of the judicial mould.

One of the most notable aspects in Weeramantry's opinions was his support for the United Nations Charter and the work of the UN Organization. As the most complete manifestation of internationalism that currently exists, Weeramantry considered it a necessary part of his judicial role to defend the purposes of the UN and to promote its objectives. He noted in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (1996) that "[t]he family of United Nations agencies, in working harmoniously for the common welfare of the global community, will need to work as a team".[103] Similarly, in his separate opinion in *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999), he emphasized the importance of moving towards a universally applicable system of protection for UN personnel. As noted in the previous part, it was also the unique position of the Court within the UN system that Weeramantry believed provided it with the necessary mandate actively to support international law

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[99] *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep. 1996*, at 551.

[100] *See* the draft UN Declaration of Scientific Responsibility in Relation to Nuclear Weaponry which he devised and sent to every diplomatic mission at the UN (text found in C. Weeramantry, *Nuclear Weapons and Scientific Responsibility*, 1987).

[101] *See*, for instance, *Fisheries Case (United Kingdom v. Norway)*, *ICJ Rep. 1951*, at 149, individual opinion *per* Judge Alvarez: "the law of *social interdependence* is taking the place of the old individualistic law." Author's emphasis.

[102] Falk, n. 8, at 16. The attendant issues of legal reasoning are dealt with in the next part.

[103] *ICJ Rep. 1996*, at 170.

within the Organization's affairs. He may have been too audacious in conceiving of the Court as a constitutional tribunal, analogous to a domestic supreme court, yet his view that the Court should be playing a broader role within the business of the Organization reflected a firm belief in the global *moral*, as well as the legal and political, imperative of the United Nations.

Moreover, beyond the strict confines of the UN Organization, Weeramantry also sought to ensure a more legal, rights-orientated framework for the international community. His arguments in favour of automatic succession of the Genocide Convention and his willingness to grant Portugal *locus standi* to enforce its rights of trusteeship over East Timor against Australia both stand as good examples of this wider approach. They also underlined his belief that international law should always be ready to intervene to protect the weak and those without a voice. As can be seen from his understanding of the notion of self-determination: "Charter principles combine with well-established fiduciary principles and principles of tutelage to underline the paramount importance of the interests of the non-self-governing territory over all other interests. That priority of interest is not easily defeated … and [it is] the function of international law to ensure its protection."[104] Moreover, this belief in the universal nature of the international legal system also led him to the view that, whilst there may be certain in-built structural inequalities within international society, even within international law itself, this was not something that should be either supported or condoned by the International Court.[105]

One can also see Weeramantry's attempt to promote the integrity of international law in his dissenting opinion in *Legality of the Threat or Use of Nuclear Weapons* (1996). In particular, in affirming the overarching relevance of the Martens Clause to international humanitarian law,[106] Weeramantry relied upon the laws of humanity and the dictates of the public conscience to demonstrate the "stark" incompatibility of nuclear weapons with these fundamental precepts.[107] Mendlovitz and Datan see Weeramantry's dissent as a significant move away from the current affection of law for established political structures. They note, "[j]ust as Grotius first saw in the laws of war and peace the emergence of the nation-state system and state sovereignty, so Weeramantry is foreshadowing a globalization which moves the state system from

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[104] *ICJ Rep. 1995*, at 192.

[105] *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep. 1996*, at 528: "If the corpus of international law is to retain the authority it needs to discharge its manifold and beneficent functions in the international community, every element in its composition should be capable of being tested at the anvil of equality."

[106] First adopted at the 1899 Hague Peace Conference, and utilized in subsequent texts, it states that "[u]ntil a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience."

[107] *ICJ Rep. 1996*, at 489.

geopolitics to humane governance."[108] They go on to define humane governance as "a type of geo-governance that is people- and human rights-centred rather than statist and market-centred. The guiding principles of humane governance … include economic well-being, social justice, non-violence, ecological stability, and positive identity."[109] One can immediately recognize these guiding principles as characteristic of Weeramantry's universal understanding of international law.

Moving beyond nuclear weapons, it is also no surprise that in this redefining of global norms Weeramantry has also been very interested in environmental considerations.[110] Weeramantry has taken a lead in the Court on matters of environmental protection. He first raised environmental issues in his separate opinion in *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (1993); as he noted, "[n]otions of … the sacrosanct nature of earth resources, harmony of human activity with the environment, respect for the rights of future generations, and the custody of earth resources with the standard of due diligence expected of a trustee are equitable principles stressed by those traditions"(*sic*).[111] This concern for the identification and progressive elaboration of environmental principles was then taken significantly further in various later opinions. Although this was undoubtedly a relatively new area of international law, Weeramantry was determined to illuminate fully its legal implications for the international community *and*, equally important, for the Court. Of particular regard was his view that "[t]here is a State obligation lying upon every member State of the community of nations to protect the environment, not merely in the negative sense of refraining from causing harm, but in the *positive sense of contributing affirmatively to the improvement of the environment*."[112] He took this further in *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), by examining in detail the concept of sustainable development and finding it to be not merely a principle of customary international law, but "one of the most ancient of ideas in the human heritage".[113]

For Weeramantry, environmental concerns present the international community with a unique challenge, which demand a legal system that is adaptable to this new state of affairs. As he noted in *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)* (1999),

> "The future will demand an international law that is sensitive and responsive to the problems of environmental law … The principles and the duties arising from environmental obligations now superimpose themselves upon such rights arising from State

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[108] Mendlovitz, S. and Datan, M., "Judge Weeramantry's Grotian Quest", 7 *Transnational Law and Contemporary Problems* (1997), at 415.

[109] *Ibid*., at 413.

[110] A further paper on Weeramantry's understanding on environmental law is currently under preparation.

[111] *ICJ Rep. 1993*, at 276-277.

[112] *ICJ Rep. 1996*, at 141. Emphasis added.

[113] *ICJ Rep. 1997*, at 110.

> sovereignty as may have been recognized by prior international law in an absolutist form."[114]

The cross-cutting nature of environmental considerations and their lack of respect for national boundaries simply affirmed their *global* importance. Moreover, Weeramantry was heavily influenced by the work of Professor Brown Weiss and her notion of the intergenerational rights of generations yet to be born.[115] He succinctly notes that "[i]n a matter of which it is duly seised, this Court must regard itself as a trustee of those rights in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself."[116] In seeking relevant legal principles to tackle these new challenges, Weeramantry has taken great assistance from past cultures; in fact, it is in some of his "environmental" opinions that his reliance on past wisdom was most pronounced. One can contrast that with the Court's much more restrained approach. Weeramantry was clearly frustrated by the reluctance of the Court as a whole to consider in any meaningful way the challenges of environmental degradation. In what was arguably his most vociferous outburst in an individual opinion, he concluded his dissent in *Request for an Examination of the Situation* (1995) with the comment: "[t]he Court has too long been silent on these issues and, in the words of ancient wisdom, one may well ask 'If not now, when?'."[117]

The range of topics on which Weeramantry had the opportunity to comment upon makes it difficult to come to any definite assessment of the validity of his views. In any event, this can only be a partial analysis because – as has been noted upon numerous times before – the connexions he makes between the substantive law and his method of legal reasoning prevent any real conclusions from being drawn until his approach to this issue has also been examined. Nevertheless, there are certain comments that can be made. For some, Weeramantry's appreciation – in contrast to that of his contemporaries – of what law can achieve is little short of invigorating. As Mendlovitz and Datan note, in relation to his dissent on the question of nuclear weapons, "[u]nlike the 'majority' opinion, Judge Weeramantry is not trapped between the past and the spectrum of potential power structures. Instead, he discerns the signs of humane governance tomorrow already manifest in the legal and political structures of today."[118]

Others are more circumspect. Falk, who so positively described Weeramantry's time on the bench (and from which I derived the notion of a "heroic undertaking"), is ultimately more balanced in his final assessment. Again as regards the particular issue of nuclear weapons, Falk rejects Weeramantry's view because "the unmediated

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[114] *ICJ Rep. 1999*, at 1195.

[115] Brown Weiss, E., *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Tokyo: UNU Press, 1989).

[116] *Request for an Examination of the Situation, ICJ Rep. 1995*, at 341.

[117] *ICJ Rep. 1995*, at 362. Since then, the Court has begun actively to consider environmental arguments in *Legality of the Threat or Use of Nuclear Weapons* (1996) and *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997).

[118] Mendlovitz and Datan, n. 108, at 427.

analysis of applicable legal principles assumes an unrealistic autonomy for the domain of law and an implausible objectivity of interpretation on the part of the policymaker or judicial official."[119] On a more pragmatic note, Falk thinks that global disarmament "can only be usefully achieved on the basis of an agreement that is endorsed by the nuclear weapons states."[120] This contrasts with Weeramantry's view that a defiant declaration of law against such nuclear weapons will provide a powerful foundation against which even the most powerful States will ultimately find hard to resist.

It should not, however, be considered that Weeramantry is naïf to think a judgment from the Court is all that it will take; rather, he believes "[i]t will assist in building up a climate of opinion in which law is respected."[121] This is a crucial difference. Thus, while Weeramantry may be criticized, in some cases, for too readily supporting the "unrealistic autonomy for the domain of law" – not only as regards nuclear weapons, but more broadly (one can refer back to Weeramantry's attempt to conceptualize the International Court as a constitutional tribunal) – this is not the same as to suggest that he is blind to the political landscape in which the Court operates. Rather, he views the role of the Court as providing authoritative judgment and normative guidance within the context of an international system still largely controlled by, and governed on the basis of, political strength.[122] International law and the International Court are, however, not the handmaidens of any political elite; for Weeramantry, its political neutrality and its normative aspirations combine to provide the foundations of a legal order suited to an emerging, greatly more integrated, international society. Although Weeramantry's views are still open to criticism in this regard – in Falk's opinion, largely because they are ultimately ineffective in promoting substantive change[123] – Weeramantry's opinions are nevertheless significant in affirming the important role jurists can and should play in continually striving towards an international society based on legal rules even if, at present, he appears something of a "voice in the wilderness".

Of course, as an academic Weeramantry could make such statements without fear of censure. As a judge, though, could he act with the same degree of latitude? The conception of the judge is always that s/he acts "within the law". As already noted, Weeramantry resolutely denied judicial law-making yet, equally, his response left significant space for judicial creativity. Nevertheless, in *Legality of the Threat or Use of Nuclear Weapons* (1996), he continually asserted his conviction that he

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[119] Falk, n. 8, at 26.

[120] *Idem*.

[121] *ICJ Rep. 1996*, at 550.

[122] *Case concerning East Timor (Portugal v. Australia)*, *ICJ Rep. 1995* 220: "A matter for adjudication under the judicial function of the Court within its proper sphere of competence is not to be considered extraneous to the Court's concerns merely because political results may flow from it.

[123] Although not saying so directly, there is also the implication in Falk's paper that Weeramantry suffers from the utopianism captured by Koskenniemi in *From Apology to Utopia* (1989). As Falk notes, he is "setting forth legalistic positions that are dismissed as pathetic fantasy by those entrusted with the responsibilities of political leadership." (*see* n. 8, at 32).

was deciding the issue on the basis of *lex lata*[124] recognition both of his judicial role and the reality that greater weight would be given to an opinion that asserted the law "as it now is".[125] However, both in substance and tone, Weeramantry's approach to positivist legal thought stretches the very nature of this paradigm. In particular, although respectful of the essential constraints inherent within international law and international adjudication and, respectively, the notions of sovereignty and consent, Weeramantry has never been prepared to endorse understandings that circumscribed his ability to develop the law. Mention has already been made of Weeramantry's approach to the question of consent in matters of jurisdiction in such cases as *Fisheries Jurisdiction Case (Spain v. Canada)* (1998). On issues of substantive law, he was equally firm. He noted in *Legality of the Threat or Use of Nuclear Weapons* (1996) that:

> "The doctrine that the sovereign is free to do whatever statute does not expressly prohibit is a long-exploded doctrine. Such extreme positivism in legal doctrine has led humanity to some of its worst excesses. History has demonstrated that power, unrestrained by principle, becomes power abused. Black-letter formulations have their value, but by no stretch of the imagination can they represent the totality of the law."[126]

There is no disguising the gulf between positivism *stricto sensu* and Weeramantry's understanding thereof. For Weeramantry, however, there is no contradiction. In fact, one is reminded of Philip Allott's comment that "[l]aw constrains or it is a travesty to call it law. Law enters decisively into the willing of its subjects or it is a travesty to call it law. Law transcends the power of the powerful and transforms the situation of the weak or it is a travesty to call it law."[127] Others have referred to his approach as importing into "positive international law a strong set of naturalist tendencies."[128] There is no denying this is a source of tension yet for Weeramantry this is not the traditional tension between the "is" and the "ought", but between international law as narrowly restrained by the confines of formalistic Western legal thought, on the one hand, and his own understanding, not bound by such an artificial enclosure, on the other.

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[124] *ICJ Rep. 1996*, at 440.

[125] *ICJ Rep. 1996*, at 439.

[126] *ICJ Rep. 1996*, at 494. *See* also *Request for an Examination of the Situation*, *ICJ Rep. 1995*, at 360, dissenting opinion: "Black-letter law and legal logic do not assist us when we reach a fork in the road".

[127] Allott, P., *Eunomia: A New Order for a New World* (Oxford: Oxford University Press, 1990), at xvii.

[128] Falk, n. 8, at 17. *See* also Weeramantry's discussion of Hart's minimum content of natural law in *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep. 1996*, at 520-521. As Weeramantry notes, "[h]ere is a recognized minimum accepted by positivistic jurisprudence which questions some of the more literal assumptions of other schools."

2.4. A new model of reasoning?

Weeramantry's understanding of international law is, therefore, clearly built around a more universal approach to legal reasoning. For Weeramantry, this was not an arbitrary choice of methodology, but one mandated by the very structure and position of the International Court. As the principal judicial organ of the United Nations, its Statute requires diversity of law in all its forms to be represented on the Court.[129] As Weeramantry, paraphrasing the relevant provision, noted in his dissent in *Case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the Indication of Provisional Measures* (1999), "the International Court of Justice, constituted as it is to embody the representation of the main forms of civilization and of the principal legal systems of the world, is heir to the judicial traditions of many civilizations."[130]

Where such diversity of membership is arguably most relevant, if not absolutely vital, is when the International Court seeks to rely upon "general principles of law recognised by civilised nations" as mandated under article 38.1(c) of its Statute. Although it is perfectly possible for the Court to consider such notions in the abstract, judges with *some* appreciation of how general principles are understood and applied at the regional, national and/or local levels are surely a significant asset to the judicial bench. Weeramantry has had much to say about the importance of a universal court and, in particular, how this reference to general principles of law should provide a significant indication to the International Court as to how it should approach and interpret international law. As he has noted since leaving the Court,

> "Since international law specifically includes 'the general principles of law recognized by civilized nations' a heavy burden is thrown upon international lawyers and judges to ascertain what these are and not to form their conclusions on a survey of only part of the field. The great familiarity with other systems … will facilitate a search for those general principles – a search which is often only a partial search under prevailing circumstances."[131]

Weeramantry clearly conceptualizes the role of the International Court broadly; one senses that for him the judicial authority of the Court is not just derived from the formal sources of the UN Charter and its Statute, but that, on a more fundamental level, it is because the Court represents, and is at the apex of safeguarding, the "main forms of civilization". As he noted in his separate opinion in *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (1993), "[t]he International Court of Justice … is under a particular

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[129] Article 9, Statute of the Court.

[130] *ICJ Rep. 1999*, at 198. Footnote removed. *See* also *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *ICJ Rep. 1997*, at 109: "this Court constitutes a unique forum for the reflection and the revitalization of those global legal traditions".

[131] *See* Weeramantry, C., *Universalising International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), at 30.

obligation to search in all these traditions and legal systems for principles and approaches that enrich the law it administers."[132] Moreover, he sought to affirm not only the significance of the world's principal legal systems in the jurisprudence of the Court, but also to incorporate other normative frameworks, gleaned from, *inter alia*, religious beliefs and customary practices developed throughout the ages, whenever relevant.[133] He does this not for its own sake, but because international law is, he argues, immensely strengthened thereby.[134]

In his clearest defence of the use of material, i.e., his separate opinion in *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), Weeramantry very firmly sought to place his approach within mainstream international law. First, as already noted, the inclusion of traditional wisdom is explicitly mandated by the Statute of the Court itself.[135] Second, it is, Weeramantry believes, in accord with traditional understandings of legal reasoning.[136] Third, it reflects the historic approach of Grotius to the development of international law.[137] Fourth, the settlement of present-day disputes undoubtedly benefits, he argues, from such wisdom.[138] Fifth, international law, more generally, profits from a richer and more complete understanding of "all the insights available from the human experience."[139] Finally, sixth, the very authority of the Court is jeopardized, he feels, if it fails to take this

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[132] *ICJ Rep. 1993*, at 273-4.

[133] On this basis, one suspects that Weeramantry might object to the more State-centric definition of general principles to be found in the 1998 Statute of the International Criminal Court, "general principles of law derived by the Court from national laws of legal systems of the world." (article 21(1)(c), ICC Statute).

[134] *ICJ Rep. 1993*, 278: "Such transcending qualities, as visualized by those systems, *add new dimensions* to the equitable framework within which the equities of the law of the sea can evolve, and *add authority* to this structure." (emphases added).

[135] *ICJ Rep. 1997*, at 109-110: "when the Statute of the Court described the sources of international law as including the 'general principles of law recognized by civilized nations', it expressly opened the door to the entry of such principles into modern international law."

[136] *ICJ Rep. 1997*, at 96: "In drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration, international environmental law would not be departing from the traditional methods of international law."

[137] *Idem*: "Rather than laying down a set of principles *a priori* for the new discipline of international law, he sought them also *a posteriori* from the experience of the past, searching through the whole range of cultures available to him for this purpose."

[138] *ICJ Rep. 1997*, at 97: "I see the Court as being charged with a duty to draw upon the wisdom of the world's several civilizations, where such a course can enrich its insights into the matter before it."

[139] *ICJ Rep. 1997*, at 119. Weeramantry relied in part on Sir Robert Jennings, a one-time president of the Court who, writing extra-judicially, argued that "[i]t seems to the writer … that at the present juncture in the development of the international legal system it may be more important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions." (R. Jennings, "Universal international law in a multicultural world' in TMC Asser Institute (ed.), *International Law and the Grotian Heritage*, 1985).

opportunity to utilize a broader range of sources.[140] This last point is all the more pertinent, for Weeramantry, in the light of the universal nature of the International Court and the civilizations which its Statute so clearly states it must reflect.

The sheer diversity of traditional practices, philosophical thought, and religious teachings upon which Weeramantry relies are beyond brief description. In *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), for instance, Weeramantry highlights various examples of traditional irrigational practices including in his native Sri Lanka, China, Iran, and sub-Saharan Africa, all of which he believed reconciled environmental and development considerations so effectively that they "carry a message to our age".[141] He then, in the same opinion, undertook a more general survey of the spiritual and philosophical teachings to have shown respect for the environment over the centuries. This included consideration of the belief systems of Native Americans, Africans, Pacific Islanders, Aborigines, and ancient Indians, as well as the teachings of Islam and the romanticism of European literature. In the same case, he also manages to incorporate references to *The Mahavamsa* (the ancient chronicle of Sri Lanka), Milton's *Paradise Regained*, and the writings of Arthur C. Clarke!

The key to appreciating why Weeramantry so widely conceptualizes legal reasoning is to be found in his understanding of the relationship between society and law. He notes: "[t]he ingrained values of any civilization are the source from which its legal concepts derive, and the ultimate yardstick and touchstone of their validity".[142] In his earlier opinion in *Legality of the Threat or Use of Nuclear Weapons* (1996), he had made a very similar point when discussing the necessity of understanding the cultural context of the rules that regulate warfare:

> "It greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention … it is deep-rooted in many cultures – Hindu, Buddhist, Chinese, Christian, Islamic and traditional African … The multicultural traditions that exist on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength – the strength resulting from the depth of the tradition's historical roots and the width of its geographical spread."[143]

At a certain level of abstraction, Weeramantry's approach is difficult to criticize. The finding and endorsing of universal values as gleaned from cultures throughout the ages and from around the globe to "strengthen" international law are commendable. However, his approach is not without its flaws. Three principal criticisms may be levelled. First, although Weeramantry's universalism clearly does not seek to

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[140] *ICJ Rep. 1997*, at 97: "The Court cannot afford to be monocultural, especially where it is entering newly developing areas of law."
[141] *ICJ Rep. 1997*, at 98.
[142] *ICJ Rep. 1997*, at 108.
[143] *ICJ Rep. 1996*, at 478.

homogenize the cultures upon which he relies – there is a clear sense of respect and deference in his use of such practices and principles – his understanding of universalism and his rather random selection of historical and religious examples runs the risk of over-simplifying what are inevitably much more complex historical episodes and belief-structures. Related to this, secondly, is his belief that civilizations share certain common and inherently positive values. Not only is this, it is argued, not necessarily correct; it ignores very real cultural differences between societies.[144] Thirdly, it is unclear what role Weeramantry is giving to this wisdom within his legal reasoning process. Although he expressly relies on the notion of general principles of law as permitted under article 38.1(c) of the Court's Statute to incorporate such teachings, he is careful not to establish a *current* substantive obligation solely on the basis of *historical* wisdom. Nevertheless, not only is the line between past experience and present law somewhat confused;[145] what is also unclear is the jurisprudential weight that Weeramantry gives to such material in his reasoning.[146] As he notes, "[t]his is a legitimate source for the enrichment of international law, which source is perhaps not used to the extent which its importance warrants".[147] The difficulty, however, is that what "enrichment" actually means is an inherently open and ambiguous concept. Where are the limits of, and what is permissible in the use of, such material? While Weeramantry himself has a clear understanding of how to extract such evidence from history,[148] this is inevitably a somewhat subjective process.

3. CONCLUSION

How, then, might one evaluate Weeramantry's time as a judge on the bench of the International Court? It is surely impossible to measure a judicial career by reference to managerial notions such as success and effectiveness. Even with his very long list of dissenting opinions, it would be ridiculous to conclude that Weer-

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[144] Falk, n. 8, at 21: "In its more moderate formulation, a pluralist view of civilizational identity argues that there are notable divergencies on matters of values and beliefs, as well as with respect to historical experience, that subverts, or at the very least, qualifies claims of a universal normative order."

[145] In *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), he goes on to discuss "living law" – "compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous test and standard of reduction to writing." (*ICJ Rep. 1997*, at 109). As living law can be incorporated into international law as a "general principle of law", one might criticize Weeramantry for, arguably, opening up this Pandora's Box even further."

[146] *ICJ Rep. 1997*, at 103: "The task of the law is to convert such wisdom into practical terms."

[147] *ICJ Rep. 1997*, at 96.

[148] *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Rep. 1996* 439: "It requires the Court to scrutinize every available source of international law, quarrying deep, if necessary, into its very bedrock. Seams of untold strength and richness lie therein, waiting to be quarried. *Do these sources contain principles mightier than might alone, wherewith to govern* the mightiest weapon of destruction yet devised?" Emphasis added.

amantry was unsuccessful as a judge. Nevertheless, if one were to ask whether Weeramantry achieved what he himself set out to achieve (as he said in his own words, "some suggestions which, though I am in a minority, may still, I hope, be of some utility"[149]), one would be forced to concede that, at the present time, the majority of his views have failed to permeate the jurisprudence of Court as a whole.[150] The bench remains distinctly traditionalist both in terms of its outlook and its legal reasoning; critics would suggest that it was Weeramantry himself who was out of step: out of step with the political realities of the international judicial function. His writings may be less a heroic undertaking and more a misconceived endeavour.

Nevertheless, even if one was minded to agree with this point of view, it would be wrong to marginalize or malign Weeramantry's contribution as simply the work of a legal maverick. Moreover, if one were obliged to classify his contribution both to international law and the International Court, one might say it was three-fold: first, he left the Court with a legacy of stimulating, challenging, and highly reasoned separate and dissenting opinions on a diverse range of topics. Second, the Court would be neglectful if it were to ignore his consistent and vocal reminder that it should always adjudicate with fairness, without fear or favour, and in support of the rule of law. Third, his emphasis on the universal nature of the Court, moving away from the "cultural and disciplinary boundaries which have traditionally hemmed in the discipline of international law"[151] towards a jurisprudence that embraces the diversity of cultures from which it could derive insight and clarification (although seemingly more subjective in approach than many current methodologies) is surely worth the Court considering afresh,[152] as it seeks continually to ensure its authoritative voice in global affairs.

Ultimately, however, it is probably best if I leave the final word to Weeramantry himself; yet, in an effort to particularize the comment and to relate it more closely to his time on the bench, I have replaced the term "court" with "judge".

> "The judicial function by its very nature involves a choice among competing principles all of which in one way or another have relevance to the matter in hand. What principles a [judge] adopts from the range of choice available is determined by a weighing of considerations such as those of relevance, immediacy to the problem, practical value in the particular circumstances, and the degree of authority of the principle. These are matters in which a [judge's] experience and sense of judgment

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[149] *See* text accompanying n. 36.

[150] Although his view as to the binding nature of provisional measures has been accepted more widely by the Court (*see* n. 71) and his belief expressed in *Case concerning East Timor (Portugal v. Australia)* (1995) that a State could be held in explicit violation of self-determination was confirmed in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004). In neither case, of course, did the Court quote from Weeramantry.

[151] *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *ICJ Rep. 1997*, 119.

[152] *ICJ Rep. 1997*, at 96: "It would be a pity indeed if [such wisdom] were left untapped merely because of attitudes of formalism which see such approaches as not being entirely *de rigueur*."

will provide [him] with guidance. In such situations, an important additional guide would be, within the limits of choice available in law, the [judge's] sense of justice, fairness and equity."[153]

ANNEX

(i) Separate and dissenting opinions

Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), *ICJ Rep. 1991*, at 130-174, dissenting opinion
Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) Request for the Indication of Provisional Measures, *ICJ Rep. 1992*, at 50-71, dissenting opinion
Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) Request for the Indication of Provisional Measures, *ICJ Rep. 1992*, at 160-181, dissenting opinion

Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), *ICJ Rep. 1993*, at 211-279, separate opinion

Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) Further Requests for the Indication of Provisional Measures, *ICJ Rep. 1993*, at 370-389, separate opinion

Case concerning East Timor (Portugal v. Australia), *ICJ Rep. 1995*, at 139-223, dissenting opinion

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, *ICJ Rep. 1995*, at 317-362, dissenting opinion

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, *Advisory Opinion, ICJ Rep. 1996*, at 101-171, dissenting opinion

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Rep. 1996*, at 429-555, dissenting opinion

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[153] *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *ICJ Rep. 1993*, at 250.

Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections, *ICJ Rep. 1996*, at 640-655, separate opinion

Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia), *ICJ Rep. 1997*, at 88-119, separate opinion

Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Counter-Claims, *ICJ Rep. 1997*, at 287-297, dissenting opinion

Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Preliminary Objections, *ICJ Rep. 1998*, at 362-376, dissenting opinion

Fisheries Jurisdiction Case (Spain v. Canada) Jurisdiction of the Court, *ICJ Rep. 1998*, at 496-515, dissenting opinion

Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Preliminary Objections (Nigeria v. Cameroon), *ICJ Rep. 1999*, at 42-48, dissenting opinion

Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, *ICJ Rep. 1999*, at 92-98, separate opinion

Case concerning Legality of Use of Force (Yugoslavia v. Belgium) Request for the Indication of Provisional Measures, *ICJ Rep. 1999*, at 181-204, dissenting opinion

Case concerning Legality of Use of Force (Yugoslavia v. Canada) Request for the Indication of Provisional Measures, *ICJ Rep. 1999*, at 315, dissenting opinion

Case concerning Legality of Use of Force (Yugoslavia v. Netherlands) Request for the Indication of Provisional Measures, *ICJ Rep. 1999*, at 599, dissenting opinion

Case concerning Legality of Use of Force (Yugoslavia v. Portugal) Request for the Indication of Provisional Measures, *ICJ Rep. 1999*, at 713, dissenting opinion

Case concerning Kasikili/Sedudu Island (Botswana/Namibia), *ICJ Rep. 1999*, at 1153-1195, dissenting opinion

Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Application by the Philippines for Permission to Intervene, *ICJ Rep. 2001*, at 630-651, separate opinion (as judge *ad hoc*)

(ii) Declarations

Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Request for the Indication of Provisional Measures, *ICJ Rep. 1996*, at 31, joint declaration of Judges Weeramantry, Shi and Vereshchetin

Case concerning Legality of Use of Force (Yugoslavia v. France) Request for the Indication of Provisional Measures, *ICJ Rep. 1999*, at 376, declaration

Case concerning Legality of Use of Force (Yugoslavia v. Germany) Request for the Indication of Provisional Measures, *ICJ Rep. 1999*, at 435, declaration

Case concerning Legality of Use of Force (Yugoslavia v. Italy) Request for the Indication of Provisional Measures, *ICJ Rep. 1999*, at 495, declaration

Case concerning Legality of Use of Force (Yugoslavia v. United Kingdom) Request for the Indication of Provisional Measures, *ICJ Rep. 1999*, at 842, declaration

IMPLEMENTING GLOBAL ENVIRONMENTAL STANDARDS: IS THE NON-STATE SECTOR A RELUCTANT CONVERT OR AN EAGER DEVOTEE?

Palitha T.B. Kohona*

1. BACKGROUND

The international community has over a period of time been developing standards to deal with a range of environmental issues, some global and some regional[1] The setting of contemporary international environmental norms received a major boost with the United Nations Conference on the Human Environment (Stockholm 1972).[2] The Stockholm Declaration contributed to clarifying a number of principles which may subsequently have acquired customary international law status. The process of developing global environmental standards gathered further momentum with the Rio Summit which resulted in the Rio Declaration,[3] and with the Johannesburg World Summit on Sustainable Development.[4] In parallel with (and sometimes ahead of) the development of global standards, countries have been both adopting a wide array of environment-related domestic policies and enacting legislation. The environment is no longer an issue that concerns only focused pressure groups and other non-mainstream entities seeking to achieve their narrowly defined goals through specifically defined actions, in particular in the developed countries.[5] It is a concern for most individuals, civil society and to corporations, to varying extents, and is a

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1 *See*, Guruswami, L.D., Palmer, G.W.R., Weston, B.H., and Carlson, J.C., *International Environmental Law and World Order* (Westgroup, 1999).

2 *Stockholm Declaration*, http://www.unep.org/DPDL/Law/PDF/Stockholm_Declaration.pdf; *See* also Brown Weiss, E, "Our rights and obligations to future generations for the environment", 84 *AJIL* (1990) 198.

3 United Nations publication, Sales No. E.73.II.A.14 and corrigendum.

4 A/CONF.151/26 (Vol. I); http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

5 Kohona, P.T.B., "The role of non state entities in the making of international norms and their implementation", *IJWI* (September 2001).

Asian Yearbook of International Law, Volume 11 (B.S. Chimni *et al.,* eds.)

mainstream political issue in most developed countries.[6] "The environment" is also defined in a wider sense. While public pressure ensures that the environment continues to occupy the political centre stage in developed countries, developing countries are also beginning to pay greater attention to it for a range of reasons.

The ascendancy of the environment to the centre of the political stage has much to do with the growing acknowledgement of the impact of human activity on the environment and, in turn, its increasing effect on the lives, health, and wellbeing of individuals and communities, and of the business activities of corporations.[7] The environment and any changes to it have an impact on humans, animals, plants, and people's livelihoods in ways that are only now beginning to be better appreciated. In recognising some of the negative consequences of human activity on the environment, states have concluded a large number of multilateral agreements incorporating a complex range of global standards to address a variety of environment-related issues. Over 250 of these agreements, both regional and global,[8] have been concluded, of which more than fifty-five are deposited with the Secretary General of the United Nations.[9] Many non-binding international instruments have also been concluded.[10] Some elements in these non-binding instruments may have achieved customary international law status.[11] Ensuring compliance with these global standards[12] –

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[6] In a major policy statement in September 2004, Prime Minister Blair said that he would make global warming a centrepiece of the UK's presidency of the G8 group of industrialised nations next year (2005), in his speech to the Prince of Wales's Business and the Environment charity, "Blair urges world to act over global warming", *Financial Times*, Internet Version at FT.com (23 September 2004).

[7] "Climate change in the Arctic is a reality now", Dr. R. Corell, Head, Arctic Climate Impact Assessment Group, as reported in *The Economist* (13 November 2004), at 87.

[8] Among the key global agreements are: Convention on Biological Diversity, 1992, 1760 *UNTS* 79; United Nations Framework Convention on Climate Change, 1992, 1771 *UNTS* 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997, *Depositary Notification C.N.101.2004.TREATIES-1* of 11 February 2004; Convention on the Transboundary Effects of Industrial Accidents, 1992, 2105 *UNTS* 457; Stockholm Convention on Persistent Organic Pollutants, 2001, *Depositary Notification C.N.531.2001.TREATIES-96* of 19 June 2001; Vienna Convention for the Protection of the Ozone Layer, 1985, 1513 *UNTS* 293; Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, 1522 *UNTS* 3; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994, 1954 *UNTS* 3 (all texts are also available on untreaty.un.org).

[9] *See Multilateral Treaties Deposited with the Secretary-General*, U.N Doc. ST/LEG/SER.E…; Also available at http//untreaty.un.org.

[10] The most prominent among these would be the Stockholm Declaration, http://www.unep.org/DPDL/Law/PDF/Stockholm_Declaration.pdf; Rio Declaration of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I), http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[11] *See*, Lachs, M. "The general development and trends of international law in our time", 169 *Recueil des Cours* (1980-IV) at 175 *et seq*.

[12] Among the principles that were developed include the following: "The environment is the Common Concern of Humankind", "Intergenerational Equity", "The Precautionary Principle", "Good-Neighbourliness", "Common but Differentiated Responsibility", "The polluter pays principle", "The Principle of Cooperation in Scientific Research, Systematic Observations, and Assistance". Whether

not only by states, but in the modern context, also by non-state entities – has been a major issue.

Historically, governments and international organizations were required to play the dominant role in the implementation of internationally agreed norms.[13] Over time there was a gradual realization that other actors needed to be engaged in this exercise and other options explored, not only because of the political and financial limitations that had begun to constrain the actions of governments and international organizations, but also because of the realization of the significant position in society occupied by these other entities. Resources were also needed to be sourced from elsewhere. Accordingly, considerable effort has been expended in recent times in encouraging non-governmental entities to become more closely engaged in giving effect to internationally agreed environmental standards. For many non-state entities, in particular for those in the private sector, this was a novel experience and, for some, one that seemed to conflict with their normal core activities. NGOs have, for some time, been raising their profile in contributing to the implementation of global environmental norms. As Kofi Annan, Secretary General of the United Nations, has observed,

> We live in an era in which international affairs are no longer dominated by States as the sole actors. The participants include non-governmental organisations, national parliaments, private companies, the mass media, universities, intellectuals, artists, and every woman and every man who considers him or herself to be part of the great human family.[14]

As the enthusiasm for giving effect to global environmental norms has grown, an increasing number of private sector corporations have entered the environmental arena. The United Nations has heartily encouraged this tendency. The Global Compact targeted at the private sector and developed under the leadership of the UN Secretary General, states in Principle Eight that "[they] should undertake initiatives to promote greater environmental responsibility".[15]

2. INTERNATIONAL ORGANIZATIONS

Treaty provisions are essentially directed at state parties; environmental treaties are no exception. However, many environmental treaties by their very nature have an impact on the lives of individuals and the business activities of corporations, thus requiring states to adopted detailed domestic legal and policy measures to give effect

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some or all of these have attained customary international law status continues to be debated.

[13] International law recognizes that only states and international organizations could be parties to treaties.

[14] "Introduction", United Nations *Directory of Non Governmental Organisations Associated with the Department of Public Information (1997-1998)*; also *see* Kohona, n. 6.

[15] www.unglobalcompact.org.

to their treaty obligations.[16] While compliance by states with their treaty obligations in treaties that have entered into force is obligatory, and many states readily give effect to their treaty obligations, others may require assistance in this respect.[17] It is usual for environmental treaties to contain provisions requiring assistance to be provided to those states that need assistance with the implementation of their obligations.[18] Developing countries are usually the beneficiaries of such provisions.

While bilateral assistance has been important, intergovernmental organizations have, historically, played an important role in providing financial and technical assistance to developing countries for the latter to comply with their treaty-based obligations. This has also been true of environmental treaties. Since international organizations have always depended on the goodwill of donor governments, their policy approaches have largely been a reflection of the priorities of such governments. Donor governments, under constant pressure from their own constituencies, particularly from the environmental lobby groups, have assiduously sought to influence policy formulation by international organizations with a view to having their own environmental and social concerns (perhaps, even, economic concerns) reflected in the policies. It could be said that donor governments, while in the process of implementing their own obligations under multilateral treaties, have also sought to influence developing countries' environmental and development policies through the mechanism of bilateral aid and multilateral donor agencies.[19] For example, it is today almost impossible for multilateral lending organizations, which themselves are not party to the multilateral environmental agreements, to fund projects in a developing country without ensuring the execution of an environmental impact assessment.

The policies of international organizations have undergone considerable change over the years; efforts to exert influence on private sector corporations and particularly on financial institutions, have become a part of their strategy. It is also noted that the policy framework set by certain intergovernmental organizations, in particular by the World Bank (Bank) and the International Monetary Fund (IMF), has played an important role in influencing decision making by private sector corporations, especially in the areas of the environment and social policy.

Although the Bank is not a party to the multilateral environmental agreements,[20] the extent to which multilateral environmental norms have begun to influence the

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[16] Kohona, P.T.B., "The international rule of law and the role of the United Nations", 36 *The International Lawyer* (Winter 2002) 1131, at 1133.

[17] *See* Art. 26, Vienna Convention on the Law of Treaties, untreaty.un.org; also *see* the offer of assistance made by the UN Secretary-General in his letter to heads of state and government inviting them to the Millennium Summit Treaty Event, *DPI/2130*.

[18] *See* for example, Art. 11, Kyoto Protocol to the United Nations Framework Convention on Climate Change, (Kyoto Protocol) untreaty.un.org. Art. 11 requires developed country parties and other developed parties included in Annex II to the Convention to provide new and additional resources and assist with the transfer of technology to developing countries.

[19] NGOs also play a prominent role in influencing the policies of multilateral donor agencies.

[20] Art. 13(8) of the Kyoto Protocol makes provision for the United Nations, its specialized agencies and the International Atomic Energy Agency to be represented at sessions of the Conference of Parties.

Bank is illustrated by the way global environmental standards and their implementation have become part of its policy framework.[21] While these standards may not be linked directly to any specific multilateral agreement, they seek to reflect the thrust of these agreements and affect the environment of recipient countries in a positive manner.[22] The Bank has established an environmental department and a five-year strategy on "Environment, Growth and Development". Consistent with its policy,[23] it will determine whether an environmental impact assessment (EIA) is necessary when disbursing financial assistance.[24] The criteria developed by the Bank and its affiliates provide a valuable yardstick for assessing the activities of private sector corporations. It is noted that the Bank, which allocated $200 Million for energy efficiency and renewable energy projects, has agreed to increase this amount annually (the annual target is 20 per cent) over the next five years.[25] Although it did not agree with the recommendation in the Extractive Industries Review that it cease funding oil, gas and mining projects,[26] past experience suggests that, in the future, it is likely further to tighten its environmental and social policy approaches, as these affect extractive industries.[27] In turn, given the influence of the Bank in arranging project financing in developing countries, there will be a flow-on effect on private sector institutions that provide financing in these areas. The International Finance Corporation (IFC), which finances development projects and is the private sector

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[21] Member states of the Bank who are party to these environmental agreements and NGOs have been largely responsible for this development.

[22] It may even be time to consider encouraging intergovernmental lending institutions to become directly active in the multilateral environmental agreements through an appropriate mechanism although at the time that these agreements were negotiated only the European Community was considered as a prospective member. These lending institutions play a critical role in the realization of the goals of these multilateral environmental agreements; active participation in their governing fora may result in a more effective cross fertilization of policies and approaches. In addition, such an innovation might lead to a greater consistency between policies and approaches of intergovernmental financial institutions, on the one hand, and the goals sought to be achieved by these multilateral environmental agreements, on the other.

[23] *See* generally, *Making Sustainable Commitments: An Environment Strategy for the World Bank, 2001*, at http:ht//lnweb18.worldbank.org/ESSD/envext.nsf/41ByDocName/EnvironmentStrategyStrategyAtAGlance.

[24] While the multilateral environmental agreements do not contain detailed provisions on best environmental practices, the Bank's approach has been influenced by the practices of those states parties to these agreements who are also members of the Bank.

[25] Bank to Go On Financing Coal and Oil Projects, *New York Times*, 4 August 2004 (Internet edition). A review of the Bank's role in mining, oil and gas industries headed by Emil Salim (*Striking a Better Balance – The World Bank Group and Extractive Industries: The final Report of the Extractive Industries Review*, 4 June 2004) had recommended that the Bank cease funding those industries by 2008; *See* comment in, 11 (114) *IPS UN Journal* (23 June 2004), at 1.

[26] The Bank's position was largely strengthened by the support it received from developing countries.

[27] While, not directly stated, the Bank's policies with regard to renewable energy would contribute considerably towards realizing the goals of the Kyoto Protocol, untreaty.un.org.

lending arm of the World Bank Group,[28] developed the Equator Principles in 2003; these are applicable to certain categories of project financing.[29] The Equator Principles have inevitably been influenced by Bank policies on environmental and social issues. Several major public and private sector institutions take their cues on social and environmental standards from the IFC.[30] The credit group of the Organisation for Economic Cooperation and Development has been moving closer to the IFC's guidelines.[31]

The Global Environmental Facility (GEF), constituted by the World Bank, the United Nations Environmental Programme (UNEP), and the United Nations Development Programme (UNDP), is another major facility providing multilaterally sourced funding for the realization of global environmental standards consistent with the objectives of a number of multilateral environmental treaties. Originally conceived as a mechanism for giving effect to the Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer,[32] the GEF has 172 State partners and has, so far, disbursed $4.5 billion for various environment-related projects in developing countries. The GEF has been designated the financial mechanism for biodiversity, climate change, and persistent organic pollutants. It also supports projects for combating desertification, and the protection of international waters and the ozone layer.

The United Nations Development Programme (UNDP), the main development funding programme of the United Nations, provides resources for environmentally friendly development.[33] It insists on EIAs when disbursing certain categories of development assistance. UNDP policies also tend to influence its private sector collaborators. The UNDP also plays a significant role in providing training and capacity building.

The United Nations Environment Programme (UNEP), which has the primary responsibility for global environmental policy formulation, also plays a valuable role in facilitating the implementation of global environmental norms. It also focuses on training and capacity building. UNEP arranges technical assistance to developing countries, yet the funding for such assistance comes primarily from bilateral or multilateral donors.[34] The UNEP, which has suffered in the past due to the suspicions harboured by donor countries with regard to its ability to be effective, still has much potential to realize.

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[28] The IFC has provided $16.8 billion for project financing since 2003.

[29] *See* below for further details on the application of the Equator Principles.

[30] *See* for a critical review, Balls, A., "World Bank 'weakening' social safeguards", *Financial Times*, 3 September 2004 (Internet version).

[31] 11 *IPS UN Journal* (No. 154, 19 August 2004), at 1.

[32] *See* untreaty.un.org.

[33] www.undp.org.

[34] Walde, T.W., "The role of selected international agencies in the formation of international energy law and policy towards sustainable development", in Bradbrook, J. and Ottinger, R. (eds.), *Energy Law and Sustainable Development*, *IUCN Policy and Law Paper*, No. 47(2003), 171 at 190.

Increasingly, bilateral aid donors are also insisting on environmental conditions, in particular EIAs, when providing project aid. Donors are themselves driven by the demands of domestic lobby groups.

3. POLICY FRAMEWORK FOR PRIVATE SECTOR CORPORATIONS

In addition to the direct initiatives undertaken by governments and intergovernmental organizations themselves, mechanisms are continuing to be developed to enable effective private sector participation in the implementation of the growing web of international rules on the environment. Considerable effort is now being made by governments through legislation and policy formulation, by intergovernmental agencies, and by NGOs to encourage private sector entities to play a proximate role in advancing environmental and social goals expressed in multilateral environmental and other agreements. For example, the Convention Biological Diversity[35] contains detailed provisions on *in situ* and *ex situ* conservation. As will be seen later, these provisions are influencing not only legislative action by national governments but also the activities of private sector corporations.

The European Union (EU) and many of its member States party to a range of multilateral environmental agreements have been at the forefront of some of these initiatives. Each member state of the European Union listed in Annex B to the Kyoto Protocol is required to limit its emissions of the listed greenhouse gasses to the level specified.[36] Article 6 of the Kyoto Protocol establishes the framework for emissions trading among Annex I parties to the United Nations Framework Convention on Climate Change; this not only enables Annex I parties to seek the assistance of each other through trading in realizing the emissions targets specified in the Protocol but also facilitates the development of a trading mechanism that could benefit private sector entities.[37] With the threat of climate change looming[38] and with a view to complying with the requirements of the Kyoto Protocol, the EU has taken the initiative to make emissions trading a reality[39] with the enactment of the European Emissions Allowance Trading Directive, 2003.[40] In a constructive effort to comply with the obligations under the Kyoto Protocol by the European Community and its member States, the EU has agreed on an emissions trading framework which com-

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[35] Untreaty.un.org.

[36] *See* Annex B to the Kyoto Protocol, untreaty.un.org.

[37] It is likely that many private sector entities will seek to benefit from this facility in the future, both as sellers as well as buyers of emissions credits.

[38] After the US, which emits 20.6 per cent of the world's greenhouse gases, China is the world's second biggest, accounting for 14.8 per cent of greenhouse gas emissions in 2000, according to a Pew Centre report. This compares with 14 per cent for the European Union and 4 per cent for Japan. India made up 5.5 per cent and Brazil 2.5 per cent.

[39] The European Community has competency for environmental matters.

[40] www.field.org.uk.

menced in January 2005.[41] Over 10,000 companies, including power generators, glass makers, steel producers, and cement manufacturers, will be covered by this directive. It is estimated that the carbon market within the European Community will be worth $1.5 billion when the trading framework becomes fully operational; companies would be able to factor in carbon trading on their balance sheets. The EU established a deadline for its Member States for completing their emissions reductions plans (31 March 2004). It is currently considering legal action in the European Court of Justice against those members who missed this deadline.[42] In a major policy statement, Prime Minister Blair said that he wanted to use the UK's presidency of the European Union in 2005 to push for the inclusion of the aviation industry within the EU's emissions trading scheme. Emissions from aircraft could represent a quarter of the UK's total contribution to global warming by 2030.[43] The emissions trading framework would create obligations for both government and private sector entities.

The precedent set by the EU is likely to have a significant effect on its trading partners. Already Norway, Switzerland, Canada, and Japan have had formal discussions about linking to the EU system and thus creating the prospect of a hugely expanded carbon market. Some individual countries are implementing emissions trading already, e.g., the United Kingdom and Denmark. In the USA, despite the lack of enthusiasm in Washington, Chicago has established an emissions trading mechanism – the Chicago Climate Exchange (CCX). The CCX currently involves a number of major North American companies such as Dupont, BP, and the Ford Motor Company, as well as the cities of Chicago and Mexico City. The European Climate Exchange, formed in response to the regulatory framework established by the EU, brings together the CCX and London's International Petroleum Exchange. This will offer European companies a facility through which to trade emissions credits.[44]

The EU, consistent with the goal under the Kyoto Protocol of reducing carbon emissions, has also established a self-imposed target of producing 22 per cent of

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[41] The EU, as a group, ratified the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997 on 31 May, 2002; The Russian Federation ratified it on 18 November 2004, triggering the treaty requirements for its entry into force.

[42] The EC scheme is not without its critics. Some academics doubt whether such a well-functioning market will be the result of the Commission's endeavours. Professor Steve Rayner at Oxford's Said Business School and a member of the UK's royal commission on environmental pollution says: "Will there ever really be an efficient global carbon market? I seriously doubt it. The UK trading pilot scheme was a £275m boondoggle that attracted only a handful of meaningful participants, and even then resulted in almost no trading. International carbon trading is unlikely to develop into anything more than a much needed cover to allow for necessary subsidies and capital transfers necessary to decarbonise the energy systems of less technologically advanced countries." *Financial Times*, Internet Version at FT.com (22 October 2004).

[43] "Blair urges world to act over global warming", *Financial Times*, Internet Version at FT.com (23 September 2004).

[44] *The Economist*, 11 to 17 September 2004, at 69.

energy requirements from renewable sources by 2010.[45] Considerable incentives are being provided for the private sector to benefit from this initiative, which would include solar power, and wind and geothermal energy.

In addition to requiring certain companies to comply with the established emissions reduction goals within the EU, it has also taken measures to facilitate compliance with these goals by EU-based companies in their activities in developing countries. Article 12 of the Kyoto Protocol established the clean development mechanism enabling States listed under Annex 1 to the United Nations Framework Convention on Climate Change to undertake initiatives consistent with the objective of the Convention in non-Annex 1 countries. Those initiatives in developing countries meeting the criteria established under this article could be set off against the emissions reduction commitments established under Annex B of the Kyoto Protocol. A scheme has been launched for financially assisting EU companies to undertake in developing countries projects consistent with the clean development mechanism. Currently, an initiative has been launched by a number of developing rain-forest countries to have the Kyoto Protocol supplemented by an optional protocol that would enable them to participate in the carbon trading mechanism established under Article 6 of the protocol using their rain forests to acquire carbon credits.[46]

Many European countries have also adopted individual measures to encourage private-sector enterprises to comply with global environmental standards. The Netherlands, for example, provides tax depreciation opportunities, tax deductions, and subsidized loans for green projects.[47]

Although not required by the Kyoto Protocol, some developing countries have also begun to establish the framework for private sector enterprises to comply with global environmental standards, either through the adoption of appropriate policy guidelines or through actual financial and technical support. While still maintaining their negotiating position that those who have caused damage to the environment by following a harmful approach to development since the beginning of the industrial revolution, namely, the developed countries, must bear the main cost of reversing the damage, developing countries have begun to play a part in addressing the key issue of climate change. Many of the multilateral environmental agreements encourage developing countries also to contribute to the processes of addressing environmental problems, but subject to the principle of common and differentiated responsibilities.[48] In addition, the attitudes of developing countries may have been influenced by pure necessity, given that a cleaner environment is more desirable than a polluted one. Increasing prosperity in some developing countries has made them more conscious of the benefits of a cleaner environment. The growing call by developed countries

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[45] Although it is now estimated that the EU will achieve only about 18 per cent. *See* 11(96) *IPS UN Journal* (27 May 2004), at 4.

[46] This initiative places particular emphasis on the emissions reduction effect of non-deforestation.

[47] Moore, C. and Ihle, J., *Renewable Energy Policy Outside the United States, Renewable Energy Project Issues Brief*, No. 14 (Washington, DC, October 1999).

[48] Art. 10, Kyoto Protocol is applicable to developing countries also. However, it specifically makes obligations under it subject to the principle of common but differentiated responsibilities.

that developing countries should also play a part in the processes of addressing environmental damage and the increasing and often hidden barriers in developed countries to products made through unacceptable environmental practices have also had their effect. For example, China has committed itself to producing ten per cent of its energy needs from renewable sources by 2010.[49] China has also adopted a tough new fuel efficiency policy for motor cars. In India, the Federal Ministry for Non-Conventional Energy Sources supports renewable energy projects through the Indian Renewable Energy Agency.[50] Such initiatives are unlikely to be ignored by the private sector in these countries. Brazil produces much of its electricity from biomass using sugar cane which may become a major export item in a climate of petroleum shortages. Cane is also used for the production of ethanol, which accounts for approximately 40 per cent of the fuel consumed by cars and light trucks in Brazil.

The recent rapid increase in the price of fossil fuels,[51] the additional cost to industry and the obvious security risks were undoubtedly the major (and welcome) motivators for the EU and China.[52]

4. PRIVATE SECTOR RESPONSE

Against a background of the expanding network of multilateral environmental norms and responding to both government policy and public pressure (and the possibility of litigation-related costs), the approaches of major corporations in many countries, particularly in industrialized countries, have begun to be influenced by international environmental standards. Other factors, such as enlightened leadership, the effect of hardening global and domestic standards, simple expediency, possible adverse effects on profits, etc., have also affected this development. As Neilson from Dow Chemicals has observed with regard to the issue of global warming, 'We are going to be in a carbon constrained world, and there's going to be a cost for carbon dioxide'.[53] 'Scenario planners at Royal Dutch/Shell think that gas may surpass oil as the world's most important energy source.'[54] One notes that this attitude is more widespread in the European Union, Canada, and Japan than elsewhere due to a history

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[49] 11 (60) *IPS UN Journal* (6 April 2004), at 3.

[50] Mendis, M., *Financing Renewable Energy Projects: Constraints and Opportunities* (Silver Spring, MD: Alternative Energy Development, Inc., July 1998).

[51] Tricks, H. and Marsh, P., "Manufacturers face 40 per cent rise in energy bills", *Financial Times*, Internet Version at FT.com (17 August 2004).

[52] "The rapid rise in global oil demand should lead the industrialised world to promote alternatives to oil as well as energy conservation, the International Energy Agency said on Friday", Morrison, K. and Blas, J., IEA says world must turn away from oil, *Financial Times*, Internet version at FT.com (11 March 2005).

[53] Neilson, who directs Dow Chemical's sustainable development efforts, quoted in *The Economist* (10 April 2004), at 53.

[54] Demand for gas has expanded in recent years, thanks chiefly to its greenness – it burns far cleaner than oil or coal, making it ideal for new power plants from California to China. *The Economist* (28 August to 3 September 2004), at 53.

of environmental consciousness at both the social and political levels. Both Japan and the members of the European Union have been in the forefront of the environment debate as well as in participating in multilateral environmental agreements. In particular, European Community directives and legislation in individual countries have played a major role in influencing the attitudes of private sector corporations.[55] In some instances, corporations have responded to public pressure and sought to comply with global standards even in the absence of legislative rules. This is a significant development since the decisions of major corporations have wide implications in the contemporary world, including on government policies and legislation. In many countries government policy tends to follow corporate attitudes. The public positions of corporations such as British Petroleum (which now prefers to describe itself as Beyond Petroleum), IBM, Ford, Alcan, Alcoa, Dow Chemicals, Cargill, and Dupont will no doubt influence governmental attitudes in due course.[56] These corporations, in addition to being major investors in their respective fields, generate wealth and employment, and contribute to government revenues.

British Petroleum (BP) has developed an in-house cap and trade mechanism for its various divisions.[57] While this will encourage a corporate culture of emissions consciousness, the experience that the company gains through the operation of this mechanism will stand it in good stead when it becomes necessary for BP to engage in carbon trading with other companies within the country and in the European Union in general. BP achieved its goal of reducing its 1990 emissions levels by ten per cent by 2010, eight years ahead of schedule. There was no additional cost. As Lord Browne of BP observed in "Beyond Kyoto",

> Business has already found that it is possible to reduce emissions from its operations. … Indeed, the company added around $650 million of shareholder value, because the bulk of the reductions came from the elimination of leaks and waste. Other firms – such as electricity generator Entergy, car manufacturer Toyota, and mining giant Rio Tinto – are having similar experiences. The overwhelming message from these experiments is that efficiency can both pay dividends and reduce emissions.[58]

Insurers and re-insurers, consistent with concerns of those who negotiated the United Nations Framework Convention on Climate Change and its Kyoto Protocol, have begun to pay closer attention to the issue of climate change and a rise in sea levels.

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[55] "Regulation has spurred the creation of the ECX (European Climate Exchange). Next January, the European Union will put into effect new rules designed to curb carbon-dioxide emissions, which contribute to global warming. Major companies in the EU's 25 member states will be allowed to emit a specified amount. If they go over, they can buy credits from companies that have stayed within their limits", *The Economist* (11 September 2004), at 69.

[56] Dupont has reduced its emissions of Green House Gasses by 65 per cent compared with 1990 levels. "But multinationals like Dupont are convinced that carbon constraints are coming anyway in America, and they want to make global preparations. Since they have operations inside Kyoto-land, many are pursuing low carbon strategies at home," *The Economist* (9 October 2004), at 58.

[57] *The Economist* (9 October 2004), at 59.

[58] Browne, J., "Beyond Kyoto", *Foreign Affairs* (July/August 2004).

Swiss Re, the reinsurance giant, has incorporated environmental risk into its underwriting and provides risk specific insurance products. It also encourages banks to place a higher value on those companies that are effective in their climate change risk management. Swiss Re will go "carbon neutral" over the next ten years by cutting emissions and investing in World Bank carbon sequestration projects.[59] Axa, the French insurer, argues that climate risk – which it has said would affect about 20 per cent of global gross domestic product – is more important than the interest rate or foreign exchange risk.[60]

Citigroup which is the biggest project financier in the world has subscribed to a comprehensive environmental policy initially promoted by environmental groups to a large extent consistent with the United Nations Convention on Biological Diversity. It has agreed that this environmental policy will cover project financing affecting rain forests, indigenous areas, sensitive ecosystems, etc. It has even agreed to the concept of no-go areas.

The largest mining company in the world, Rio Tinto, which has operations on all continents except Antarctica, has formed partnerships with conservation groups such as Birdlife International. Rio Tinto sees these partnerships as a means of meeting on site the company's biodiversity goals consistent with the provisions of the Convention on Biological Diversity.[61]

Johnson & Johnson has become the largest corporate user of wind power in the USA. Lafarge is reducing its emissions from its cement kilns by using innovative fuels, such as sewage treatment sludge.[62]

According to an assessment by the Financial Times, five per cent of global chemical sales are derived from bio-based sources today. This percentage is expected to increase to 20 per cent by 2010. In the USA, 75 refineries produce 2.8 billion gallons of ethanol. Bio-based fuels could provide 20 per cent of electricity in OECD countries by 2020.

London is emerging as the carbon finance capital of the world. Climate Change Capital, the first merchant bank dedicated to carbon issues, and the Carbon Trust, an innovative public-private partnership that aims to boost clean energy, in part, by funding promising technologies considered too risky for private financiers, are based there.[63]

In a clear public manifestation of changed attitudes, Shell has developed mechanisms for openness and public participation, in particular of indigenous groups, in

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[59] Walker, C., "Carbon renewables – the role of the financial industry", *A supplement to Environmental Finance*, December 2004 – January 2005.

[60] *Financial Times*, Internet Version at FT.com (16 September 2004).

[61] *See* Inbaraja, S., "Business and biodiversity – risk of 'greenwash'", 12 (219) *IPS UN Journal*, at 4.

[62] *Financial Times*, Internet Version at FT.com (16 September 2004).

[63] *The Economist* (9 October 2004), at 59.

its controversial Camisea Project in Peru. It maintained a publicly accessible website on developments relating to the project.[64]

Similarly, the Chad/Cameroon project involving ExxonMobil, Petronas and Chevron, along with the governments of Chad and Cameroon, provides another example of the developments now affecting major companies. In this case, the World Bank became a key player because of the loans it extended to the two governments to facilitate their equity participation in the project. Significant pressure was exerted by NGOs on the oil companies and the Bank to ensure that oil money was used neither to further undemocratic governance nor for the purchase of weapons.[65]

Many large corporations, under pressure from NGOs, have begun to produce non-financial reports relating to the impact of their activities on "environmental and social" aspects. Although many in the environmental community remain sceptical of these non-financial reports, the UNDP, with the assistance of Sustainability (a consultancy) and Standard and Poors (a credit rating agency), has begun to produce annual ratings for corporations that participate.[66]

Even in developing countries many corporations have become more conscious of the need to act consistently within global environmental standards. It is beginning to be acknowledged that compliance with global environmental standards does not necessarily increase costs. In fact, in many instances, it may contribute to reducing costs. For example, Kuruwita Manchester Textile Mills of Sri Lanka, a major exporter of textiles and apparel to the US market, uses a totally biological process for the treatment of its effluent. Kuruwita is the only company in the region to employ flue gas from the boiler chimney to neutralize its effluent, thereby eliminating the need for 1,000 tons of sulphuric acid annually that was previously used for neutralization. Kuruwita's enlightened attitude is reflected by many forward-looking companies in the developing world.

In many developing countries there is legislation both designed to serve environmental goals and which responds to the standards set by multilateral environmental agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer 1987,[67] the Basel Convention on the Control on the Transboundary Movements of Hazardous Wastes and their Disposal 1989,[68] and the Washington Convention on International Trade in Endangered Species and Wild Fauna and Flora 1973.[69] Developing countries may also have legislation which simply seeks to address immediate environmental challenges such as pollution reduction, even in the absence

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[64] Shell withdrew from the project due to guerrilla violence and because it could not secure a long-term contract for the gas at a guaranteed price. Citigroup decided not to renew its financial advising contract. Camisea is now being developed by a consortium led by PlusPetrol of Argentina.

[65] Useem, J., "Exxon's African adventure", *Fortune* (15 April 2002), at 102.

[66] *The Economist* (6 November 2004), at 64.

[67] Untreaty.un.org.

[68] Untreaty.un.org.

[69] Untreaty.un.org.

of binding treaty obligations.[70] Increasingly, such legislation is being enforced, sometimes through action undertaken by civil society. Non-compliance with environmental legislation could lead to costly litigation and adverse publicity, which corporations would very much like to avoid. Compliance with environmental standards also makes them less susceptible to public criticism. Since many developing country corporations produce goods for developed country markets, it makes economic sense to comply with global environmental standards. Not only would these assist in preventing conflict with legal requirements in the target markets; it would also help to prevent damaging protests by vigilant civil society groups. It would also make the corporations more competitive in developed country markets.

5. PRIVATE SECTOR FINANCIAL INSTITUTIONS

Private sector project financing is an area that is gradually beginning to comply with global environmental standards even in the absence of directly applicable treaty or domestic legal provisions. Increasingly, the import of the United Nations Convention on Climate Change and its Kyoto Protocol are beginning to be appreciated by significant segments of the financial sector. Due to a combination of factors, including pressure from NGOs and intergovernmental financial organizations, many major private sector financial institutions are beginning to pay close attention to the need to take environmental and social considerations into account in their funding and investment decisions. This is a development with potentially wide-ranging consequences which may even force the hands of governments. The views of the financial sector carry considerable weight in government circles, even in those that remain to be convinced of the reality of climate change and global warming.

Some investors are also becoming more assertive about the potential risk posed by climate change to their portfolios. The Australian Commonwealth Superannuation Scheme, which controls a substantial fund, has incorporated sustainability principles into its risk management with regard to its long term investments.[71] In the US, thirteen public pension fund leaders managing assets of nearly $800 billion called on the Securities and Exchange Commission to "eliminate any doubt" that companies should be disclosing the financial risks of climate change in their securities filings.[72]

Corporations of this nature can exercise significant influence on the decisions made by the institutions with which they place their funds. An environmentally-conscious fund could engage in "environmental shopping" thereby exerting pressure on banks and other financial institutions to comply with its own standards.

The IFC developed the Equator Principles in collaboration with major banks; these principles have now attracted the participation of a number of global banks.

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[70] It is noted that the United Nations Framework Convention on Climate Change 1992 and the Kyoto Protocol 1997 do not create binding commitments relating to GHG (Greenhouse Gas) reduction for developing countries.

[71] www.css.gov.au.

[72] *Financial Times*, Internet Version at FT.com (16 September 2004).

Under the Equator Principles, implementation of which is voluntary, banks commit themselves not to "provide loans directly to projects where the borrower will not or is unable to comply with our environmental and social policies and processes".[73] Twenty-eight major banks have already subscribed to these and the number has increased gradually. Among the banks listed as having subscribed to these principles are ABN Amro, Westlb, Royal Bank of Canada, Credit Suisse Group, Citigroup, Dresdner Bank, Westpac, and Banco Bradesco S.A. The Equator Principles apply globally. They relate to project financing and specifically to investments above $50 million. They cover all industry sectors, including mining, forestry, oil, and gas. The Principles would require banks to undertake environmental assessments prior to decision making affecting project financing, which would address issues such as the impact on natural habitat, implications of involuntary resettlement, and effects on indigenous peoples and communities. Subscription to the Equator Principles by a bank attracts IFC endorsement of the project concerned and is an important element in encouraging participation by other financiers. It is estimated that the banks that have subscribed to them are responsible for 30 per cent of project loan syndication. IFC involvement also contributes to higher standards of governance. The IFC provides training to banks on these principles.

6. REASONS FOR THE CONVERSION – FAITH OR NECESSITY?

The reasons for the gradual conversion of the decision makers of an increasing number of private sector institutions to adopting environmental friendly policy approaches are interesting, given their traditional focus on profits and the obsession with year-end bonuses. Undoubtedly, the global environmental standards incorporated in a range of treaties have been a major factor: not only did these result in the development of a network of broadly accepted universal standards and raised awareness, but also caused the enactment of domestic legislative and policy measures.[74] The availability of global standards enabled civil society, using them as benchmarks, to mount campaigns to exert pressure on governments and corporations. Against the strengthening framework of legal measures, the message preached by civil society groups and academics for some time – that non-compliance with global environmental standards carries financially negative consequences – may also finally be getting through. In fact, non-compliance with global environmental standards may actually result in the loss of profits and bonuses, and this has been a powerful element in focusing the minds of those making critical corporate decisions.

Undoubtedly, the growing environmental political activism world-wide, which has increasingly become more closely oriented towards results, has been a critical factor. Environmental activism is likely in the future to gather further momentum rather than to diminish. In the US, Senators McCain and Lieberman have tabled a

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[73] Preambular paragraph 5, Equator Principles, at www.equator-principles.com.

[74] European Emissions Allowance Trading Directive, www.field.org.uk.

bill that will impose federal restrictions on Greenhouse Gas (GHG) emissions.[75] Although repeatedly tabled without success in the Senate, this initiative might gain majority approval in time; it would be an unwise corporate decision maker who ignored this eventuality. Some states in the US have already begun to adopt GHG restrictions. In New England, curbs on carbon emissions from power plants are in place. They are also developing a common trading system for emissions with Canada's eastern provinces. California has legislated for such restrictions on motor car emissions to become effective in 2009.[76] New York may follow suit. Given that California is one of the major markets globally for motor car producers, the US state could be expected sooner rather than later to comply with these legal requirements, with significant implications for industry standards and emissions levels.[77] While such developments may not necessarily ensure US compliance at a governmental level with the caps established by the Kyoto Protocol (to which it is not a party), they will contribute to limiting the level of GHG emissions by the US and prepare the ground for US participation at some future point in emissions trading.

The continuing pressure exerted by civil society lobby groups has had a significant impact. Groups such as Greenpeace, WWF, Rainforest Action Network (RAN) and Sierra have continued to highlight corporate shortcomings and attract public attention to these. The "naming and shaming" approach adopted by such pressure groups has in some cases had a critical impact. It could be assumed that the negative publicity would harm not only the image of a company, but also its earnings. The environmental lobby group Friends of the Earth published a report (Beyond the Shine – The Other Shell Report) on the environmental damage caused by the installations of Royal Dutch Shell in Sakhalin in East Russia, in Nigeria, and in Texas.[78] This report tends to contradict some of the claims publicly made by Shell. In another instance, television images of prominent individuals cutting up their credit cards issued by Citibank at the instigation of RAN may have had an impact on this bank's decision to enter into a "common understanding of key global sustainable development issues".[79] The company Home Depot changed its wood sourcing policies following a campaign carried out by environmental groups, including RAN.

Another significant and often ignored factor in the changing attitudes of the corporate sector is that many of yesterday's green activists are in pin stripes today, working in banks, other financial institutions and law firms – one famous activist from the past is now a minister of foreign affairs of a major industrial power. Unlike

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[75] *The Economist* (9 October 2004), at 58.

[76] Recent scientific studies have presented an alarming view of climate change in California, suggesting that by the end of the century rising temperatures could lead to a sevenfold increase in heat-related deaths in Los Angeles and imperil the state's wine and dairy industries. These studies would further encourage environment related legislative action, *see*, "Study finds climate shift threatens California"*, New York Times*, NYTimes.com (17 August 2004).

[77] Toyota is already marketing a hybrid petrol/electric motor car (the Prius) which, according to government ratings, consumes petrol at an average of 60 miles per gallon. *The Economist* (28 August 2004), at 54.

[78] 11 (15) *IPS UN Journal*, at 4.

[79] 'The mosquito in the tent', *Fortune* (31 May 2004), at 159.

the executives of yesteryear, it is no longer necessary to convince these younger individuals of the worth of the environmental cause. Having grown up experiencing environmental activism, both directly and indirectly, they are already converted and need only encouragement in incorporating environmental principles into their decision-making processes. Environmental consciousness is particularly evident among younger executives in such places as Europe, Australia, and New Zealand.

Many major companies are increasingly taking an expansive view of their environmental responsibilities. They are not merely looking for ways to reduce their own waste, pollution, and energy usage; they are pushing their suppliers, partners and customers to do the same. In some cases these suppliers and partners may be in developing countries, encouraging compliance through economic means in those countries which are not required to undertake commitments under some of the key environmental treaties (e.g., under the United Nations Framework Convention on Climate Change). Shell and fifteen other leading mining companies have decided to treat world heritage sites as "no–go" areas for exploration purposes.

The peer pressure factor is important not only among individuals working in the corporate sector, but among corporations themselves. When a major corporation subscribes to global environmental standards, it is not uncommon for others to follow. No company wishes to be left behind or be identified as being socially irresponsible. There is also the fear of losing a carefully cultivated corporate image. "The truth is that companies adopt green practices for lots of reasons … And they care about their reputations, which is why corporate campaigns by the likes of RAN, Greenpeace, and Friends of the Earth have an impact".[80] Corporations are extremely conscious of their public image, given that a negative image could have a deleterious impact on sales and profits.

Shareholder pressure is also factor influencing corporate compliance with global environmental standards. Encouraged by civil society groups, many companies have had shareholder resolutions tabled – over 300 in the US in 2002. The *Financial Times* estimates that those requesting sustainability reports relevant to their investment activities receive about 20 per cent of the votes at annual meetings of shareholders. This is a percentage of shareholders that a company could not ignore other than at its own peril.

Actual litigation, including in developing countries,[81] encouraged by environ-

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[80] *See ibid.*, at 162.

[81] For example, an Indonesian aid group has filed a suit for $543 million on behalf of three villagers against the Newmont Mining Corporation, the world's biggest gold producer based in Denver, in a district court in South Jakarta, alleging that they had been made ill by mine waste dumped by Newmont in its operation at Kayut Bay, Indonesia. The fight has aroused intense interest in mining circles and among environmental groups for the concerns it raises about how multinational companies – especially those that extract resources such as coal, copper and gold as well as oil and natural gas – conduct themselves in poor nations. On 31 August 2004 an Indonesian government panel announced that Newmont 'had illegally disposed' of waste containing arsenic and mercury in the ocean near the mine site, and had failed to obtain the required permits from the Ministry of the Environment, New York Times, 8 September 2004 (Web edition); *see* report in the *Sydney Morning Herald*, 9 December 2004, 'US mining giant to face pollution trial in Indonesia'. Five executives

mental and other civil society groups, has begun to play an important role in influencing corporate attitudes towards the environment. Suit was brought before US courts by plaintiffs from Myanmar and Nigeria against Shell and Unocal respectively for breaches or connivance in breaches of human rights.[82] The Unocal case, which subsequently travelled a tortuous route, was settled out of court. It was based on a law passed by Congress in 1789 awarding the district courts jurisdiction over any civil action by a foreigner against a person on US territory for acts committed abroad in violation of the law of nations or a treaty to which the USA is a party. (This law was originally designed to combat piracy.) Unocal was alleged to have been implicated in the violation of human rights by Myanmar soldiers during the construction of an oil pipe line in Myanmar. It is important that the violation of human rights standards established mainly under the International Covenant on Civil and Political Rights 1966[83] by the agents of a foreign government could have been used to base a claim for legal liability before a US court. A significant implication of this approach is the possibility of other American corporations' being sued in the US for the violation of universal human rights principles or established environmental principles by a collaborating governmental authority of a foreign country acting to advance the interests of such American entities.[84]

There is litigation pending in Ecuador involving ChevronTexaco concerning environmental- and health-related harm caused by the dumping of toxic wastes and crude oil by the company in its Ecuadorian operation. After a battle lasting over ten years, US courts have held that the Ecuadorian courts had primary jurisdiction in this matter, which concerns claims by indigenous groups on the basis of *forum non conveniens*. Although the objections to and the litigation involving the Karahnjukar Power Plant in Iceland funded by Barclay's Bank of the United Kingdom took four years to resolve, the eventual judgement permitted the construction of the plant.[85] The Baku-Ceyhan Pipeline Project managed by British Petroleum and funded by a range of private banks, multilateral financial institutions such as the IFC, and governments is being challenged before a range of judicial institutions.[86] Cases are pending before the European Court of Justice, the Georgian Court of Abandonment, and the European Court of Human Rights involving a complexity of issues, including breaches of the Equator Principles.[87]

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working for US gold mining giant Newmont were to stand trial in Indonesia in early January 2005 over pollution allegations.

[82] *Doe I v. Unocal*, 110 F. Supp.2d. 1294 (C.D. Cal. 2000). Here the court held that Unocal could not be held liable for Myanmar's use of forced labour due to its lack of control over the actions of the Myanmar government. In *Ken Wiwa v. Royal Dutch Shell Pet. Co*. 226 F.3d 88 (2d Cir. 2000) the court upheld US jurisdiction over a claim that Royal Dutch Shell had provided money, weapons, etc. to the Nigerian military, which committed human rights violations.

[83] *See* untreaty.un.org.

[84] *See* report, 'US oil giant settles suits on Burma abuses', 12 (230) *IPS UN Journal*, at 4.

[85] The Equator Principles featured in the claim advanced by the Icelandic Nature Conservation Association.

[86] The Equator Principles have been discussed also in the context of this dispute.

[87] www.ifc.org/btc.

Such litigation is time consuming and costly.[88] Where the damage is clear, the plaintiffs are certain responsibility could be traced, jurisdictional issues could be determined within a recognized framework, and the legal rules are clear, litigation involving breaches of environmental norms may proceed in a predictable manner. However, given the uncharted nature of some of the issues in the environmental arena, litigation might provide an interesting challenge to lawyers. The clarification of the legal rules may take time thus in many instances, a project could be held up for years by litigation. Royal Dutch Shell is facing legal challenges arising from its alleged violations of environmental standards in Manila in the Philippines, Sao Paulo in Brazil, and Texas in the US.[89] Many major corporations would rather not be confronted by litigation that could be avoided in the first place through their adequate compliance with environmental norms.

The possibility of shareholder litigation against directors for acting culpably by not taking adequate action to avoid climate change-related consequences of their actions has also been raised. The Overseas Private Investment Corporation and the Export Import Bank were in 2002 sued by Friends of the Earth, Greenpeace, and the City of Boulder. The former agencies were accused of failing to conduct environmental reviews in accordance with the National Environmental Policy Act before financing fossil fuel projects, worth over $32 billion, that contribute to global warming.[90] Similarly, the US Environment Protection Agency was sued by the states of Maine, Connecticut, Massachusetts, *et al.* in 2003 under the Clean Air Act for failure to regulate carbon dioxide emissions.[91]

Projects could be closed down for contravention of environmental rules or by endless protests. These would impact negatively on the profitability of a corporation.

What does this all mean? There exists a clear likelihood of cost overruns. Essentially, these are elements that have a serious impact on the bottom line: on profits and bonuses.

7. CONCLUSIONS

It is probably premature for environmental activists to declare victory in their efforts to encourage environmental responsibility in the decision-making processes of private sector corporations. Much more work remains to be done especially in the area of consolidating the global framework of environmental norms and in giving effect to them within domestic jurisdictions. Efforts to obtain wider participation in the multilateral environmental treaties must continue. Universal participation will undoubtedly create a common feeling of a need to comply with the global standards incorporated in these treaties. Domestic implementation will increasingly require a higher level of uniformity and co-ordination among different states if the global standards are

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[88] In the US, in particular, awards could run into huge figures.

[89] 11 (15) *IPS UN Journal*, at 4.

[90] www.greenpeaceusa.org.

[91] www.ago.state.ma.us.

to be effective. Lack of uniformity could result in the dissipation through uncoordinated approaches of these standards.

Corporate compliance with the global standards, even in the absence of relevant domestic legislation, is an absolute necessity in the modern context. In the rapidly globalizing world corporations play a critical role in establishing and consolidating standards and work practices. Against this background, efforts to highlight corporate shortcomings and raise awareness must continue. Similarly, it is important further to encourage corporations that have already made the decision to adopt environmentally responsible measures. It is noteworthy that different elements of the corporate sector have begun to respond positively, to varying degrees, to the concerns of civil society. Many factors have contributed to these welcome developments; it is suggested that the dawning conviction that profits and bonuses are on the line has been a critical factor.

In addition, it is important for governments to set clear policy directions for the guidance of corporations. It may at times even be necessary for governments to assist with a helping hand. As Lord Browne of BP observes,

> Offering positive incentives is one key contribution that governments can make to stimulate business. Another is organizing research. It is crucial to extend our understanding of the science of climate change: monitoring key variables with sufficient precision to understand both natural variability and the climate's response to human activity. … [W]ith the clock ticking, we cannot wait for definite answers before we take action.[92]

He further states,

> Government intervention must take other forms too. Transforming the energy system will require new technologies with risks that will be too high (and benefits too remote) for private firms to provide all the needed investment. This is one area in which the United States, with its outstanding technical capacity, should take a leadership role. Innovation will require an across-the-board infusion of resources for basic science and technology, as well as the development of a portfolio of key demonstration projects.[93]

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[92] Browne, *loc. cit.,* n. 58.
[93] Browne, *loc. cit.,* n. 58.

GENUINE PROTECTION OF INTERNATIONAL REFUGEES: A STUDY OF THE INFLUENCE OF WESTERN STATES ON THE MANDATE OF THE UNHCR

Sugiyama Kanako*

1. INTRODUCTION

The aim of this essay is to analyze the principal roles of the United Nation High Commissioner for Refugees (UNHCR). It examines how the mandate of the UNHCR has evolved in the context of recent events in order to balance the protection of the human rights of refugees with the interests of powerful Western states. The crucial fact is that the Western European states, leading donors to the UNHCR, exercise considerable influence on UNHCR policy for it to meet their demands, no matter how such influence limits the capacity of the UNHCR to protect refugees at risk. Western influence has become particularly evident since these states first faced the arrival of an increasing number of asylum seekers in their territories. The states, while restricting their own asylum policy, try to impose on the UNHCR restraints and pressures aimed at controlling its policy and operations. This can clearly be seen in recent UNHCR operations, namely, towards the Tamils, Kurds, Afghans, and Kosovars, where the UNHCR has shifted away from genuine international protection. Furthermore, it can be understood that the recent Western-oriented operations have shaped both the mandate of the UNHCR and the international legal framework for refugee protection as a whole.

This essay is divided into four chapters. Chapter 1 provides a brief survey of the worldwide history of refugee movements and the causes over the past fifty years of an individual's becoming a refugee. It illustrates current refugee flows with the numbers and country destinations, as well as with the geographical proportions of refugee movements in the world. The statistics shown in this chapter indicate that only a small number of refugees seek asylum in the West, while the developing

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countries receive a much larger number of asylum seekers. The last section then introduces conflicts between, on the one hand, this European current asylum trend and humanitarian obligations which the Western governments are expected to fulfil due to their having ratified the Convention Relating to the Status of Refugees (1951 Convention) and, on the other, certain other international human rights laws.

Chapter 2 sketches the mandates of the UNHCR, the only comprehensive international machinery for providing protection to refugees, and the 1951 Convention, the first established international law related to refugee protection. The chapter also shows other international human rights laws providing safeguards for refugees at risk. Although the UNHCR carries out its policies in accordance with its Statute, it has confronted inevitable changes and challenges in order to adapt its functions to current environments. The problems stem partly from the fact that the tasks of the UNHCR have developed in different ways depending on the location where it operates, given the various attitudes of the respective host governments. For example, the activities of the UNHCR differ considerably in Europe, to which refugees escape from developing countries, from their activities in the developing world, the source of most refugee flows and, in effect, where numbers of people are suffering from daily hardship.

Following these core mandates of the UNHCR, the third chapter discusses the restraints and pressures imposed upon the UNHCR by powerful Western states, and analyzes why the UNHCR is so vulnerable to pressures from these states. Through quoting recent UNHCR preventive operations in various countries, this chapter illustrates and examines the consequences of such policies, and also their impact both on the mandates of the UNHCR and on the international legal framework in the context of refugee protection.

In conclusion, having analyzed certain recent events, the last chapter explores questions arising from the Western-influenced policies towards refugees. Recent UNHCR operations have actually raised the issue that these policies may devalue not only the whole refugee protection regime, but also the UNHCR's *raison d'être*. Finally, this essay concludes that the UNHCR has reached the point where it needs to reconsider and re-evaluate its mandates in order for it to provide genuine protection to refugees. It suggests that the UNHCR and the international community elaborate a realistic yet refugee-oriented policy, in particular bearing in mind that, since conflicts and wars seem not to have ended, the number of asylum seekers seems similarly unlikely to decline.

1. THE REFUGEE PROBLEM IN A GLOBAL CONTEXT

1.1. A short history of refugee movements in the twentieth century

The original refugees who provoked the issue of the "International Protection of Refugees" were those who had fled their own countries because of persecution during the First World War. During and after the Second World War, the increasing number of refugees in Europe, mainly persons displaced by war from Poland and

other Eastern European countries to Allied-occupied Europe, became the biggest problem in the region. Eventually, this refugee influx resulted in the very first development of an international protection instrument, which subsequently evolved through many events to cover a much wider range of refugees over the world.

In the year 1951, there were merely some 1.5 million refugees, mainly in Europe; the number grew to 20.6 million world-wide at the start of the year 2003.[1] The first new refugee group, subsequent to two World Wars, consisted of those escaping from the newly-established Communist states in Eastern Europe during the Cold War in the 1950s. At that time, the Western states were generous enough to receive those refugees since then these states could use them as political and ideological opposition to the Communist countries. On the other hand, the second group comprised those fleeing from the developing countries in the 1960s and 1970s. This group of refugees fled their countries of origin due to such reasons as, for example, the struggle to achieve independence from former colonial rulers, or conflicts within newly independent states. Besides, in this period, about ten million people migrated to Europe from the developing countries as guest workers to fill the labour shortage in the aftermath of the Second World War.[2]

Furthermore, it can be seen that more and more refugee exoduses have occurred since the 1970s for a variety of reasons: civil wars, natural catastrophes, poverty, political repression, internal discrimination, and so on. With the help of recent advances in communication and transport, those who fled their countries of origin for such reasons are more likely to seek asylum in the industrialized states, namely, Western Europe, the United States, Canada, and Australia. Such refugee inflows into the developed states had become marked by the 1990s.

1.2. Analysis of refugee flows in the world

At the time of writing (2003), it is clearly seen that refugee movement has expanded globally. At the beginning of 2003, the number of people of concern to the UNHCR – including refugees, asylum seekers, returned refugees and Internally Displaced Persons (IDPs) – was 20.6 million, in contrast to 1.5 million in 1951. The geographical breakdown demonstrated by the UNHCR[3] in 2003 shows 9,378,900 refugees are in Asia; 4,593,200 in Africa; 4,403,900 in Europe; 1,061,200 in Northern America; 1,050,300 in Latin America and the Caribbean and, lastly, 69,200 in Oceania. Of this total population of 20,556,700, according to the UNHCR's latest analysis, approximately 1,014,400 applied for asylum worldwide in 2002.

The UNHCR table also indicates the origins of the major refugee populations and the main countries of asylum in 2002. The majority of refugees came from Afghanistan, Burundi, Sudan, Angola, Somalia, the Congo, Iraq, Bosnia-Herzegovina, Viet Nam and Eritrea. 2,481,000 Afghan refugees applied for asylum mainly in

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[1] Loescher, G., *Refugee Movements and International Security* (London: Brassey's, 1992), at 9.
[2] *Ibid.*, at 9.
[3] UNHCR, *Refugees by Numbers* (Geneva, 2003).

Pakistan and Iran; 574,000 Burundi refugees in Tanzania and the Democratic Republic of Congo; 505,200 Sudanese in Uganda, Ethiopia, the Congo, Kenya, and the Central African Republic; 433,000 Angolans in Zambia, the Congo, Namibia, and the Congo; 429,000 Somalis in Kenya, Yemen, Ethiopia, the UK, the USA and Djibouti; 415,000 Congolese in Tanzania, the Congo, Zambia, Burundi and Rwanda; 401,000 Iraqis in Iran, Germany, the Netherlands and Sweden; 372,000 Bosnians in Serbia-Montenegro, the USA, Sweden, Denmark and the Netherlands; 348,000 Vietnamese in China and the USA and, finally, 316,000 Eritreans sought asylum mainly in Sudan and Ethiopia.

It is worth remarking that a larger number of developing countries receive more refugees than do the developed countries despite the formers' poor economic circumstances. Compared to the size of the national population, the main refugee hosting countries during 2001 were Armenia 1:14, followed by the Congo 1:25, Yugoslavia 1:26, Djibouti 1:27, and Zambia 1:37. In 1992, Malawi received the largest number of refugees: 1:10 as compared to 1:869 for Germany, and 1:3,860 for the United Kingdom.[4] Moreover, the least developed countries usually host refugees for long periods of time. The countries receiving the largest numbers of refugees in recent years have been Pakistan and Iran, hosting 2.2 million and 1.9 million respectively; these constitute twice as many refugees as there are in all of the countries of Western Europe combined.[5] A recent prominent example is found in the Eastern European developing countries, Armenia, Albania, and the former Yugoslav Republic of Macedonia, all of which continue to receive a great number of refugees from Kosovo in spite of the not only financial but also social burdens placed upon them by the influx.[6]

Statistics also reveal that a great majority of refugees seek asylum in the world's poorest states; the twenty countries with the highest ratio of refugees have an annual average *per capita* income of $700.[7] In contrast to the developing countries, the number of asylum applications submitted in Western Europe is considerably lower: in 2002, the United Kingdom, the country receiving the largest number of refugees from the developing states among the Western European countries, received 110,700 applications. (The UK government claimed during the year that the number had reached 100,000.) The second-highest was Germany, receiving 71,100. There were 50,800 refugees applying for asylum in France; 37,100 in Austria; 33,000 in Sweden; 26,200 in Switzerland; 18,800 in Belgium; 18,700 in the Netherlands; 17,500 in Norway and, finally, 11,600 in Ireland.[8] Compared with the numbers in the developing countries as shown above, even when taking into account the geographical size of the countries, the number in the West seems paltry in the extreme. The second controversial issue regarding the current refugee protection regime thus increasingly

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[4] World Refugee Survey 1992 (Washington, D.C.).

[5] UNHCR, n. 3.

[6] UNHCR, "UNHCR Executive Committee of the High Commissioner's Programme 50th Session Note on International Protection", 11 *International Journal of Refugee Law* (1999).

[7] Loescher, n. 1, at 1.

[8] UNHCR, n. 3.

places greater focus on the matter of sharing the burden, with collaboration between the developed and the developing worlds.

1.3. European policies towards asylum seekers

Ironically, in spite of the fact that developing countries assume a greater role in receiving refugees with little assistance from the developed countries, European states have steadily been restricting their asylum policies in order to lessen their obligations towards refugees. This current attitude reflects the fact that refugees are no longer of a symbolic or instrumental value to the Western states. Rather, in recent years, refugees have been perceived as burdens.[9] The second reason is that countries have experienced a sudden increase of the number of refugees seeking asylum in Europe, especially from the developing world, due to recent advances in technology: from 70,000 in 1983 to 450,000 in 1990, and to more than 288,100 in 2003.[10]

Throughout Western Europe, there is a common view that the governments fear that granting asylum to such a great number of refugees may cause social as well as political problems in their respective countries. From national perspectives, most of the European governments which have experienced an increasing problem with xenophobia are concerned that refugee inflows may adversely affect the social balance by causing racial, cultural, and religious discriminations and hostility among the locals and the refugees. Moreover, due to the increasing fear of terrorism in recent times, many people in Europe may simply be worried that some of the new arrivals might aim to attack their countries. In such circumstances, even Germany, which has for its own historical reasons been generous in taking refugees, has started to restrict its asylum policy and has amended its constitution regarding the right of asylum.[11] Considered from the international point of view, on the other hand, the governments are largely concerned about international security and political interests as well as their relations with refugee-sending countries.

This European willingness to exclude asylum seekers is manifested in the course of the European common asylum policy. Originally, the idea of having a common EU asylum policy itself emerged from the single market policy – the freedom of movement of persons, goods, services, and capital among member countries of the EU – which as a result involved abolishing internal borders within the EU member states. However, this approach was shelved and blocked by a number of states wishing to retain their state sovereignty, control their own borders, and also keep asylum policy within their authority. Consequently, the agreement for the common EU asylum

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[9] In the face of escalating Cold War struggle, Western governments came to perceive assistance to refugees as a central part of their foreign policy, thus using foreign aid as one of the principle tools in this East-West struggle for influence. Loescher, G, *The UNHCR and World Politics* (Oxford: Oxford University Press, 2001), at 10.

[10] UNHCR, *Asylum Levels and Trends 2004* (Geneva, 2004).

[11] Lavenex, S., *The Europeanisation of Refugee Policies* (Budapest: Central European University Press, 2001), at 148-184.

policy, the Schengen Agreement, was finally designed to emphasize the sovereign right of internal security, public order and border controls.

The Agreement was especially formulated to restrict asylum seekers; it allowed the governments of the member states to retain state discretion and, if necessary, to send the applicant to a third state. Furthermore, it did not explicitly prohibit the return of asylum seekers to the country where their life or freedom would be threatened. It was apparent that such a principle was contrary to the 1951 Convention and other international human rights laws.

Moreover, in the context of the harmonization of European asylum policy, EU member states have been shifting away from international legal bindings by strengthening their national laws and discretion towards asylum seekers. Article 32 of the Schengen Agreement, as well as Article 3 of the Dublin Conventions, states that an application shall be processed in accordance with 'national law' in fulfilling the goal of European integration, national security and stability.[12] In addition, as stated in Article 3(5) of the Dublin Convention, the so-called "safe third country policy", every contracting party to the Convention has the right to send or send back to a third country an asylum seeker *before* examining their application; this may occur when the state has confirmed that the third country will not send the person back to their country of origin where they may face persecution. Moreover, the party state could, through the safe country of origin strategy, simplify the application procedure of a person who comes from a country where there is in general terms no serious risk of persecution.[13]

Restricting internal borders and tightening refugee controls enabled each member state both to preserve its national security and stability, and to prevent inflows from other member states that hold less firm asylum policies. This "protectionist" tendency became common in Western Europe; it could be clearly observed when the Western European states prevented a massive flow even from other parts of Europe, namely, the former Yugoslavia in the 1990s. (This is discussed in Chapter 3.) Preventive action by the Western states was strengthened in particular when their governments perceived that humanitarian assistance to refugees in camps in the country of origin was financially and politically a relatively low-risk option, in contrast to the results of accepting an indefinite number of refugees or of directing political and military intervention.

However, even though these states complain about the numerous refugee influxes, the number of refugees in Western Europe is still comparatively much smaller than that in the developing countries, as shown in the previous section. It is not hard to imagine that a sudden and large-scale refugee inflow can much more seriously endanger the social and economic stability of the poorer countries than of European countries. Besides, with or without a refugee inflow, developing countries already suffer from poverty, disease, scarce economic and natural resources, unstable political structures, and ethnic and religious divisions.

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[12] Lavenex, n. 11, at 73.
[13] Lavenex, n. 11, at 112.

Apart from the unfavourable European policy towards refugees, the statistics of the UNHCR indicate that Western European countries became increasingly reluctant to finance the UNHCR. Instead, they spend ten times more on maintaining their own asylum system to prevent refugee inflows than on contributing to fund the UNHCR to protect refugees around the world.[14] It is no doubt understandable that European governments are concerned with the impact of larger refugee inflows. However, the question arises as to whether such attitudes are relevant in the face of the fact that the cause of refugee problems is not attributable only to the refugee-sending countries; one also must consider the crucial factor that the developing countries have been struggling with a much larger number of refugees. Besides, since the governments in Europe are parties not only to the 1951 Convention and the 1967 Protocol but also to other international human rights laws, there is a question as to whether these states honour their international obligations as required by such laws. While the European governments are striving to ease their binding obligations, the duty would fall on the international community and watchdogs such as the UNHCR to lead the governments to fair, legitimate and reliable implementation of refugee protection policy. As such, it would be the UNHCR who should enforce the important role of the existing international laws and restructure the whole refugee regime in order to protect those in need. The details of the mandates of the UNHCR are discussed in the next chapter.

2. THE UNHCR AS A REFUGEE PROTECTION BODY IN THE GLOBAL AND EUROPEAN CONTEXT

2.1. The 1951 Refugee Convention[15] and international human rights law

The 1951 Convention was established on 28 July 1951 to define and codify a refugee's rights and status at international level. It came into force on 21 April 1954. Since Denmark became the first state party to the Convention, a total of 145 states had by 2003 become contracting states. The Convention in Article 1A (2) defines a refugee as someone who:

> As a result of events occurring before January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual resid-

[14] UNHCR, http://www.unhcr.ch

[15] For details such as the process of the establishment of the Convention, *see* Jackson, I., *The Refugee Concept in Group Situations* (The Hague: Kluwer Law International, 1999), at 11-76.

> ence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[16]

As specified in the Preamble to the Convention, refugees are assured "the widest possible exercise" of all fundamental rights without discrimination, which was affirmed in the UN Charter and the Universal Declaration of Human Rights (1948). The 1951 Convention contains a wide range of rights of refugees such as the right to work, education, social security, freedom of religion, non-discrimination, access to court and other minimum standards for the treatment of refugees. This automatically requires the party states to treat refugees in the same way as they would treat aliens or their own nationals. The Convention also ensures the refugee's right to travel and exemption from visa requirements.

Moreover, the Convention prohibits states to expel a refugee to a country where he is threatened; Article 32(1) spells out that "the Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." In addition, Article 33(1) of the Convention stipulates that "the Contracting State shall not expel or return (*refouler*) a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion." This so-called "*non-refoulement*" principle has been recognised as a rule of customary international law. Nevertheless, these protections are not infinite. Articles 1(F) and 32(2) of the 1951 Convention lay down an exclusion clause for people who have committed serious criminal offences, crimes against humanity and war crimes, acts contrary to the purpose and principles of the United Nations.[17]

Apart from the rights of refugees, the 1951 Convention defines some obligations and duties of the contracting states. For example, it stipulates the state's obligation to co-operate with the United Nations regarding the protection of refugees; Article 35(1) spells out that "the Contracting States undertake to co-operate with the UNHCR, or any other agency of the United Nations ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention." In addition, Article 35(2) requires states to provide information and data regarding the condition of refugees in their territories, implementation of the Convention, and national laws and regulations. Furthermore, Article 36 specifies the states' duty to communicate to the United Nations regarding national laws and regulations to ensure the application of the Convention and its enforcement. These

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[16] Shah argues that in the table of negotiation regarding the Refugee Convention, the USA, France and Italy opposed recognizing non-European refugees and also refugees emerging from beyond the immediate post-war context. The UK, on the other hand, took the broadest possible definition of refugees, arguing that no restriction of time and place should be included. It did not believe that the refugee problem in the future would be a serious burden on European countries. In the end, those states which had advocated a narrow approach won and the Convention was limited by time and place. Shah, P., *Refugees, Race and the Legal Concept of Asylum in Britain* (London: Cavendish, 2000), at 58-59.

[17] UNHCR, *The Status of the World's Refugees* (Oxford: Oxford University Press, 1997), at 53.

state obligations specified in the provisions therefore compel party states to be legally bound to implement its asylum policy in co-operation with the UNHCR.

Sixteen years after the first comprehensive refugee law was established, the 1967 Protocol was adopted in order to adapt the 1951 Convention to the current situation. It eliminated the deadline and geographical restrictions laid down in the 1951 Convention and thus granted the UNHCR a more comprehensive competence to cover refugees all over the world; this allowed the UNHCR to provide protection to the people who became refugees due to events even after 1951. However, the most important effect of the 1967 Protocol was, as Loescher noted, that "it brought the 1951 Convention into line with the universal mandate of the Statute of the UNHCR".[18]

Apart from the 1951 Convention as the principal international refugee law, other international human rights instruments also provide legal rights and protection to the people fleeing their own countries and in need of protection such as the right to asylum[19] and the right not to be subject to torture.[20] These provisions are often emphasized together with the 1951 Convention in order to prevent states from neglecting to protect people at risk.

2.2. A short history of the UNHCR

The UNHCR was established as a subsidiary organ of the General Assembly on 14 December 1950 by Resolution No. 428 of the Fifth United Nations General Assembly, which laid down the Statute of the UNHCR. The original idea of developing the international protection of refugees was initiated by the League of Nations, the predecessor of the United Nations, to protect refugees during and in the aftermath of the First World War. This League of Nations High Commissioner for Refugees (LNHCR) in office from 1921 to 1930 offered legal protection including the issue of an identity paper as well as the co-ordination of assistance to refugees. Later by 1939, the Nansen Office and the High Commissioner for Refugee replaced the LNHCR and again later, it developed into the International Refugee Organization (IRO), but this time only as an agency of limited duration.

While realizing that the post-war refugee problem could not be solved in the short term, as Salomon noted, "the western powers felt, unwillingly or willingly,

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[18] Loescher, n. 9, at 123-4.

[19] The right to seek asylum is universally recognised in Article 14 of the Universal Declaration of Human Rights (UDHR); Everyone has the right to seek and to enjoy in other countries asylum from persecution.

[20] Article 3 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) stipulates: "No State shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture." In *Chahal v. United Kingdom* as a leading case, the Court held that whenever there is a substantial and real risk of being subjected to treatment contrary to Article 3 of the CAT if he is removed to another state, the state has the responsibility to safeguard him against such treatment. *Chahal v United Kingdom*, [1997] 23 EHRR 413.

obliged to continue in one way or the other the refugee policy introduced during the Second World War." Consequently, the UNHCR was established by the UN General Assembly to continue to provide protection to refugees.

The UNHCR was, however, awarded only a limited budget to provide solely legal and political protection.[21] It was initially considered that such an agency thus had to appeal to governments for material assistance and was prevented from organizing migration projects as the IRO had been able to do. As a result, the UNHCR had nothing but the competence of facilitating diplomatic pressure that it could bring upon states in order to safeguard the legal rights and interests of refugees.[22]

Nevertheless, until the 1980s, the UNHCR enjoyed maximum legitimacy and had a monopoly on information about refugee laws and refugee movements. Because only the UNHCR possessed specialized knowledge of and expertise in the refugee laws at that time, states simply required the UNHCR to advise on asylum matters. Nonetheless, in recent decades, the states have developed their own refugee regimes to the extent that they do not need support from other states or bodies, The UNHCR has lost its monopoly over information and expertise. In such circumstances, its authority and legitimacy in the realm of asylum have declined, in particular, since 1980s.[23]

2.3. The principal mandates of the UNHCR

The principal mandates of the UNHCR today can be categorized in five ways: 1) international protection, 2) emergency assistance, 3) the facilitation of voluntary repatriation, 4) the promotion of resettlement, and 5) the integration of refugees in their country of asylum. The first and primary mandate of the UNHCR is to promote, organize and supervise international protection for refugees who lack national protection, in order to safeguard their rights and interests. The objective is to ensure that refugees acquire a proper legal status as close as possible to that of the country's nationals and, further, to help them to acquire the status of citizen in order no longer to be a refugee. The UNHCR has autonomy in protection matters and intervenes with the governments on behalf of refugees, whether individuals or groups, who may be facing difficulties as a result of their status or the lack of their status.[24] In order to achieve international protection for the refugees concerned, the UNHCR expedites and encourages governments to adopt appropriate provisions for the benefit of refugees and to introduce a generous policy of asylum.

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[21] Shah discusses that some Western European States, led by France, advocated an agency that could provide material assistance as well as legal and political protection, while the UK and the US, on the other hand, favoured an agency that could provide only legal and political protection. Shah, n. 16, at 58.

[22] Shah, n. 16, at 58.

[23] Loescher, n. 9, at 5.

[24] UNHCR, *Background Paper on the Office of the United Nations High Commissioner for Refugees* (Geneva, 1971).

The second direct activity of the UNHCR is emergency assistance for refugees in need of material support. In the course of the emergency assistance the UNHCR, in theory, works in co-operation with the host government, including providing assistance in planning and implementation, but only if invited to do so by the said government. Moreover, as specified in the Statute of the UNHCR, the UNHCR shall not appeal to governments for funds or make a general appeal for assistance to refugees without the prior approval of the General Assembly.[25] This mandate, however, was not a task of the UNHCR in the early stages of the establishment of the Organization. No provision for direct material assistance for refugees was initially made at that time. Nevertheless, the UNHCR has in recent years become increasingly involved in this mandate due to the interests of the Western states; these states have become reluctant to accept refugees and so prevented refugee outflows while pressurizing the UNHCR to continue containing displaced populations in the country of origin and help them from the inside. As a result, providing emergency assistance to the displaced living in camps in their own country became, as we now can see, the second-largest component of the mandates of the UNHCR. This part of the UNHCR's evolutional duty is analyzed in Chapter 3.

Third, voluntary repatriation is considered as a primary solution to the problem of refugees, as is providing legal protection. The UNHCR makes every effort to achieve the repatriation of refugees who wish to return home. The principle of the voluntary repatriation scheme is that refugees themselves decide when to return and under what conditions. The UNHCR then supports refugees only when it has confirmed such preconditions as a fundamental change of circumstances in the country of origin, the voluntary nature of the decision to return, return in safety and dignity, and tripartite agreements between the state of origin, the host state and the UNHCR.[26] Resettlement through emigration to other countries is the other solution especially favoured by many European refugees. Accordingly, the UNHCR promotes and negotiates such emigration in co-operation with the interested governments, and encourages them to liberalize their criteria for the admission of refugees.[27]

However, it is noteworthy that since the end of the Cold War, repatriation has been mistakenly perceived as an effective method towards reducing the number of refugees in the country of asylum. Governments, especially of the Western states that want to exclude new entrants, have exerted pressure on the UNHCR to encourage and promote the return of refugees as quickly as possible. As a consequence, the UNHCR has had no choice but to start to promote repatriations under less strict conditions than those of voluntary repatriation. In such circumstances, it cannot be denied that the beneficiaries of this repatriation policy are not primarily the refugees, but the Western states. Problems arising from the change in focus, in the light of the Western influence, within the recent repatriation policy are discussed in greater detail in Chapter 3.

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[25] *Ibid*., at 12.
[26] Loescher, n. 9, at 16.
[27] UNHCR, n. 24, at 17.

Lastly, as the scale of refugee movements has changed since the globalization of the Cold War, integration into the country of residence has become the most realistic, practical and durable solution for refugees. As such, the UNHCR tries to facilitate the integration scheme. In theory, primary responsibility for providing aid to refugees falls upon the government, local authorities and social welfare agencies of the country where the refugees reside. However, the UNHCR helps refugees to become self-supporting in the country and so provides additional material aid only if necessary, while international protection continues to be granted to the refugees until the integration of the refugees is completed by naturalization. In the field of the material assistance at this stage, providing housing is the biggest contribution of the UNHCR. Other than that, it implements a variety of projects, such as language and cultural support in order to solve problems, to support refugees.

Nevertheless, as the UNHCR has been focusing almost entirely on repatriation and emergency relief in recent years, other crucial solutions – including international protection and local integration – have hardly been implemented as feasible options for long-staying refugee populations. The reason is very simple: the Western states, leading donors to the UNHCR, are reluctant to fund any operation other than repatriation and emergency relief. Thus, the UNHCR does not have the means to start relief operations other than these. Accordingly, it cannot be denied that some of the principal mandates of the UNHCR stipulated upon its establishment have been fading and, instead, "Western" principal mandates for refugee protection have been emerging in the face of massive donor states' influence.

Apart from direct forms of support to refugees, the mandate of the UNHCR involves a statutory function. According to paragraph 8(a) of the UNHCR Statute, the High Commissioner shall provide protection by promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto. Moreover, the High Commissioner is granted the competence to promote implementation of any measures for the protection of refugees through special agreement with the governments concerned. The UNHCR therefore becomes a legislative body in the sense of supervising, developing and amending international laws concerning protection of refugees. The first exercise of such undertakings was to adapt the refugee definition of the 1951 Convention to the present circumstances by initiating the form of the 1967 Protocol. The UNHCR has also participated in promoting the inclusion of provisions regarding refugees and other relevant persons into international instruments as well as into national legislations.

In addition to these core mandates of the UNHCR, the Organization should engage in such additional activities as the General Assembly may determine, alongside those as may be required by the Economic Social Council. It recognizes in Article 9 of the Statute that "the High Commissioner may, in addition to the work with refugees, engage in such activities … as the General Assembly may determine, within the limits of the resources placed at his disposal." Hence its mandate can be highly dynamic and flexible in principle.

2.4. UNHCR activities in the developing countries and Western Europe

With the main purpose of international protection of refugees, the UNHCR has been developing its mandates to meet global change since its establishment in 1951. Although the goal of the Organization is perpetual, due to differing situations such as governmental policies or for economic reasons in respective countries, the tasks of the UNHCR in Western Europe have strikingly diverged from those in the developing countries. The latitude of mandate, responsibility, and power seems much more limited by the governments in Western Europe, on the one hand while, on the other, its duties and commitments are wider in range in the developing countries. In these circumstances, it is necessary to demonstrate and compare the activities of the UNHCR in the developed and developing countries respectively in order to clarify the reasons why the UNHCR in the West retains only restricted power, while this is not the case in the developing world. It also helps articulate the main actors who limit or facilitate the Organization's tasks in the context of protecting refugees in the state territory.

2.4.1. The UNHCR in developing countries

As shown in the analysis of refugee flows in Chapter 1, it can be stated that the developing countries are more generous towards refugees than are the developed countries, in the sense that the former accept a much larger number of refugees. They are also benevolent to the activities of the UNHCR since the governments in the developing countries often co-operate with the UNHCR or international agencies in accepting refugees fleeing their country. The UNHCR is welcome to be involved in a great range of activities concerning plans and implementations for refugee protection as well as arrangements of material assistance in collaboration with the host government. For example, since India is not party to the 1951 Convention and has no laws or institution on asylum, the government allows the UNHCR to deal with asylum seekers to a great extent.[28] The UNHCR interviews each asylum seeker individually on behalf of the government to assess his claim to refugee status, then issues what is called the "UNHCR refugee certificate" if he is recognised as a refugee. The certificate normally leads the Indian authorities to grant an official residence permit; if not, the authority gives protection against arrest and deportation.[29] Furthermore, in regard with material assistance, in 1984, the Pakistan government extensively co-operated with the UNHCR to set up a project in collaboration with the World Bank, which included re-afforestation, watershed management, irrigation, and road repair and construction for the Afghan refugees living in camps in Pakistan. It had

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[28] The government allows the UNHCR to deal with asylum seekers unless the reason concerns sensitive political issues. For example, the government excludes the UNHCR's involvement in asylum issues if the asylum seekers
are from China, Myanmar, Bhutan, or Pakistan.

[29] UNHCR, n. 17, at 59.

a significant and positive impact on the extent to which many of the refugees had become self-sufficient by the late 1980s.[30]

The UNHCR in the developing countries also has direct access to and contact with the authorities. One of such cases is to provide financial contributions, equipment and training to police officers. To ensure the physical safety of refugees in camps, the UNHCR offers local police training and improves security in the area. Such a programme was successfully carried out in north-east Kenya, where Somali refugees were living in camps. The UNHCR took the initiative to undertake "the Women Victims of Violence Project" in order to combat the high incidence of rape and sexual violence occurring in camps, and provided special training to refugees as well as to local police in order to improve security in camps.[31] Moreover, the governments in the developing countries tend to shoulder the burden of financial support to improve refugees' lives in the area of new settlement. This co-operation usually follows the government's aim to develop the region and re-invigorate local economies.

In addition to these active operations, the UNHCR is in the developing countries involved in law-making courses in co-operation with the governments. This occurs on a much broader scale than in Europe. For instance, Principles Concerning Treatment of Refugees were adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966 in close co-operation with the UNHCR. Moreover, the Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention) was adopted on 12 September 1969 under the aegis of the Organization of African Unity in collaboration with the UNHCR. It was decided that the OAU Convention should be a supplement to the 1951 Convention,[32] and thus became favourable to the UNHCR's objectives. Furthermore, as for the protection of refugees in Latin America, the Organization co-operated in formulating the 1984 Cartagena Declaration on Refugees[33] adopted in November 1984. On this occasion, the UNHCR had the opportunity to be involved in the preparation of the Declaration, obviating formal procedures within the UN or a regional organization.

In conclusion, the UNHCR has gone much further in its role in the developing countries to the degree that it has taken part in establishing national legislations and regulations concerning the protection of refugees. The Zimbabwe Refugee Act 1983, as a leading model, is now widely acclaimed to be Africa's most comprehensive and appropriate piece of domestic refugee legislation, owing to the involvement of the UNHCR. Having been drafted with the advice of the UNHCR, the Act gives

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[30] *Ibid*., at 118-120.

[31] In most refugee camps, women and female children comprise 45-55% of the whole population. Women and girls are the most vulnerable group facing gang rape and sexual violence.

[32] Türk, V., "The role of UNHCR in the development of international refugee law", in Nicholson, F. *et al* (eds.), *Refugee Rights and Realities* (New York: Cambridge University Press, 1999), at 167.

[33] For details, *see* Jackson, n. 15, at 395-414.

direct effect both to the 1951 Convention and to the OAU Convention, and has been used as a model for draft legislation in Kenya, Tanzania and Swaziland.[34]

2.4.2. The UNHCR in Western Europe

Looking at the degree to which the UNHCR could affect the refugee protection regime in Western Europe, on the other hand, the main actors establishing the protection system for refugees are largely limited to the governments themselves. In the area of material assistance, for instance, unlike in the developing countries, numbers of governments are no longer prepared to finance community and social services programmes since they believe, erroneously, that such programmes might discourage refugees from going home. This seems contrary to the willingness of certain states to resolve refugee problems with the minimum of delay. Accordingly, states often prevent refugees from becoming self-sufficient and prohibit them from seeking employment, or else give them only limited access to jobs provided by the prospective employers or governmental organizations. In these circumstances, the presence of the UNHCR is barely noticeable in this field.[35]

In the intergovernmental as well as in the supranational levels of the refugee protection regime, and most critically, it follows that the governmental actors dominate the course of law-making despite the major mandate of the UNHCR: the supervision of international law regarding refugee protection. For instance, solely as observers, representatives of the UNHCR joined the Ad Hoc Committee of Experts on the Legal Aspects of Refugees (CAHAR), consisting of governmental experts in the fields of asylum policy mainly from its members' interior and justice ministries. The UNHCR is not entitled to an official representative to the Committee, thus does not hold the right to vote in the Committee. Moreover, in the course of the formal and intergovernmental arrangements of the EU, the UNHCR is rarely involved in the process or implementation. As a result, the UNHCR was consulted only at a very late stage of the negotiations on the final text of the Schengen Agreement. It was not allowed to participate in the due process of the Agreement or thus to function as a watchdog of the refugee protection regime.[36]

This tendency has been emphasized especially since the EU started building up an idea of harmonizing asylum policy; member states have been likely to restrict their policy by imposing higher criteria such as visa requirements or simply by closing the border. The states tend solely to pursue their own benefits while placing greater emphasis on sovereign rights yet not on human rights principles. The fact that, at the intergovernmental level, even suggestions and oppositions of supranational bodies such as the Council of Europe and the European Parliament became likely to be excluded further emphasizes the unequal circumstances.

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[34] Alexander, J. and Berkowitz, N., "Hospitality or hostility? Refugee law in Africa", 12 *Immigration and Nationality Law and Practice* (1998), at 51.

[35] UNHCR, n. 17. at 67.

[36] UNHCR, *Briefing* 16 August 1991.

Apart from the Schengen Agreement, this intergovernmental phenomenon of restricting asylum policy can be seen in various law-making tactics; the EU Joint Position of 4 March 1996 on the harmonized application of the refugee definition among the member states put a narrow interpretation on its definition. It spells out that persecution by non-state agents who have no link with the state and whose activities the state is unable to control cannot constitute grounds for refugee status. In the specific context of armed conflicts, persecutory acts perpetrated by non-state agents whom the state is unable to control may be considered as persecution, but only where the perpetrators control part of the state territory. Another remarkable example is the Protocol to the Treaty Establishing the European Community on asylum for nationals of the EU member states. The Protocol places certain limits on the right to seek asylum by allowing member states to use their discretion in considering asylum applications from non-EU citizens.

These European attitudes stipulated in the previous paragraphs are obviously contrary to the UNHCR's interpretations and standards. Accordingly, the recent European policies towards refugees raise questions not only as to whether the UNHCR fulfils its mandate of supervising and developing international law concerning refugees, but also as to whether the EU member states infringe Articles 1 and 35 of the 1951 Convention by excluding the formal co-operation of the UNHCR.[37]

Where individual European states are concerned, there is also a growing view that their national jurisprudence has severely undermined UNHCR competence. For example, despite the states' obligation stipulated by the 1951 Convention, many of the Western European states have been increasingly straying into restricting their interpretation without consulting the UNHCR.[38] In such circumstances, the fact that each Western European state develops and manipulates interpretations of the Convention, refugee definition and application of asylum at its own discretion raises tremendous questions regarding the UNHCR's *raison d'être*.[39] Moreover, there is a fear that such domestic practices would lead both to changes in the Convention's relevance and to the competence of the UNHCR solely in this region.[40]

It is true that since the criteria of refugee status are not in the 1951 Convention defined in a rigid manner, there exist as many variations as there are countries. For instance, since no universally accepted definition of "persecution" exists, various interpretations are displayed; these can make all the difference in a decision of refugee

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[37] Türk, n. 31, at 169.

[38] Various commentators have noted, nevertheless, that the 1951 Convention could be interpreted more broadly, to provide protection to many individuals currently denied its benefits. *See* Jackson, n. 15.

[39] *See* Arboleda, E. and Hoy, I., "The convention refugee definition in the West: a legal fiction?", 5 *International Journal of Refugee Law* (1999), at 66-90.

[40] In the *Reg. v Home Secretary,* ex parte *Sivakumaran* case, the interpretation of 'well-founded fear' of persecution lay at the heart of the dispute. The Secretary of State interpreted this expression as meaning that the applicant for refugee status must establish not only fears subjectively justified but also objectively well-founded, thus rejected the applicant's asylum claim. The UNHCR was not consulted and there was no room for the UNHCR to suggest its broader interpretation. *R v Secretary of State for the Home Department,* ex parte *Sivakumaran* [1987] 3 WLR 1047.

status, depending on the country of asylum. Nevertheless, even under such conditions, contracting states are legally bound to take particular account of any advice from the UNHCR as to whether the interpretation is adequate under Article 35(1) of the 1951 Convention and whether the principle of *non-refoulement* is observed in practice. The recent European policies obviously fail to follow this principle.

Considering all factors both in the developing countries and in Western Europe, there may be various answers emerging as to why the mandates of the UNHCR are significantly limited in Western Europe while the Organization enjoys a greater role in the developing countries. One of the primary reasons is that some states in the developing countries have neither become parties to the 1951 Convention nor have adequate resources such as finance and a well-structured asylum policy to assist refugees in their countries. Therefore, they rely heavily on the UNHCR or just allow its staff to work in order to resolve refugee problems ranging from the determination of the granting of asylum to material assistance. Moreover, due to the lack of substantial finance, the developing countries tend to depend on the UNHCR to set up comprehensive assistance for the people fleeing to their countries.

However, the Western European governments, on the other hand, possess their own sophisticated asylum policy as well as enough resources to deal with refugees, within their respective capacities. As clearly seen, the states manage to tackle the refugee problems and thus do not need support from outside agencies such as the UNHCR and non-governmental bodies.

Secondly, national economic factors also constitute a significant reason. While employment is largely related to agriculture in the developing countries, this is not the case in Western Europe. Some governments in the developing countries are willing to co-operate with the UNHCR and new entrants in settling in rural areas because it is expected that such new settlers may help to develop the region, which factor as a result supports the local economy and development. For these reasons, the governments co-operate with the UNHCR to establish infrastructures, construction or schools, initially to achieve self-sufficiency for refugees but also advantageous for the host countries.

However, in Europe, by contrast, refugees often disperse rather within urban or more widely populated areas than in farming regions. Since the governments are concerned about the increasing local hostility towards refugees and *vice versa*, they prefer to control both the types and the numbers of jobs that refugees may obtain. As a result, those governments that want to manage national issues within their own capacity tend to exclude the outside voice from the topic of local arrangements.[41]

Thirdly, in particular since the idea of the harmonization of asylum policy emerged, the Western European governments keep insisting that control of national

[41] Nevertheless, Western states are eager to address the lack of labour force in the areas where even the native unemployed do not want to engage. On the other hand, the developing countries, sometimes the UNHCR programmes for the employment of refugees encounter opposition from the locals. For example, the UNHCR terminated a variety of programmes such as skills training at the insistence of Pakistan government, which argued that tension could develop between the refugees and the local population, who had no such programmes.

borders and decisions regarding asylum matters are exclusively determined and implemented by each state itself under the right of sovereignty. This is because the governments that retain stricter asylum policy hope to avoid appeals from other governments that adhere to a less strict policy. The consequence is that all governments are trying to set a policy as rigid as possible within their discretion. In other words, certain governments are eager to retain the severe asylum policy and wish other governments to act similarly so that the former will not have to deal with new entrants coming from another European country under the freedom of movement policy. Hence, it results in the dominance of the governmental bodies and the severe exclusion of outsiders. Contrary to the Western governments, it is worth remarking that the political leaders of the developing countries are deeply concerned about their international image and have thus sought international legitimacy through their co-operation with the UNHCR. In that sense, the UNHCR could enjoy maximizing its influence or leverage to affect the behaviour of states towards refugees.[42]

Lastly and most prominently, the fact that the UNHCR's donors are predominantly Western European states reflects to a great extent the Organization's competence. Donors could stop supporting the UNHCR if its practice is not in accordance with the interests of the donor states. In other words, they can always prevent the UNHCR from stepping in to interfere in their asylum issues by threatening financial leverage over the Organization. Moreover, these rich states retain not only significant financial power but also strong political influence over the world. Since refugee problems involve various political factors, politically influential and authoritative states could more significantly affect the policies and mandates of the UNHCR than any other states. As a consequence, these powerful states could exclude the UNHCR whenever they choose to do so – and this is perhaps the most prominent reason why the mandate of the UNHCR in Western Europe has strikingly differed from that in the developing countries.

3. THE TRANSITION FROM "PROTECTION" TO "REPATRIATION" AND "CONTAINMENT"

3.1. Constraints on the mandate of the UNHCR

As stated in the previous chapters, the UNHCR often encounters conflicts between its international responsibilities and the limited obligations formally accepted by Western states. This dilemma is a recurring issue for the UNHCR.[43] Despite its willingness to provide substantial protection to refugees, it is evident that without full co-operation from local governments and donor states, its mandate is largely restricted in scope and type. This section, in order to seek the solution towards the international protection of refugees, aims to analyze the main impediments placed on the UNHCR, which are the political problems posed by the refugee's particular

[42] Loescher, n. 9, at 5.
[43] Türk, n. 31, at 165.

characteristics and, secondly, the extensive financial contribution to the UNHCR by Western states.

As for the first obstacle, the political facet of refugee issues, the UNHCR encounters great difficulties when states are unwilling to receive refugees in their territories. Since there is no country to which refugees could escape without any authoritative permission, the UNHCR always needs formal consent from the local government of the territory. Nevertheless, there has hardly ever been a time when states offered asylum without some form of political calculation or discrimination.[44] While refugee policies could be used to deny refugee status to nationals of a friendly state and will often imply foreign policy support for the sending government on the one hand, the decision to bestow formal refugee status on citizens of a particular state, on the other hand, usually implies condemnation of the sending government for persecuting its citizens.[45] Taking into account the fact that refugee problems involve to a great extent the respective internal politics of each state, it is inevitable that the operations of the UNHCR are restrained when encountering the negative co-operation from a government.

In addition, as the UNHCR itself admits, it normally needs to rely on the authorization of the host government to implement operations in the field, and so is ultimately incapable of obliging others to respect international refugee law.[46] Because the Organization's task in protecting refugees is restricted to non-political actions enshrined in its Statute, it is not possible that without the government's consent, the Organization could go further in enlarging its mandate in their territories.

A further major factor that impedes the UNHCR from implementing genuine protection policies is the governments' insistence on the rights of sovereignty. As governments wish to retain their power in controlling the entry and the number of foreign citizens, they stress the importance of their right of sovereignty and thus successfully exclude outsiders. Such an example is clearly laid down in the EU common asylum policy as described in Chapters 1 and 2.

The second factor severely to limit the ability of the UNHCR in defending the rights of the refugee is that the UNHCR is part of the United Nations system, a political organ guided and financed by donations from its member states. As the majority of these donations come from the developed states, in particular the Western states, the UNHCR is obliged to depend on these states for its survival. According to the UNHCR publication showing major contributors in 2003, the largest donors were the United States and Japan, which provided US$259,244,770 and $117,969,877 respectively. Fourteen states out of the top twenty sponsors were Western European: the European Commission ($70,754,484), the Netherlands ($61,210,482), Sweden ($42,457,288), Norway ($38,731,557), the United Kingdom ($33,560,724), Denmark ($33,731,660), Germany ($30,560,090), Switzerland ($16,326,268), Italy ($13,809,819), Finland ($11,953,196), and France ($10,711,140).[47]

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[44] Loescher, n. 9, at 16.
[45] Loescher, n. 1, at 37.
[46] UNHCR, n. 17, at 80.
[47] UNHCR, n. 3.

In line with each state's political interests, donor states often use their financial influence in order to exert control over the UNHCR. An apparent example can be seen when the massive Afghan exodus occurred into the neighbouring countries after the Soviet Union's invasion of Afghanistan in December 1979. While the donor states contributed vast sums of money to assist Afghan refugees in Pakistan, they provided little for the Afghans in Iran even though these refugees comprised one of the world's largest refugee populations at the time. It was because relations between Iran and the Western states – in other words, donor states – were strained to the limit due to the 1979 Islamic revolution as well as to the assault on the US Embassy in Teheran in 1979. In such circumstances, the donor states were unwilling to assist the refugees in Iran; in turn, Iran decided not to seek international or what it perceived as "Western" help.[48]

Another striking example is when the UNHCR fell into a financial crisis because of the dramatic increased number of refugees in the 1980s and the promotion of expensive large-scale repatriation programmes. The donor governments took advantage of the situation and seized on this shortfall to bring the Organization under their direct financial control. The donor governments refused to cover the deficit and insisted that the UNHCR should base its operation on the funds that were available, instead of on the needs of refugees. Consequently, there was no alternative or compromise solution that the UNHCR could have adopted for the protection of refugees; it merely followed what the Western states required. As a result, there was a complete breakdown of confidence between the donor states and the UNHCR.[49] To summarize: as long as the UNHCR depends on financial support from the Western states, it is difficult to imagine that the Organization would be able to enjoy complete freedom of action without taking those states' views into account.

3.2. Shifting from genuine "protection" policies

As mentioned in the previous section, due to the great financial contribution by the powerful Western states, it is clear that the UNHCR's policies and activities are, as a result, largely influenced by these states. In effect, the UNHCR has been compelled to come closer to the Western approach and has developed its policy in accordance with the wishes of those states. In recent years, it can be clearly seen that the UNHCR has shifted from its original "Protection" policy focus to "Repatriation"- and "Containment"-oriented policies, which apparently suit the purposes and interests of the donor states. These measures are carried out in order to prevent refugee flows into their territories and, directly and indirectly, to reinforce their non-

[48] Later, when Iran faced another massive refugee flow from Iraq during the war in Iraq, the government officially requested UNHCR assistance because of their lack of finance to assist refugees. UNHCR, n. 17, at 117-8.

[49] Loescher, n. 9, at 263.

entrée policy.[50] Ironically, these new approaches focus on the responsibilities of the refugee-sending countries and hence place heavier burdens on the poorer states within the international system. The new measures have, moreover, helped to facilitate temporary protection policies, where refugees are granted only limited rights and protection.

Western-oriented approaches exert a considerable influence on the shape of the international legal framework and jurisprudence. Chimni precisely noted in this context, "the (Western) dominant ideology tends to present itself as the common sense of the age and therefore often goes uncontested (in the international community)."[51] As a result, the policies of the UNHCR, led by Western states, justify the new approaches to the rest of the international community by carefully shifting its mandate in accordance with the interests of the Western states in practice.[52] It can follow, in conclusion, that the international legal issues regarding refugee protection are highly dependent on the political priorities of the leading donor states which control the UNHCR's lifeline,[53] and that these subsequently override the Organization's "non-political agency" principle.

The UNHCR has adopted the "Repatriation" scheme in co-operation with the Western governments in the context of repatriation of the Tamil asylum seekers. The "Containment" policy, on the other hand, was highlighted in Afghanistan, Iraq and Bosnia-Herzegovina. These cases are examined in the following sections.

3.2.1. "Repatriation" policy focus

The crucial shift of the UNHCR from a "Protection"- to a "Repatriation"-oriented policy focus became apparent when the number of the Tamil asylum seekers increased in Europe. By the year 1987, in spite of restrictive measures imposed by the UK government, the number of the Tamils arriving in Britain from Sri Lanka, a former British colony, expanded; it was at this time that the UNHCR switched its policy towards repatriation.

The British government then in power argued that, since there had been no objective evidence of persecution of the Tamils generally or any particular group of the Tamils or the applicants in Sri Lanka, the rejected Tamils were without scrutiny of individual cases legitimately being sent back to Sri Lanka. This severe repatriation policy implemented by the British government towards the Tamils was emphasized throughout Europe through co-ordination with other European states who also wanted to control the movement of the Tamil asylum seekers and to prevent the influx of

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[50] Given that Vietnamese refugees are the last case of non-European refugees accepted as part of an international protection scheme in 1975, Western states have started focusing on repatriation especially since numbers of Tamil refugees have emerged.

[51] Chimni, B.S., "The geopolitics of refugee studies: a view from the South", 11 *Journal of Refugee Studies* (1998), at 371.

[52] *See* the details, *ibid*., at 350-374.

[53] As Chimni noted, "the thinking of international organisation is shaped by its more powerful members, especially if they control the financial lifeline." *Ibid*., at 371.

asylum seekers into their territories. Such motivation led those European states, together with North American governments, to influence the UNHCR not to accord the applicants Convention status, and to adopt a cooperative attitude in repatriation programmes for the Tamils.[54]

The repatriation scheme was supported by the UNHCR especially after 1986, when the UNHCR took a decisive turn through the appointment of a new High Commissioner, Jean-Pierre Hocke,[55] at the insistence of the United States. Later, Hocke appointed Jonas Widgren, Swedish Deputy Minister for Immigration, as the Co-ordinator for the Inter-Governmental Consultations.[56] It is worth mentioning that the appointments were made when the Western donor governments perceived the UNHCR to be both too closely focused on protection issues in Europe and in North America, and inadequately concerned with managing refugee programmes in the developing countries. In particular, the United States criticized the UNHCR and campaigned strenuously for a new High Commissioner who would be more "operational" and who would have a more "hands-on" approach to refugee problems.[57]

The new High Commissioner, supported by the West, consequently shifted UNHCR policy towards closer co-operation with North American and European states. Moreover, Hocke himself had from the beginning of his appointment believed voluntary repatriation to be the only realistic alternative to indefinite subsistence on charity. In such circumstances, human rights groups feared that it would accelerate the European restrictive policies, especially towards the Tamils who were a matter of concern at that time. They also criticized the Organization's involvement in the repatriation of the Tamils, questioning its ability to provide substantive protection for them upon their return. Moreover, it was argued that the position of the UNHCR on the Tamils' repatriations might eventually encourage involuntary repatriation by those European states who wished to exclude Tamils from their territories. Indeed, following Widgren's statement that the UNHCR hoped to enforce repatriation and return 500 young Tamils from Europe,[58] the repatriation program was facilitated by some European states such as France and the Netherlands.

Nevertheless, this new policy, backed by Western governments and the UNHCR, inflicted severe hardships on some Tamil asylum seekers; this subsequently attracted international attention. In February 1988, some Tamils, whose applications had been

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[54] Shah, n. 16, at 151.

[55] Hocke was the Swiss Director of Operations at the International Committee of the Red Cross. He resigned as High Commissioner in October 1989 after huge criticism of his arbitrary management and a financial crisis. *Ibid.*, at 155.

[56] When Hocke appointed Widgren, he believed that this would increase his leverage with Western governments. On the other hand, UNHCR officials perceived this as a deliberate undermining of the Europe bureau and as a sign of the UNHCR's capitulation to European governments. Following this appointment, it marked a loss of the UNHCR's influence and legitimacy in Europe over the asylum issue. Loescher, n. 9, at 250.

[57] There was no question that the UNHCR at that time was more highly esteemed by many donor governments, particularly the United States, which sought its relief operations rather than its protection of refugees, Loescher, n. 9, at 250.

[58] Shah, n. 16, at 156.

dismissed by the Lords in the *Sivakumaran* case,[59] were returned to Sri Lanka on the grounds that there was no objective evidence of persecution that may have occurred in Sri Lanka. Later, four of them were found to have been persecuted upon their return. They then launched an appeal to an adjudicator and won their appeals from Sri Lanka. Finally, in 1989, the five of the applicants were granted entry clearance and returned to the UK. Subsequently, the applicants in this case appealed to the European Commission of Human Rights.

As far as the international judiciary is concerned, it is noteworthy that this Western-oriented repatriation scheme had a significant influence even on the decisions of the international judiciary, particularly on the European Commission of Human Rights. In the case of V*ilvarajah and others v. UK*,[60] the Commission rejected, by a majority of eight to one, a claim by the applicants in the above *Sivakumaran* case that the UK government had violated Article 3 of the European Convention on Human Rights (ECHR: prohibition against torture) despite the clear evidence of persecutions which had been inflicted on the applicants upon their return to Sri Lanka.

What is more, the Commission upheld the repatriation scheme, stating that the policy was a strong indication that the situation in Sri Lanka had improved sufficiently for repatriation. Further, it found that the applicants were not in a worse situation than were the generality of other Tamils in Sri Lanka, thus recognized the consideration of the Secretary of State as substantive. Considering the fact that there was apparent evidence of persecutions upon their return, the European human rights machinery also seemed to support, or be influenced by, the Western-interested view towards non-European asylum seekers and thus did not reject the repatriation itself.[61] Last but not least, the Commission left the issue of the legitimacy of the repatriation policy ambiguous, such that it has facilitated further repatriation measures in Western Europe.

Hocke's continuous insistence that repatriation was the only viable alternative to the current refugee problem, while stressing that the refugee problem costs Western donor states too much, earned the backing of the Executive Committee, which encouraged the High Commissioner to look for opportunities to promote repatriation. It provided the UNHCR with the legislative mandate to exploit political openings to promote repatriation, even into areas where active conflicts were still taking place.[62] Since 1992, the UNHCR has further developed its repatriation policy towards the Tamils, despite their fears as to whether it would guarantee substantive protection for returnees in Sri Lanka. Recently, the UNHCR carried out a repatriation programme in co-operation with the governments of Switzerland and Sri Lanka based on the view that the Tamils and the Sinhalese refugees whose asylum applications had been rejected could be safely returned to the south of Sri Lanka.

The UNHCR's active involvement in the repatriation programme has, as McDowell argued, directly influenced asylum granting procedures in the Western states

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[59] *R v Secretary of State for the Home Department,* ex parte *Sivakumaran*, [1987] 3 WLR 1047.
[60] *Vilvarajah and others v UK*, 14 *European Human Rights Reports* (1992), at 248.
[61] Shah, n. 16, at 157-8.
[62] Loescher, n. 9, at 252.

faced with high numbers of the Tamil asylum seekers; furthermore, the repatriation agreement backed by both the Western states and the UNHCR would make it difficult for a Sri Lankan national to prove that he or she was genuinely in fear of persecution.[63] It is clear that in the case of the Tamils, the UNHCR repatriation programme was directed in favour of the Western European states under the influence of the UNHCR policy makers appointed by the leading donor states. By carrying out the Western-supported approach, the UNHCR has hence helped to create and justify new procedural and substantive laws set up from the Western point of view. In other words, it has helped in guiding both the nature of the UNHCR and the international refugee law in a different direction.

The Tamil asylum seekers are one instance; the UNHCR also sought repatriation of other nationals to the Horn of Africa and Central America. The promotion of repatriations in both areas gave rise to problems because refugees were returning to theatres of either on-going conflict or of political tension. In such circumstances, it became highly controversial as to whether the UNHCR did in fact coerce refugees to return to their respective home countries. Even after Hocke left office, further development of repatriation policy was intensively pursued through various practices under High Commissioner Sadako Ogata, who also made repatriation a primary objective of the Organization.[64]

In sum, repatriation policies have shifted to be based more strongly on pragmatic considerations and less on protection principles. For example, the UNHCR has developed terminology and concepts such as 'safe return', where conditions in the home country did not have to improve 'substantially' but only 'appreciably' so that nationals should be returned to the country of origin;[65] during the Kosovo crisis in the former Yugoslavia in the 1990s, the UNHCR co-operated with the Western states in implementing an involuntary repatriation scheme that replaced the notion of 'safe return'.[66] It is clear that this concept is contradictory to the principle that repatriation must be based on a strictly voluntary decision by refugees and has to guarantee their return in safety and dignity.

In such circumstances, it cannot be denied that the UNHCR has been practising a repatriation policy according to the interests of the leading donor states, while these various repatriation operations gave rise to tremendous doubt that refugees could indeed be satisfactorily protected in the country of asylum where they were unwanted by host governments; rather, protection required freeing refugees from the country of asylum and finding ways for them to return to their home countries as quickly as possible even if it occurred under less than ideal circumstances.

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[63] Shah, n. 16, at 159.

[64] She was appointed High Commissioner in December 1991. From 1991 to 1996, over nine million refugees were repatriated to their homes in such countries as Namibia, Somalia, Ethiopia, Cambodia, Mozambique, Afghanistan, and Angola: seven times greater than the number between 1985 and 1990.

[65] Loescher, n. 9, at 284.

[66] Chimni, n. 50, at 365.

Accordingly, the UNHCR appears to have lost its focus on protection along with some of its autonomy and independence. As a consequence, such UNHCR practices have led not only the Western states but also other states that also want to discourage entirely refugee movement to misuse, even abuse, this new preventive policy. There is no question that the UNHCR, in such circumstances, seems unable to oppose forced repatriation, given the absence of stronger support from the international community.[67]

3.2.2. "Containment" policy focus

The containment policy approach is designed to assist the displaced persons from inside their country of origin while preventing refugee outflows from there. It relies on material assistance rather than on international protection. Together with the repatriation-oriented focus, this containment policy has successfully attracted the Western states since it can be used to prevent refugees from entering their countries and as a result, the number of refugees could be reduced in Western Europe. The containment-oriented policy appeared significant in the cases of Afghanistan, Iraq and Bosnia in the 1990s, when the UNHCR adopted this so-called "in-country protection scheme" rather than insisting on the importance of protection in the country of asylum, usually assumed to be the Organization's primary mandate.

Regarding the first case, Afghanistan, as Pakistan closed its border to prevent Afghan refugees from flowing into the country, the UNHCR was obliged to set up camps across southern Afghanistan to receive numerous refugees fleeing from the capital. This action resulted in reducing pressure upon Pakistan to accept refugees. In effect, Pakistan has refused to open its borders to any new refugees except the most needy even after the US bombing campaign started in 2001. Although the UNHCR condemned Pakistan's decision to close the border, it was helpless to do anything to divert the flow of refugees elsewhere outside of Afghanistan. As a result, the UNHCR ended up solely continuing to provide humanitarian assistance to those who were displaced within the borders of Afghanistan whilst still under dangerous conditions.[68]

The second example of the containment policy was when a mass displacement of Kurds occurred in Iraq following the Gulf War in 1991. No condemnation was made by the United Nations when the Turkish government closed its border in its own interests; rather, it sympathized with the Turkish government, which feared the threat of destabilization of the region from the influx of refugees. The United Nations thus indirectly supported Turkey's refusal to accept refugees. The Western states, under pressure from the public's demand for protection for those displaced Kurds, decided to carry out containment measures; they requested the UNHCR to provide protection to the Kurds in camps, largely located throughout the mountainous regions

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[67] Landgren, K., "The future of refugee protection", 11 *Journal of Refugee Studies* (1998), at 427.

[68] In 1999, crowds enraged by the prospect of UN sanctions against the Taliban regime went on the rampage against UNHCR facilities and burned UNHCR offices located in Afghanistan. UNHCR, www.unhcr.ch.

along the border of Iraq and Turkey, whilst refusing to force Turkey to accept the Kurds. They then announced that they were preparing with the use of NATO force[69] a "safe zone" in northern Iraq to receive refugees. The UNHCR was left with no option but to provide humanitarian assistance to the displaced.

The third most prominent UNHCR in-country protection policy was implemented during the time of war in the former Yugoslavia in the 1990s. It was most striking among the recent operations in the sense that, unlike other situations where refugee flows occurred, this tragic event was considerably influenced by the foreign policies of Western European states and their efforts to prevent refugee flows from the country geographically close to their territories. To limit the potential occurrence and effects of refugee flows, the Western European states imposed great pressure upon the UNHCR to pursue the containment protection method. Under those circumstances, it is worth remarking that contributions from the Western states increased dramatically to the extent that total UNHCR expenditure more than doubled between 1990 and 1993.[70]

Moreover, the fact that European states made it clear that they intended to control and pre-empt the arrival of refugees in their territories[71] compelled the UNHCR to adopt the containment policy focus. At the same time, the then High Commissioner, Sadako Ogata, however, perceived as an opportunity to render the Organization relevant to the international community's most powerful actors the UNHCR's engagement with the Western-interested approach.[72] As a result, the UNHCR pursued strategies whereby it set up camps mainly at state borders to contain the displaced within the territory whilst providing humanitarian assistance to those in need. Needless to say, this policy successfully prevented people from becoming refugees simply by virtue of the fact that they could not flee their country of origin. In other words, the policy thus indirectly helped to reduce the number of refugees in Western Europe.

The last and most striking case was eastern Bosnia-Herzegovina, where a large number of Muslims was forcibly displaced and completely surrounded by Serbian military forces supporting the "ethnic cleansing" of Muslims. In 1993, the international community decided to establish a "safe haven" in the area, the similar term also used as "safe areas" in the northern Iraq for the Kurds. Under an agreement with Serbian authorities, the UN Security Council ensured that the UNHCR was able to grant humanitarian assistance to the Muslims without any threat of armed attack. Nevertheless, the situation in the camps was considered worse. Moreover, the UNHCR found

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[69] It was obvious that the security of Kurdish population in 'safe areas' was far from guaranteed and the needs for emergency relief did not always meet the requirements due to severe geographical conditions.

[70] Total expenditures increased from $296,518,600 in 1992 to $532,362,900 in 1993. It was greater than expenditures for the entire African continent ($325,141,000). Barutciski, M., "The reinforcement of non-admission policies and the subversion of the UNHCR: displacement and internal assistance in Bosnia-Herzegovina (1992-1994)", 8 *International Journal of Refugee Law* (1996), at 92.

[71] In 1992, owing to special tie with the country, Germany admitted over 100,000 refugees from the former Yugoslavia, the highest number among the EU states. A total of only 3,000 refugees were admitted by France and the UK. See the details, Barutciski, n. 69, at 73.

[72] Loescher, n. 9, at 296.

it difficult to secure the protection of human rights and the physical security of the displaced people in the camps. It thus became obvious that those displaced people were a most vulnerable group. They could go nowhere to find refuge outside of the territory, while not only the Western European states but also their own authorities, in their own interests, prevented them from leaving the enclaves.[73] To add to the worsening of the situation, the UNHCR ended up withdrawing its operation from the region due to the increasing risks to its personnel.

As can be seen in these cases mentioned above, it is clear that in-country protection is not efficiently implemented to protect civilians especially in the middle of a war, where humanitarian assistance to the displaced persons relies solely on military action and co-operation from warring states; the stories from Kosovo highlight the difficulty of ensuring the protection of human rights and the physical security of displaced persons when their camps are located within areas of on-going conflict. Although the UNHCR tried to establish a presence to monitor human rights abuses and carry out its protection activities, warring parties often hindered the UNHCR from visiting areas where ethnic cleansing was taking place and the staff were unable to prevent the harassment of minorities. Moreover, the containment policy focus led the UNHCR to work not only with the governments but also with opposition groups, guerrilla forces, political factions, and clan leaders, as well as with UN peacekeeping and military intervention forces. As a result, there was a growing view that the UNHCR has been largely involved beyond its competence in political factors influencing refugee problems, and that its operation in protecting the displaced differed substantially from its principle to protect refugees in the country of asylum.[74]

Nevertheless, as the UNHCR had to adapt its approach in order to balance the expectations of the donor states with the reality of people's being displaced, the containment policy focus was sought as a compromise method by the Organization itself. It thus expanded its mandate to cover those displaced, and struggled to establish legitimacy by creating a new notion known as the 'protection of the IDPs' (Internally Displaced Persons), according to which the IDPs must be protected, within the UNHCR's capacity, for humanitarian purposes.[75] The legal basis for the operations for protection of the IDPs was provided by the General Assembly Resolution, which acknowledged the UNHCR's particular humanitarian expertise, together with Article 9 of its Statute. Nevertheless, given the UNHCR's statutory responsibility as an independent actor representing the interests of refugees, the question arises as to whether the containment policy was sought within its mandate, and whether it was

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[73] See Barutciski, n. 69, at 84-88.

[74] Traditionally, the internally displaced persons (IDPs) were not included at the time the 1951 Convention was set up. It is because the IDPs were seen as falling under the domestic jurisdiction of the state concerned. As a result, the IDPs remained without effective protection or assistance.

[75] It was argued by the Executive Committee that the UNHCR should involve itself in a broad range of policies touching on issues formerly considered domestic and therefore too political. Protection, the core activity of the UNHCR's mandate, could take many forms, including the provision of relief assistance to civilians caught in conflicts. Loescher, n. 9, at 269.

the most appropriate organization to carry out such programmes.[76] Furthermore, the issue of whether the growing number of IDPs and the increasing UNHCR practice of enacting preventive policies in the light of the way donor states and the UNHCR are interacting with each other warrants attention.[77]

What should also be emphasized in the Kosovo case is that, not coincidently, the UNHCR adopted a containment-oriented measure when the European states articulated that they intended to control and pre-empt the arrival of asylum seekers in their territory. In this sense, it cannot be denied that the practice of the UNHCR in the former Yugoslavia was propitious for the Western European states wishing to prevent cumbersome refugee flows. Although the UNHCR stressed that prevention protection implementation was not a substitute for asylum, it made it easier for a government to justify its denial of admission. As a consequence, a fear arises as to whether these UNHCR practices will lead the states to implement this new containment approach whenever they discern the threat of a massive refugee inflow into their territories. Especially since the Western states were willing to resist assisting people fleeing violence even from other parts of Europe, it is not difficult to imagine their view towards others in need of protection fleeing from the developing countries. In summary, a series of the events in the former Yugoslavia concludes that, as Goodwin-Gill has precisely stated, "[the] UNHCR's strategy was directed away from protection of refugee strictly so-called, to the more idealistic political goal of preventive solutions."[78]

4. CONCLUSION

4.1. Consequences of the UNHCR's preventive policies

As a consequence of these various practices, the UNHCR's Western-oriented policies give rise to considerable problems in both legal and practical contexts. Primarily, "Repatriation" and "Containment" policies are not in accordance with the UNHCR Statute, since the UNHCR has no legal authority to protect persons within their own country. Moreover, there is no international customary law as such, and no *locus standi.* When facing legal difficulties in providing protection to the people in need, the UNHCR has nevertheless often evolved its roles while relying on so-called "good office" concepts; it depends on consensual arrangements outside the

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[76] Critics have argued that the UNHCR's activities for the IDPs may be misinterpreted as obviating the need for international protection and asylum. It is also argued that a blurring of the distinction between refugees, who enjoy additional rights under international refugee law, on the one hand, and the IDPs, on the other, would undermine the protection of refugees themselves. UNHCR, *The State of the World's Refugees* (Oxford: Oxford University Press, 2000), at 215.

[77] There were 1,200,000 IDPs in Afghanistan, 683,300 in Sri Lanka, 438,300 in Bosnia-Herzegovina in 2001 according to the UNHCR, *Refugees by numbers* (2001).

[78] Goodwin-Gill, G., "Refugee identity and protection's fading prospect", in Nicholson, F. *et al.* (eds.), *Refugee Rights and Realities* (New York: Cambridge University Press, 1999), at 226.

rule of law, hence they are always negotiable by states at will.[79] In such circumstances, there is no doubt that the mandate of the UNHCR will always be negotiable and thus will remain susceptible to manipulation by powerful states for them to meet their wishes. Accordingly, the fear lies in the extent to which the UNHCR's role in "the protection of refugees" will be compromised following such manipulation in the face of the Western states' interests.

Secondly, "Repatriation"- and "Containment"-oriented measures have forced the UNHCR to become involved in political discourse, which is outside of the Organization's guiding principles. Both policies have forced the UNHCR to engage in political discussion where it was obliged to negotiate with warring states for humanitarian access, or was used in these states' interests. If the influential Western states continue to direct the UNHCR to adopt these new preventive approaches, as well as compelling the Organization to negotiate within political rather than humanitarian scenarios in order to meet their demands, the assumption is that the ability of the UNHCR to fulfil its primary responsibility as a non-political agency will ultimately be nullified.

Thirdly, repatriating refugees on the grounds that there is no risk in their country of origin automatically raises the question as to whether the country of asylum violates the provisions against torture or *non-refoulement.* On the other hand, containing refugees in camps within the country of origin would deny them their right of asylum in and access to another territory, which are the principal rights as internationally recognized. While implementing Western-oriented policies, there is a doubt that the UNHCR itself may attenuate international legal obligations conferred upon states. What is more important is that these policies apparently put in danger those people most in need of protection.

Lastly, the claim that both these Western-oriented policies and the perspective of the Western European states have imposed more and greater burdens on the developing countries from which refugees are fleeing seems justified and thus cannot be avoided. Since the Western European states are reluctant adequately to fund the UNHCR unless the Organization adopts policies that suit their interests, the UNHCR tends to be obliged to implement policies such as the "Repatriation" and "Containment" measures when a massive refugee movement occurs. The West's preventive policies would result in other less restrictive countries', or the neighbouring countries of the refugee-sending country thus usually the developing countries', having to accept more refugees. Hence, the developing countries alone and despite their limited capacity shoulder the major burden of providing protection to refugees.

Accordingly, these countries have also begun tending towards preventive protection policies simply by closing borders when they can no longer afford to host refugees (Pakistan against the Afghan refugees, and Turkey against the Kurds, for example.) These countries will need to be convinced that the richer states will share the economic, social and political burdens imposed by large movements of refugees. If they feel the richer states are interested only in passing the buck back to them, it can easily be imagined that they will stop co-operating in the protection of refugees.

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[79] *Ibid*., at 246.

If the developing countries, which have so far been generous towards refugees, also start to follow the practices of the Western states as justified by the UNHCR, the assumption is that "international protection of refugees" would hold less meaning and, further, that the UNHCR would engage solely in offering humanitarian assistance, which is not considered as the principal mandate of the UNHCR. For these reasons, it cannot be denied that the fear exists that, for as long as the UNHCR follows Western-oriented policies, not only would more people fleeing violence be in danger, but also that the UNHCR's whole *raison d'être* would be in jeopardy.

4.2. Reconsidering the UNHCR

As noted in the previous sections, one of the problems which hinder the UNHCR from acting independently and outside the influence of the Western states is its reliance on voluntary contribution. The UNHCR depends on voluntary donations from the member states of the United Nations, as noted in Chapter Three. It is obvious that the Western European states will not support the UNHCR if the latter carries out operations they do not favour. On the other hand, these states are willing to fund the UNHCR as long as its policies reflect their sovereign interests. This can be specially seen in the Bosnia case where the total UNHCR expenditure on the former Yugoslavia amounted to more than that on the whole of the African continent. Goodwin-Gill has suggested that this dependence on the contributions of states wishing to influence the UNHCR has "significantly undercut its capacity for independent or objective thought and action." As long as the UNHCR depends on voluntary finance by states for its survival, it may be assumed that the Organization cannot help continuing to be influenced by the leading donor states.[80] Finding realistic alternatives to the relationship between the reliance on voluntary contributions and the UNHCR's operations should, however, be more widely discussed.

The second problem that the UNHCR needs to take into account is the fact that the UNHCR usually collaborates with Western academics, research institutions and lawyers, rather than with those from the developing states.[81] It may be a fact that facilities and databases are far better structured in the developed countries, yet since most refugees are generated in the developing countries, it can be deemed inappropriate to share ideas and policies only among the developed countries. Moreover, Western experts sometimes aim to deliver the perspectives held by their own governments and could thus indirectly shape the policies of the UNHCR. It is both advisable and necessary for the UNHCR to explore refugee problems from the point of view of the developing states in order for refugees' needs and solutions to be discussed within a much wider perspective. Hence, collective and reliable data and information

[80] Goodwin-Gill accuses the UNHCR of its inability to pursue what the international community wants. In his book, he criticizes dependence on voluntary contributions as this practice apparently enslaves the UNHCR.

[81] Chimni, n. 50.

from both the developed and developing states should be demanded in determining refugee policy.

Thirdly, it is urgently required that the UNHCR co-operate more closely with those European supranational actors who urge the genuine protection of refugees, such as the Council of Europe, instead of co-operating with the governments and facilitating the preventive protection schemes. In that sense, it is crucial that the Western governments should also reflect the voices from supranational regimes, and from Western and local NGOs in their policy-making process.

Fourthly, at the institutional level, the need for transparency and accountability in UNHCR implementations should be urged. It is inevitable for the UNHCR to open up its operations to scrutiny by other institutions such that they can prevent the UNHCR from focusing too closely on the preventive policy, a system not in the interests of refugees. For example, in Tanzania, several NGOs reported that the UNHCR had promoted repatriating refugees under less appropriate conditions, and in a less open and transparent process.[82] It is apparent, therefore, that the UNHCR should consider establishing solid relationships with NGOs, academics, and other humanitarian institutions instead of solely pursuing the co-operation with governmental bodies.

Lastly, for all actors involving in refugee issues, it is necessary to sustain solidarity and internationalism among states, the UNHCR, and other international humanitarian organizations, as well as NGOs. While the UNHCR and other humanitarian organizations are co-operating in exchanging various opinions and views, this process must prevent governments from focusing on preventive policies and, rather, direct them towards refugee-centred protection policies.

4.3. Towards future operations

Under High Commissioners Hocke and Ogata, it is not too much to say that the UNHCR lost sight of its traditional protection principles, in the face of pressure from the influential Western states. At the same time, a new set of rules and practices emerged during their mandates that stressed greater state control over refugee and asylum admissions; limited access to asylum procedure, and humanitarian aid over protection. These combined to erode the rights of refugees.

In January 2001, Ruud Lubbers, a former Dutch Prime Minister, became the ninth High Commissioner for Refugees. He took over its already well-established repatriation policy focus thus following previous High Commissioners. When he was appointed High Commissioner, most European governments were still deeply concerned about the increasing number of asylum seekers in their territories. Such European concerns were articulated when the UK government, which aimed at halting the growing numbers of Afghan asylum seekers coming to the UK, signed a tripartite agreement for the voluntary repatriation of Afghans residing in the UK, and with

[82] Goodwin-Gill, n. 77, at 246.

the government of Afghanistan and the UNHCR for their re-integration back into Afghanistan in October 2002.[83] The UNHCR's co-operation with this repatriation policy was ensured by Lubbers, who encouraged sustainable repatriation on a 'voluntary basis' with other European states, while there was a view that terrorist/rebel attacks were still common in Afghanistan and US forces were still battling remnants of the ousted Taliban regime.[84]

One month later, EU ministers drove to set up a plan for 1,500 Afghan refugees every month to be repatriated from the EU region.[85] Moreover, in April 2003, the UK government began enforced deportations of a group of refugees to Afghanistan, as it believed conditions in the country had improved and the return of refugees should be secured. It is estimated that the governments carrying out the repatriation of Afghan refugees believed that the return of the refugees to Afghanistan was legitimate even when done forcibly, on the basis that the repatriation policy backed by the UNHCR gave assurances that Afghanistan had already become safe. In other words, the governments believed that Afghan refugees must be returned to their country of origin since the UNHCR had officially confirmed that the situation was improved; the UNHCR's apparent confirmation could clearly be seen in its co-operation with the governments in facilitating this repatriation.

Nevertheless, although security and stability in Afghanistan were not assured, the High Commissioner was generally upbeat about the importance of continuing the repatriation process.[86] Loescher argued that Lubbers's challenges would include countering the decline in the willingness of states to provide asylum to refugees, securing a strong and permanent basis for financing UNHCR activities, and reforming the UNHCR to make it a more effective and accountable organization;[87] however, the assumption, while looking at recent UNHCR operations, is that such accomplishments are far too unrealistic. Unless the UNHCR itself becomes aware that preventive policies cannot be a genuine solution, there is always a fear that even a comprehensive international refugee organization whose purpose was, and still is, to provide international protection to people fleeing persecution will fail to protect the human rights

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[83] According to the UNHCR UK Office's statistics, Afghan refugees comprised the third-largest number of populations seeking asylum in the UK, amounting to 7,380 in 2002, while 199,900 Afghan refugees arrived in Pakistan. UNHCR, http://www.unhcr.org.uk.

[84] In addition to the military action, and the destruction and neglect of Afghanistan's agricultural and economic infrastructure due to the internal conflict, Afghans were confronted with the effects of drought. The drought has severely affected 2.5 million farmers, caused deprivation to over a million people, and caused massive displacement within and from Afghanistan. However, despite such situations in Afghanistan, Lubbers planned to repatriate 4,113,000 Afghan refugees solely from neighbouring states by December 2002. UNHCR, http://www.unhcr.ch.

[85] It was estimated that there were up to 400,000 Afghans living in Europe, both legally and illegally. UNHCR UK, http://www.unhcr.org.uk.

[86] Some of the largest security problems have been in the northern regions of Afghanistan, where rivalries between local commanders and the harassment of minorities, especially Pashtuns, have flared up periodically since the occupying Taliban forces were pushed out of the north in the autumn of 2001.

[87] Loescher, n. 9.

of refugees. If the UNHCR were to decide simply to become an international organization providing food and other humanitarian aid, serious questions upon the UNHCR's *raison d'être* would arise.

THE CUSTOMARY LAW OF INTERNATIONAL ABDUCTIONS: LIMITS AND BOUNDARIES*

Abraham Mohit**

1. INTRODUCTION

> "Once a person is under the authority of a given court and has been properly charged in accordance with the local law, he may be tried and, if convicted, sentenced by that court regardless of the mode by which he was brought originally under the authority of that court".[1]

During his exile in Kolonos, Oedipus had to defend himself against the horse-riding agents of Thebes who tried to force him back into Theban territory. Adolf Eichmann was forced back into the territory of Israel, as have so many other criminal offenders been in the past. These situations have resulted in the evolution of the doctrine of *mala captus bene detentus* (wrongfully caught, legally detained) explained in the introductory quote.

However, over the years the position of this principle has undergone a great number of changes. There are conflicting opinions and practices of states. By and large, though, most states prohibit exercise of jurisdiction over accused caught illegally, primarily by resorting to abduction. It will be established in the course of this paper that there is in fact a strong case to conclude that a norm of customary international law has evolved in this regard.

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[1] Glahn, Gerhard von, *Law among Nations* (6th ed., MacMillan, 1992), at 315. *See* also, Shaw, Malcolm, *International Law* (2nd ed., Grotius, 1986), at 361: "unlawful apprehension is no defence to an exercise of jurisdiction."

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The world order as it exists today, however, requires a re-examination of the new norm. Taking into consideration the increasing number of individuals accused of committing acts of terrorism, genocide and other crimes against humanity, whether states have over-reacted in their criticism of the rule of *mala captus bene detentus* needs to be examined. While the general rule is accepted, certain exceptions need to be carved out wherein the rule can apply. This paper would aim to spell out precisely those permissible limits which international law can accommodate.

On 15 June 1992, the United States Supreme Court rendered a landmark decision that affected not only American jurisprudence, but international law as well. *United States v. Alvarez Machain*[2] was the beginning of a new dimension in the concepts of state sovereignty and the right to freedom from arbitrary arrest and detention. In this case the Supreme Court of the United States held that federal courts have jurisdiction over a defendant abducted from abroad under the auspices of governmental authority, despite the existence of an extradition treaty with the state from which he was abducted. Although the decision was narrowly written, it has become the template used by courts to analyze a range of similar events, which continue to surface.[3]

The consequences of *Alvarez-Machain* are important not only for understanding the issues and for predicting outcomes for subsequent cases, but also for studying the evolution of international law in this regard. As will be argued in this paper, this is an example of how a particular incident and reactions to the same can result in a relatively rapid development of customary international law; particularly because it goes a long way in fulfilling the requirements of generality and consistency, apart from showing the necessary requirements of state practice and *opinio juris*.

In the aftermath of the decision, the United States signed an agreement with Mexico, the Treaty to Prohibit Transborder Abductions of November 23, 1994, that expressly provides for the prompt return of an abductee and strips domestic courts of jurisdiction to try such an individual.[4] In so doing the agreement effectively overrules the Supreme Court's decision in *Alvarez Machain*. This change in opinion was largely provoked by strong opposition of foreign states and international bodies to the US Supreme Court's reasoning.

The rule contrary to *mala captus bene detentus,* had thus, begun to take form and this was primarily due to three reasons; a) the threat other countries perceived at allowing a free hand for increased interference by powerful countries like the United States b) the threat that such a rule might pose to the sovereignty of countries, and c) the increasing importance states began to attach to human rights issues.

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[2] 504 US 655 (1992).

[3] Wilske, Stephan and Schiller, Teresa, "Jurisdiction over persons abducted in violation of international law in the aftermath of *United States v. Alvarez Machain*", 5 *U.Chi.L.Sch.Roundtable* (1998), at 205. *See* also Michell, Paul, "English-speaking justice: evolving responses to transnational forcible abduction after Alvarez-Machain", 29 *Cornell ILJ* (1996), at 383.

[4] *Treaty to Prohibit Transborder Abductions,* signed 23 November 1994, United States-Mexico, *in* Abbell, Michael and Ristau, Bruno A., 5 *International Judicial Assistance (Criminal) Extradition A-676.3* (Supp. 1995), *in* Wilske, n. 3.

To what extent the alacrity and intensity of the shift in international opinion and thereby in customary international law, due to the fact that it was the United States that employed this practice, is concerned is also a crucial question which needs to be examined. This question is necessary because despite the affirmation of the rule prohibiting international abductions, in many instances states and International Tribunals have approved the use of such measures. Accordingly, would the absence of the influence of the United States [which in any event is perceived to "make its own international law"] have resulted in the rule's being formed differently? The impact of this aspect on the formation of a customary norm will also be discussed.

The boundaries of such a new rule of customary international law is under an ongoing test, as will be seen in cases of international abductions in the context of the various War Crimes Tribunals.

In the past, authors have analyzed this issue with regard to whether there is any recognized customary international law justifying irregular renditions, and have invariably concluded in the negative.[5] This paper seeks to understand the evolution of such customary law and its precise limits and boundaries in today's world order. Along these lines, the paper will, therefore, seek to establish that although there is a customary rule which goes against the doctrine of *mala captus bene detentus*, certain exceptions also exist; in those circumstances states may utilize irregular methods of establishing jurisdiction, such as abducting the fugitives in order to bring them to justice, and there should not be a barrier in such an exercise of justice.

In the first part of this paper the customary status of the rule prohibiting *mala captus bene detentus* will be outlined by conducting a study of the practice of various jurisdictions, international bodies and international tribunals. Subsequently, the paper will show the circumstances in which courts may hold that an act of abduction would entitle the fugitive to being repatriated, and in which a violation of the sovereignty of the state from which the individual would have been abducted would have occurred. The paper will then finally seek to demonstrate the situations in which such acts may actually be justified.

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[5] *See*, *e.g.*, Morgenstern, Felice, "Jurisdiction in seizures effected in violation of international law", 29 *BYIL* (1952), at 265; Garcia-Mora, Manuel R., "Criminal jurisdiction of a state over fugitives brought from a foreign country by force or fraud: a comparative study", 32 *Ind.LJ* (1957), at 427; Preuss, Lawrence, "Kidnapping of Fugitives from Justice on Foreign Territory", 29 *AJIL* (1935) 502; Lowenfeld, Andreas F., "U.S. law enforcement abroad: the constitution and international law, continued", 84 *AJIL* (1990), at 444; *Id.*, "Kidnapping by government order: a follow-up", 84 *AJIL* (1990), at 712; O'Higgins, Paul, "Unlawful seizure and irregular extradition", 37 *BYIL* (1960), at 279; Halberstam, Malvina, "*Agora:* International Kidnapping", 86 *AJIL* (1992), at 736, 744; Rayfuse, Rosemary, "International abduction and the United States Supreme Court: the law of the jungle reigns", 42 *ICLQ* (1993), at 892.

2. STATE PRACTICE *VIS-À-VIS ALVAREZ-MACHAIN:* SINGING TO A DIFFERENT TUNE

The *Alvarez-Machain* case met with widespread criticism throughout the international community.[6] Twenty-one co-sponsoring states introduced a General Assembly Resolution that would request an advisory opinion from the ICJ "on the question of the conformity with international law of certain acts involving the extraterritorial exercise of coercive power of a State and the subsequent exercise of criminal jurisdiction".[7] While the resolution seeking an advisory opinion has been repeatedly deferred,[8] the UN Working Group on Arbitrary Detention concluded that "the detention of Humberto Alvarez-Machain is declared to be arbitrary, being in contravention of Article 9 of the International Covenant on Civil and Political Rights".[9] In the aftermath of the decision, the issue was addressed by various international bodies and judicial organs of countries, and also by international tribunals. The practice of states and the *opinio juris* surrounding the same both before and after the *Alvarez-Machain*þ case will be examined in this section.

2.1. Judgment and opinions of national jurisdictions

Until 1978, Commonwealth courts followed the American approach to the *male captus bene detentus* rule. Since 1978, however, a series of judicial decisions in New Zealand, Australia, South Africa, and the UK indicate that the *mala captus* rule is no longer good law in these countries.

2.1.1. England

England has traditionally been perceived as following the rule of *mala captus bene detentus*, based on precedent in *Ex parte Susannah Scott*.[10] The accused, under indictment in England for perjury, was apprehended in Belgium and returned by an English police officer to England, where she was arrested. Lord Tenterden, CJ held that the court would not divest itself of jurisdiction over an individual detained on a criminal charge. The court observed that though her arrest may have violated Belgian law, this would not bar her prosecution in England, although she may retain a right of action against the English police officer for wrongful arrest in Belgium.

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[6] *See* generally, Zaid, M., "Military might *versus* sovereign right: the kidnapping of Dr. Humberto Alvarez-Machain and the resulting fallout", 19 *Houston JIL* (1997), at 829.

[7] UN Doc. A/47/249 (1992).

[8] *See,* Morris, V. and Bourloyannis, M. Vrailas, "The work of the Sixth Committee at the Forty-ninth session of the U.N. General Assembly", 89 *AJIL* (1995) 607, at 620.

[9] *Report of the Working Group on Arbitrary Detention, UN Commission on Human Rights, 50th Session, Agenda Item 10*, UN Doc. E/CN.4/1994/27 (1993), at 139-10.

[10] Ex parte *Susannah Scott*, [1829] 109 Eng. Rep (KB), at 166.

The US Supreme Court in *Ker v. Illinois*[11] considered Scott to be one of the "authorities of highest respectability".

In *Ex parte Elliott*,[12] the court reaffirmed the *mala captus bene detentus* rule, by not inquiring into the circumstances of the arrest. In *Ex parte Mackeson*,[13] however, the court felt it necessary to put a stop to what it perceived to be overzealousness on the part of the English police in dealing with suspects abroad. What the court found illegal in this case was that a deportation order was utilized in the guise of extradition and, thus, the court held that upon its discretion, it could grant the application for prohibition and discharge the applicant.[14]

The House of Lords finally resolved the issue in *Ex parte Bennett*.[15] In this case it was held that a transnational forcible abduction that circumvents extradition proceedings is an abuse of process such that a court should exercise its discretion to enter a stay of proceedings against the fugitive. The Law Lords explicitly rejected the approach taken by the majority of the US Supreme Court in *Alvarez Machain.* The defendant in this case claimed that he was arrested by South African police, forced onto a flight for New Zealand by way of Taipei, intercepted at Taipei by South African police, packed back onto a flight to South Africa and then, in violation of an order of the South African Supreme Court, forcibly placed on a flight from Johannesburg to Heathrow. In making their decision the Law Lords did not consider whether there was protest or acquiescence by Taiwanese and South African authorities, nor did they rely on evidence of any physical brutality. Lord Bridge of Harwich concluded: "To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view".[16] The court went on to emphasize that English Courts would have the discretion to decline jurisdiction in such cases.

From this it flows that that the English Courts would necessarily look into the facts and circumstances of each given instance, and would decide accordingly.[17]

2.1.2. New Zealand

In *Regina v. Hartley*,[18] a discretionary approach, similar to that of England, has been followed. The appellate court in this case allowed the trial court to exercise its discretion in deciding whether to discharge a fugitive seized in Australia under an informal agreement between the Melbourne and Wellington police. The Court

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[11] 119 US 444.

[12] *Regina v. Officer Commanding Depot Battalion* (Ex parte *Elliott)*, 1 All ER 373 (KB 1949).

[13] *Regina v. Bow Street Magistrates* (Ex parte *Mackeson*), 75 Crim App 24 (1981).

[14] *Ibid.*

[15] *Regina v. Horseferry Road Magistrates' Court (*Ex parte *Bennett)*, [1994] 1 App Cas 42 (Eng. HL 1993).

[16] *Ibid.*, at 155g.

[17] *Ibid.*, at 356.

[18] [1978] 2 NZLR 199 (Ct. App. Wellington).

found that the trial court had discretion over the discharge even though there may have been no violation of international law. The Court observed:

> Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society.[19]

It would accordingly be reasonable to conclude that New Zealand courts would not uphold jurisdiction in a case of forcible abduction. While *Hartley* provided no opportunity for the court to consider international law, one can assume, however, based on the judgment, that New Zealand is in favour of a rule of international law prohibiting the exercise of jurisdiction over an abducted person.[20]

2.1.3. South Africa

For decades, South African courts had rigidly followed the maxim of *mala captus bene detentus*, until a most remarkable deviation was made in *State v. Ebrahim*.[2122] Ebrahim was abducted by South African police from Swaziland. Although there was an extradition treaty between South Africa and Swaziland, no formal request for extradition had been lodged. Swaziland also failed to file a complaint against the violation of its sovereignty after the seizure of Ebrahim from its territory. The Supreme Court, on appeal, reversed the lower court's decision of exercising jurisdiction over Ebrahim, and concluded that a South African court has no jurisdiction to try a person abducted by the state from foreign territory.[23] The court reached this conclusion on three basic points: 1) the necessity to protect and promote human rights, 2) the importance of maintaining good international relations, and 3) a healthy administration of justice.[24]

2.1.4. Zimbabwe

Largely influenced by the Court of South Africa, in 1992, the Supreme Court of Zimbabwe overruled old precedents which had followed the *mala captus bene detentus* rule. In doing so it also relied on considerations of international law. In *State*

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[19] *Ibid.*, at 216-217.
[20] Michell, *loc. cit.*, n. 3.
[21] 31 *ILM* 888.
[22] *Abrahams v. Minister of Justice,* 1963 (4) SALR 542 (Cape); *Ndhlovu v. Minister of Justice,* 68 *ILR* 7 (Natal 1976); *Nduli v. Minister of Justice*, 69 *ILR* 145 (S Ct App Div 1977). *See* also Michell, *loc. cit.*, n. 3.
[23] *State v. Ebrahim,* n. 22, at 899.
[24] *Ibid.*, at 896.

v. Beahan,[25] after thoroughly considering Anglo-American precedents including *United States v. Alvarez Machain* and balancing them against *State v. Ebrahim,* the court concluded that in order to promote confidence in and respect for the administration of justice and to preserve the judicial process from contamination, a court should decline to compel an accused person to undergo trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting states. It was further observed that there is an inherent objection to such a course on grounds both of public policy pertaining to coexistence and of mutual respect of sovereign nations.

Thus, *Beahan* stands as strong evidence of the prohibition of exercise of jurisdiction over a person abducted from abroad in violation of international law.

2.1.5. Australia

Australia soon followed New Zealand's lead in calling the *mala captus bene detentus* rule into question. In *Levinge v. Director of Custodial Services*,[26] the fugitive faced trial for numerous cases of dishonesty in New South Wales. He claimed that he had been arrested by Mexican police at his home in Mexico, brought to the American border, and delivered into the custody of US FBI agents who then brought him into the US and held him until he was extradited to Australia. He argued that this forcible abduction rendered his subsequent extradition to Australia unlawful and an abuse of process, such that proceedings against him in Australia should be stayed. Moreover, he alleged that the Australian authorities had been aware of and even involved in his abduction from Mexico.

The court held that even where a person is brought into the jurisdiction of a court unlawfully, the court has undoubted jurisdiction to deal with him or her. However, it also has the discretion to decline jurisdiction if it is of the opinion that to exercise its discretion would involve an abuse of the court's process. It went on to observe that such abusive conduct may exist in cases where the regular machinery for extradition is bypassed and when the executive participates in unauthorized and unlawful removal of criminal suspects from a foreign jurisdiction.

No evidence could be established in *Levinge* that the Australian police were involved in the expulsion of the plaintiff from Mexico. The court did, however, imply that a forcible abduction would be a strong case for staying criminal proceedings in order to prevent abuse of process. Therefore, considering the above factors, it seems reasonable to conclude that an Australian Court will not exercise jurisdiction over a person abducted from abroad in violation of international law.

2.1.6. Switzerland

In a 1967 case, the Court found that the defendant's apprehension violated national due process and principles of extradition law under which apprehension of

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[25] 1992 (1) *SACR* 307 (A).

[26] 9 *NSWR* 546 (Ct App 1987).

a person by means of force or ruse was prohibited.[27] Since the prosecutor knew of the circumstances surrounding the defendant's abduction and arrest, the court found that the knowledge alone sufficed to turn the private operation into state action which violated extradition law. Accordingly, Switzerland also adheres to a rule of enquiry into the circumstances in which an individual was apprehended.

2.1.7. Israel

In the extremely controversial case of *Eichmann,*[28] Israel exercised jurisdiction against the Nazi war criminal, Adolf Eichmann, who was kidnapped from Argentina by Mossad agents. The case is often cited as a precedent for the rule of *mala captus bene detentus*. However, what has to be remembered is that the issue of jurisdiction of a court had already been settled by diplomatic means when the criminal proceedings started in the *Eichmann* case. In fact, prior to this, Argentina protested the violation of its sovereignty, and requested the return of Eichmann, eventually taking the matter to the United Nations. The Security Council adopted a resolution condemning the kidnapping and requesting Israel to make appropriate reparation.[29]

After Israel tendered an official apology for violating sovereign authority, Argentina waived further action on the abduction. What is to be noted here is that the violation of sovereignty of the host state had been established by the Security Council, which clearly goes to justify the rule prohibiting *mala captus bene detentus.*

2.1.8. Costa Rica

The national judicial tribunal of Costa Rica has not accepted the principle of exercising jurisdiction over individuals who have been abducted. The Supreme Court of Costa Rica unanimously censured the *Alvarez-Machain* decision of the U.S. Supreme Court, stating in the Court's plenary session of 25 June 1992:

> Because of the profound harm to the rules of international law and to sovereignty of States that the resolution implies, this Court resolves to establish evidence so it be knowing in this way, of the inadmissibility of such pronouncement, and has no doubt that shortly, it will be amended by the same Court who has issued it, in support of supremacy of law and mutual respect that must rule between the United States and all other States …[30]

The resolution expressly refers to international law as a legal bar to the exercise of jurisdiction.

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[27] 66 *Blatter fur Zurcherische Rspr* (1967), at 248, in Wilske and Schiller, *loc. cit.*, n. 3.
[28] 36 *ILR* 18 (Dist Ct Jerusalem 1961); 36ILR 277 (Sup Ct 1962).
[29] *See* generally UN SCOR, UN Doc.S/RES/4349 (1960).
[30] Secretaria de Relaciones Exteriores, 2 *Limits to National Jurisdiction: Documents and Judicial Resolutions on the Alvarez Machain Case* (1993) 7, at 81-82.

2.2. Inter-American Juridical Committee

The *Alvarez-Machain* decision was the subject of a juridical opinion of the Inter-American Juridical Committee.[31] At the request of the presidents of the *Cono Sur* countries,[32] the Permanent Council of the Organization of American States (OAS) requested the opinion.

The Committee's opinion, issued on August 15, 1992, was approved by nine votes in favour, with one abstention: Seymour J. Rubin of the United States. The Committee concluded that the reasoning of the US Supreme Court decision was contrary to the norms of international law. It observed that by affirming the jurisdiction of the United States of America to try individuals who are brought by force from their country of origin, the decision ignores the obligation of the United States to return Alvarez to the country from whose jurisdiction he was kidnapped.[33]

This opinion clearly has no binding effect and is soft law. Nevertheless, the opinion should be accorded some evidentiary weight in determining what is to be considered customary international law because the members of the Inter-American Juridical Committee are international law experts of various Member states. Apart from this, the opinion also reflects the stand these countries would take in such a situation.

2.3. The CARICOM

The Conference of Heads of Government of the Caribbean Community (CARICOM),[34] the Community's supreme authority, issued the following statement:

> The Heads of Government of the Caribbean Community take note of the recent decision of the US Supreme Court in the Alvarez-Machain Case and the circumstances leading up to that decision. The Heads of Government emphatically reject the notion that any state may seek to enforce its domestic law by means of [the] abduction of [a] person from the territory of another sovereign state with the intention to bring them within its jurisdiction in order to stand trial on criminal charges. Such actions constitute a violation of the most fundamental principles of international law and must be unequivocally condemned by the international community.[35]

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[31] "Kidnapping suspects abroad: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary", 13 *HRLJ* (1992), at 395.

[32] Argentina, Brazil, Bolivia, Chile, Paraguay, and Uruguay.

[33] *Ibid. See* also Wilske and Schiller, *loc. cit.*, n. 3.

[34] CARICOM was founded in 1973 by agreement of Commonwealth Caribbean Heads of Government, on the signing of the Treaty of Chaguaramas. Member countries of CARICOM are Antigua and Barbados, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago, cited in Wilske and Schiller, *loc. cit.*, n. 3.

[35] Secretaria de Relaciones Exteriores, 2 *Limits to National Jurisdiction: Documents and Judicial Resolutions on the Alvarez Machain Case* (1993) 7, at 13.

The Conference of Heads of Government of CARICOM is a political and not a judicial body, yet the statement issued nevertheless reflects the *opinio juris* of the organization and the participating governments given that it reflects on how the concerned states will behave, as they are convinced it is binding upon them to do so.[36]

2.4. Declarations and statements by representatives of states

Alvarez Machain provoked many reactions by foreign governments which expressed their outrage that the United States believes it has the right to decide unilaterally to abduct one of their nationals. The Colombian government stated that it "energetically rejects the judgment issued by the United States Supreme Court"; Argentina's Justice Minister called the decision "an historic regression in criminal law"; Spain's Foreign Minister criticized the decision as "erroneous"; the lower house of the parliament of Uruguay adopted a resolution which stated that the decision shows "a lack of understanding of the most elemental norms of international law".[37]

2.5. Forcible abduction under the ICCPR

The United Nations Human Rights Committee, charged with interpreting the ICCPR and Optional Protocol, has held in four decisions (*Celiberti de Casriego*,[38] *Lopez Burgos*,[39] *Almeida de Quinteros,*[40] and *Garcia*[41]) that forcible abduction

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[36] *See* Shaw, Malcolm N., *International Law* (4th ed. Cambridge, 1997), at 67.

[37] A List of 16 countries and the protests they registered towards the *Alvarez Machain* case, is detailed in Wilske and Schiller*, loc. cit.*, n. 3, at 205.

[38] *Case of Lilian Celiberti de Casariego*, UN GAOR, 36th Sess., Supp. No. 40, at 185, UN Doc A/36/40 (1981) reprinted in 68 *ILR* 41 (1981). In this case, de Casariego, a Uruguayan/Italian citizen, was abducted from Brazil by Uruguayan agents with the connivance of Brazilian Police, brought to Uruguay, detained, and charged with subversive activities. The UN Human Rights Committee (HRC) determined that the abduction violated ICCPR Article 9(1) and that Uruguay was obligated to release and compensate de Casariego and allow her to leave the country.

[39] *Case of Sergio Ruben Lopez Burgos*, UN GAOR, 36th Sess., supp. No. 40 at 76, UN Doc. A/36/40, reprinted in 68 *ILR*, (1981). In this case, a Uruguayan exile in Austria brought an application on behalf of her husband, who had been abducted from Argentina by Uruguayan agents with the assistance of Argentine paramilitaries. He had been brought to Uruguay, detained and tortured. The HRC found that the forcible abduction violated ICCPR Article 9(1) and ordered that Lopez Burgos be released, compensated, and permitted to leave Uruguay.

[40] *Case of Almeida de Quinteros*, Comm. No. 107/1981, July 21, 1983, reprinted in 2 *Selected Decisions Of The Human Rights Committee Under The Optional Protocol* 138 (1990). In this case, a Uruguayan national was abducted from the grounds of the Venezuelan embassy in Montevideo, Uruguay, by Uruguayan troops. Her mother, in exile in Sweden, brought an application before the HRC. Uruguay failed to comply with its obligations with regard to the application. The HRC found that responsibility for the disappearance of the applicant's daughter fell upon Uruguay, and ordered that Uruguay release her and compensate her.

of an individual from one state to another for the purposes of his rendition to face a criminal trial (or torture) violates Article 9(1) of the ICCPR. The Committee has been remarkably vigilant in its protection of the human rights of abducted individuals. The Committee reinforced the emerging customary international law rule prohibiting the forcible abduction and transplanted the rule into the human rights context, protecting individuals *qua* individuals.[42] This focus on the individual is heightened by the fact that the absence of protests by the injured state, of cardinal importance under customary international law, was not even considered in these cases. In fact, the active collusion in the abductions by agents of the host states would amount to consent by those states to the abductions under customary international law and preclude a finding of an international wrong.[43] This fact did not, however, affect the reasoning of the Committee.

2.6. Forcible abduction under the European Convention

In *Bozano v. France,*[44] an Italian Court had convicted the applicant *in absentia* and sentenced him to life imprisonment for offences including abduction, murder, and indecent assault. He fled to France, where he was arrested. A French Court refused Italy's request for the applicant's extradition, and he was eventually released from custody. The applicant claimed that soon after his release, he was abducted by plain-clothes police officers, served with a deportation order, driven to the Swiss border, escorted to a Swiss police station, and informed that Italy was seeking his extradition. He was later extradited to Italy and imprisoned there.

Bozano challenged his abduction, both under French domestic law and through applications to the European Commission. In his application against France, he argued that his deportation to Switzerland had violated his rights to personal liberty and freedom of movement, contrary to Article 5(1) of the European Convention. The Commission upheld his complaint, and the court found his deportation to be unlawful and incompatible with the "right to security of the person" contained in Article 5(1). The Court thus concluded that France had acted unlawfully in circumventing regular extradition proceedings, so that there was insufficient justification for the detention

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[41] *Garcia v. Ecuador*, Hum. Rts. Comm., 43rd Sess., Annex, UN Doc. CCPR/C/43/D/319/1988 (1991). In this case Garcia, a Colombian citizen, was abducted in Ecuador by Ecuadorian agents at the behest of the US Drug Enforcement Agency (DEA), and deported to the United States to face drug trafficking charges. As a non-signatory, no action could be brought against the United States under the ICCPR. However, the HRC found Ecuador in violation of ICCPR Article 9(1). Ecuador conceded that there were administrative and procedural irregularities, and gave assurances that it was investigating the matter.

[42] Michell, *loc. cit.*, n. 3.

[43] Jennings, R. and Watts, A., (eds.), 1 *Oppenheim's International Law* (Longman, 9th ed., 1992), at 1194. *See* also the *Temple of Preah Vihear* case in which the Siamese authorities were held to have acquiesced in events against which they failed to protest in circumstances that called for some reaction within a reasonable period: ICJ Rep. 1962, at 22-3, 27-31.

[44] 9 *EHRR* (1987), at 297.

of the applicant. While the court held that it did not have the power to order his release, it did order that he be financially compensated.[45]

A similar issue was considered by the European Commission and Court of Human Rights in *Stocke v. Germany*.[46] In this case a German national, living in France, was tricked into re-entering Germany by a police informant. He was immediately arrested and was later convicted of several tax-related offences and sentenced to six years' imprisonment. Both the Commission and the Court held that state involvement in the deception had not been proved. Accordingly, the European Convention on Human Rights did not apply. However, the Commission was quite clear in its reasons that if involvement on the part of the German authorities had been proved then a violation of the Convention would have been established.[47] Given its decision with respect to the lack of state involvement, the Court did not find it necessary to comment on this point. The Commission's reasoning, therefore, still stands.[48] It should be noted that in this case, there was no allegation of a "forcible abduction" but mere "trickery". Despite that the Commission's reasoning suggests that in cases involving such "trickery", it would violate Article 5(1).

The latest case to attract world-wide attention with regard to the issue of abductions is *Ocalan v. Turkey*.[49] In this case the Applicant was accused of founding an armed gang in order to destroy the integrity of the Turkish State and of instigating terrorist acts resulting in loss of life. The Applicant submitted that the there was *prima facie* evidence that he had been abducted by the Turkish authorities (operating overseas in Kenya) beyond their jurisdiction and therefore his trial would violate Article 5 of the Convention. The Court found, however, that there was no act of abduction as the Kenyan Government had co-operated with the Turkish authorities and had in fact "handed over" the applicant to them. It distinguished other cases[50] by stating that while they pertained to situations where the applicant was physically forced to return to a country by government officials and was subject to the authority and control of a particular country following his arrest and return, in the instant case jurisdiction over the Applicant was gained with the active knowledge and assistance of the Kenyan authorities. The Court, relying on *Soering vs. the United Kingdom,*[51] observed that:

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[45] *Bozano v. France* (Just Satisfaction), 13 *HRR* (1987), at 428, 430, wherein France was ordered to pay Bozano 100,000 FF damages and legal costs.

[46] *Stocke v. Germany,* ECHR, Ser. A, No. 199. The Commission's decision is dated 12 October 1989. The decision of the Court is dated 19 March 1991. *See* also *Canon Garcia v. Ecuador*, 5 November 1991, UN Doc. CPR/C/43/D/319/1988.

[47] *Ibid*., Decision of the Commission at 24, paras. 164-168.

[48] Rayfuse, Rosemary, "International abduction and the United States Supreme Court: The law of the jungle reigns", 42 *ICLQ* (1993), at 892.

[49] *Cf.* ECHR*, (*Application no. 46221/99) Judgment, Strasbourg, 12 March 2003.

[50] *Bozano v. France*, n. 44. *Freda v. Italy*, application no. 8916/80, Commission decision of 7 October 1980, (DR) 21, at 250; *Illich Sanchez Ramirez v. France* (application no 28780/95, Commission decision of 24 June 1996, DR 86, at 155); *Bankovic and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII).

[51] 7 July 1989, Ser. A, No. 161, at 35, § 89.

> Inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition.[52]

While the above decisions would lead to a conclusion that under the European Convention there exists a norm preventing exercise of jurisdiction over abducted fugitives, it can also be seen that some Courts (as in the case of Ocalan) do lean towards carving out certain exceptions to such a norm. Some of these exceptions are discussed in Part Five of this paper.

2.7. The International Criminal Tribunal for the Former Yugoslavia

In the case of *Slavko Dokmanovic,*[53] it was argued that Dokmanovic was arrested in a 'tricky way', which can only be interpreted as a 'kidnapping' and that this violated the sovereignty of the Federal Republic of Yugoslavia (FRY) and international law.[54] The ICTY ruled that "the means used to accomplish the arrest of Mr. Dokmanovic neither violated principles of international law nor [violated] the sovereignty of the FRY *[sic]*".[55]

The Tribunal focused on the distinction between luring and forcible abduction, believing that the former was acceptable while the latter might constitute grounds for dismissal in a future case.[56] This precedent goes to show effectively that when luring is resorted to, there cannot be a violation of a state's sovereignty and that luring does not, thus, amount to a violation of international law.[57]

Whereas irregular rendition consists of unilateral action, no co-operation among states, no consent, and a violation of territorial sovereignty, it has been observed that luring criminal suspects into international waters is a different form of rendition since only one sovereign nation is involved in this type of action. It can thus be argued

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[52] *Ocalan v. Turkey*. *Cf.* ECHR, (Application no. 46221/99) Judgment, Strasbourg, 12 March 2003 at § 90.

[53] *Prosecutor v. Slavko Dokmanovic,* Decision on the Motion for Release by the Accused Slavko Dokmanovic, No. IT-95-13a-PT, T., Ch. II, 22 October 1997.

[54] *See ibid*., at paras. 16-18.

[55] *Ibid*., at para. 88.

[56] Snyder, Benjamin, "When, if ever, will an illegal arrest result in the dismissal of the charges" at http://www.nesl.edu/center/wcmemos/2000 /snyder_files/SNYDER_M .htm, last visited 20 July 2003.

[57] *United States v. Yunis,* 859 F.2d 953 (DC Cir. 1988).

that luring eliminates the potential offence of violating territorial sovereignty.[58] Indeed, this is the reasoning taken by the ICTY in the case of *Slavko Dokmanovic*.

3. THE EVOLVING CUSTOMARY INTERNATIONAL LAW NORM

Customary international law exists when "a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right".[59] There are, thus, two components to customary international law: a habit or practice of doing some act, and a conviction that such an act is legally required of the state. This latter aspect of international custom is referred to as *opinio juris*.[60]

While some states have altogether rejected the *mala captus bene detentus* doctrine, others have taken a discretionary approach. On the other hand, international tribunals have held that some methods of bringing an individual into the jurisdiction of a state, e.g., luring or using trickery to establish jurisdiction over an individual, would not vitiate the exercise of jurisdiction. The common thread that runs through the above analysis of state practice and *opinio juris,* however, seems to indicate that the doctrine of *mala captus bene detentus* has considerably weakened from the *Alvarez Machain* position. In fact, in cases which involve clear violation of human rights, e.g., the use of torture, or in cases which involve an unreasonable incursion into the territory of another state, customary law will most certainly prohibit exercise of jurisdiction over individuals so apprehended. Another reason for the strong reaction is probably because states did not want to authorize or ratify the actions of the United States in *Alvarez Machain*, since by such authorizing or ratifying they would consequently risk a situation where powerful states would effectively end up exercising jurisdiction over individuals in other states by resorting to state-sponsored abductions.

At the same time, states have left for themselves a window open, which allows a "discretionary approach". This approach would essentially allow a judicial body of a state to decide on a case-by-case basis whether or not it would be appropriate to exercise jurisdiction, as some states did not want completely to relinquish such a power.

These slight differences in the views of states have led to some confusion as to what constitutes the exact customary norm with respect to abductions. It is sub-

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[58] Laflin, Melanie M., "Kidnapped terrorists: Bringing international criminals to justice through irregular rendition and other quasi-legal options", 26 *J. Legis* (2000), at 315.

[59] Jennings and Watts, *op. cit*., n. 43, at 26-27. *See* generally Brownlie, Ian, *Principles of Public International Law* (Oxford: Clarendon, 4th ed., 1990), at 434. According to the *Restatement*, "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." 1 *Restatement (Third) of Foreign Relations Law of the United States* (1987), section 102(2).

[60] "For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation." *Restatement*, n. 58, section 102 cmt. c. See also *Asylum Case* (Peru and Colombia), ICJ Rep. 1950, at 276, 277.

mitted that in most cases, however, courts would be utilizing the "discretionary approach" and proceed on a case-by-case basis. This would not diminish the power of national jurisdictions yet would still leave them the option not to exercise jurisdiction over abducted individuals.

Most national courts inquire into the circumstances of the apprehension of alleged offenders and decline jurisdiction in cases of forcible abduction from abroad. The strong reaction and protest of states in the aftermath of *Alvarez-Machain* confirm this trend.[61] States do not want other states to enjoy the fruits of illegal conduct. In order to become a rule of customary international law, the relevant practices, such as those reviewed in this paper, may be of comparatively short duration, but they must be general and consistent.[62]

The requirements have arguably been met to create a customary rule of international law in the kidnapping cases. However, the precise limits of this restriction are not exactly clear. Most of the cases discussed above have adopted a "discretionary approach", by which the courts would essentially look into the facts and circumstances of each particular case, and to come to a decision as to when it would dismiss a case and hold that the abducted person should be returned. International law today would require a predominance of this "discretionary approach". This is particularly owing to the added protection gained by criminal offenders by virtue of the world's having become a 'smaller' place. Committing a crime and escaping to a foreign jurisdiction is commonplace in most cases. With terrorism increasing and the attempts at the continuing apprehension and prosecution of war criminals by the war crime tribunals, it would be unreasonable to hold that states and international bodies be denied the right of apprehending such perpetrators, when other alternatives are not feasible.

The paper will now turn to identifying these circumstances which would be allowable under the ambit of contemporary international law.

4. CROSSING THE LIMIT: CIRCUMSTANCES IN WHICH ABDUCTION IS ILLEGAL

This section of the paper aims to identify principles for the development of the law governing the exercise of the abuse of process jurisdiction in transnational abduction cases. The basic considerations[63] that should guide any court in deciding whether or not abduction should vitiate proceedings should be;

a) Whether there has been a violation of customary international law or an extradition treaty;
b) Whether there has been any gross violation of human rights.

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[61] *See* Wilske and Schiller, *loc. cit.*, n. 3.

[62] *North Sea Continental Shelf Cases* (Germany v. Denmark; Germany v. Netherlands), ICJ Rep. 1969, at 3, wherein the Court observed "The passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law". See also *Restatement*, n. 58, section 102 cmt b.

[63] Michell, *loc. cit.*, n. 3.

The following criteria should therefore be looked into by any court in determining whether an action is illegal or can be justified.

4.1. The necessity for state involvement

Domestic authorities must act before a judicially cognizable abuse of process exists. Domestic executive lawlessness is the essential factor.[64] In the absence of action by the domestic executive there is no unlawfulness sufficient to give rise to a stay of proceedings. The abduction must have been carried out by state agents, either state employees or private individuals working under state direction.[65] The distinction between abduction by state agents, on the one hand, and private citizens, on the other, is important because international wrongfulness and state responsibility are traced through an agency relationship.[66] Conversely, an abduction carried out by private actors without state consent or direction is not attributable to the state subject to the fulfillment of the criteria of due diligence by the state.[67] However, the action of private abductors, while not initially engaging its responsibility, may become attributable to a state if subsequently condoned by it.[68]

4.2. Illegality of action

Under the rules of international law, domestic courts have clear authority to find an abuse of process, especially given the existence of a clear customary rule against transnational forcible abduction. There are alternative bases for this authority: the territorial sovereignty of the foreign state; treaty obligations, particularly under extradition treaties, owed to the foreign state: and international human rights obligations owed directly to individuals. A fugitive should be permitted to advance evidence that his entrance to a court's jurisdiction took place in violation of international law. If the fugitive can discharge this burden, this factor should weigh in favour of a stay

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[64] *Schmidt I*, [1995] 1 App. Cas at 356 (Sedley J.), noting that Lord Giffiths in Bennett made "not physical force but executive lawlessness the critical factor".

[65] In *Alvarez-Machain* the abductors were Mexican citizens employed by the US Drug Enforcement Agency.

[66] *Velasquez Rodriguez Case* (Merits), 95 *ILR* 259, 296, at § 170 (Inter-Amer. Ct. Hum. Rts. 1988) The arbitrary detention of an individual by state agents is attributable to the State. Under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law; *See* also Meron, Theodor, "International responsibility of states for unauthorised acts of their officials", 33 *BYIL* (1957), at 85.

[67] Jennings and Watts, *op. cit.*, n. 43, at 549.

[68] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (US v. Iran), ICJ Rep. 1980, at 3, 35 (Iran was held liable for occupation of US Embassy and consulates due to its adoption of private acts). *See* also the Commentary on ILC Draft Articles, *YILC* 1974, II, 28 (Cases such as *Eichmann* cited as examples of the imputability of the acts of private individuals to a state).

of proceedings. The following acts would result in the becoming illegal of executive action.

4.2.1. Violation of human rights

Among the best recognized and documented fundamental human rights are the right to liberty and security of the person, and the right to freedom from arbitrary arrest and detention. These rights are set out in the Universal Declaration of Human Rights,[69] the International Covenant on Civil and Political Rights,[70] the European Convention on Human Rights,[71] the American Declaration on the Rights and Duties of Man,[72] and the American Convention on Human Rights.[73] These rights are also guaranteed by the constitutions of many nations. It is, therefore, without a doubt that the rights to liberty and security of the person and to freedom from arbitrary arrest are rights which, in addition to being set out in the instruments referred to above, are now firmly rooted in the corpus of customary international law.

For an abduction to prejudice the outcome of a trial, it was held in *ex rel Lujan v. Gengler*[74] that a fugitive must first establish that the governmental conduct in question "shocks the conscience". The standard for a human rights violation in an abduction case was identified as any action that would "shock the conscience" of the court. This exception allows a government to abduct suspected terrorists from international waters while still safeguarding the human rights of the abductees. By this ruling, the courts affirmed the jurisdiction and responsibility of law enforcement in overseas abduction cases, but sent a clear message that gross human rights violations would not be tolerated. For instance, torturing the individual concerned would amount to a violation.[75] Even in cases where excessive violence has been used, such action would weigh heavily in favour of a stay. For example, in the abduction of Fawaz Yunis,[76] US officials broke both of Yunis' wrists. Violence in a rendition on the part of the domestic authorities should be considered a *prima facie* ground for ordering a stay of prosecution.[77]

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[69] *See,* Arts. 2 and 9, Universal Declaration of Human Rights, GA Res. 217A, UN Doc. A/811, at 71 (1948).

[70] *See*, Art. 9, International Covenant on Civil and Political Rights, GA Res. 2200, 21 UN GOAR, Supp. (No. 16) 52, UN Doc. A/6316 (1966).

[71] *See,* Art. 5, European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 UNTS 221.

[72] *See,* Arts. 1 and 25, American Declaration on the Rights and Duties of Man, 1948.

[73] *See,* Art. 7, American Convention on Human Rig*hts,* OAS Treaty Series No. 36, 1144 UNTS 123.

[74] 510 F.2d 62 (2d Cir. 1975).

[75] *United States v. Toscanino,* 500 F. 2d 267 (2d Cir. 1974).

[76] *United States v. Yunis*, 859 F.2d 953, 955 (DC Cir. 1988).

[77] Michell, *loc. cit.*, n. 3.

4.2.2. Violation of territorial sovereignty of injured state

Abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm that is high in the opinion of mankind.[78] A nation's agents may not seize an individual from another nation without obtaining consent from the other nation's government.[79]

The *Jacob Kidnapping Case*,[80] between Switzerland and Germany, is an example of how acts of abduction and thereby bringing an individual into the jurisdiction of the country to have committed the abduction amount to a violation of the sovereignty of the other state.[81] The matter was referred to arbitration[82] and Jacob was returned to the Swiss authorities. In the case of *Eichmann*,[83] Argentina protested the violation of its sovereignty, requested the return of Eichmann, and eventually took the matter to the United Nations. The Security Council adopted a resolution condemning the kidnapping and requesting Israel to make appropriate reparation.[84]

It is well established that where an act of abduction is effectively carried out, an infraction of the sovereignty of the host state has been committed.[85] The Harvard Draft Convention on Jurisdiction with respect to crime states;

> No State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.[86]

It needs to be noted, and is also evident from the above, that only if the injured state raises a complaint of a violation of its sovereignty is the abducting state under

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[78] Henkin, Louis, "A decent respect to the opinion of mankind", 25 *John Marshal LJ* (1992), at 215, 231.

[79] Paust, Jordan J., Bassiouni, M. Cherif, *et al*., *International Criminal Law* (Carolina Academic Press, 1996), at 426.

[80] Preuss, Lawrence, "Kidnapping of fugitives from justice on foreign territory", 29 *AJIL* (1935), at 502 (discussion on Jacob Kidnapping Case).

[81] Note of the Federal Council to the German Foreign Office, 1 April 1935. Text in *Journal de Geneve,* 3 April 1935.

[82] The case was arbitrated under the Treaty of Arbitration and Conciliation of 3 December 1921, 12 *LNTS* 281.

[83] *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *ILR* 5 (Isr. Sup. Ct. 1962).

[84] *See* generally UN SCOR, UN Doc.S/RES/4349 (1960).

[85] *See* also Lowenfeld, Andreas F., "U.S. law enforcement abroad: The constitution and international law, continued", 84 *AJIL* (1990), at 444; *Id.*, "Kidnapping by government order: A follow-up", *ibid.*, at 712; O'Higgins, Paul, "Unlawful seizure and irregular extradition", *BYIL* (1960), at 279.

[86] *See* Article 16 of Harvard Research in International Law, "The Draft Convention on Jurisdiction with Respect to Crime", 29 *AJIL* (1935), at 442, 623.

an obligation to return the individual. It is obvious that the individual cannot by himself claim a violation of a state's sovereignty.[87]

4.2.3. Circumvention of an Extradition Treaty

In many cases of abduction the executive illegality at issue is the circumvention of extradition relations with that foreign state from which the fugitive was abducted. There can be little doubt that this question formed a central element of the grounds for the decision in *Bennett* and has been appreciated by various other Courts.[88] It can, thus, safely be concluded that in any case where an extradition treaty has been circumvented, that act will be termed as "illegal conduct" and will not be allowed to stand.

5. DEFINING ACCEPTABLE LIMITS: THE CIRCUMSTANCES IN WHICH THE ACTS CAN BE JUSTIFIED

As noted earlier, despite the extreme reaction of states to the *Alvarez Machain* case, most states would adopt a discretionary approach. This section of the paper seeks to define the limits within which this discretionary approach may be utilized in bringing an individual to within the jurisdiction of one state from another one.

5.1. When the abduction was not "forcible"

The observations of the International Criminal Tribunal for the Former Yugoslavia, in *Slavko Dokmanovic,*[89] are important: the ICTY ruled that "the means used to accomplish the arrest of Mr. Dokmanovic neither violated principles of international law nor [violated] the sovereignty of the FRY (*sic*)".[90] The Tribunal focused on the distinction between luring and forcible abduction, believing that the former was acceptable while the latter might constitute grounds for dismissal in a future case.[91]

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[87] *See* Gluck, Jonathan A., "The customary international law of state sponsored international abduction and United States Courts", 44 *Duke LJ* (1994), at 612.

[88] *Regina v. Bow Street Magistrates* (*Ex parte* Mackeson), [1981] 75 Crim App 24; *State v. Ebrahim,* 31 *ILM* 888; *Levinge v. Director of Custodial Services*, 9 *NSWR* 546 (Ct App 1987); *Bozano v. France,* 9 *EHRR* (1987), at 297; *Soering vs. the United Kingdom,* 7 July 1989, Series A, No. 161, at 35, § 89.

[89] *Prosecutor v. Slavko Dokmanovic,* Decision on the Motion for Release by the Accused Slavko Dokmanovic, No. IT-95-13a-PT, T., Ch. II, Oct. 22, 1997.

[90] *Ibid*., at para. 88.

[91] *Ibid.*, at para. Snyder, *loc. cit*., n. 56.

In the same breath, however, the views of the European Commission of Human Rights in *Stocke v. Germany*[92] are important because, in this case, luring and utilizing trickery, had it in the opinion of the European Commission been proved, would have amounted to a violation of the European Convention on Human Rights.[93]

These conflicting observations have created a situation of ambiguity in cases where the presence of the fugitive was procured through non-forcible ways. That which, however, constitutes a crucial distinction is the nature of the offence in each of the cases. While in *Dokmanovic*,[94] the allegations against the accused were for being responsible for the single greatest massacre of the 1991 war in Croatia, (that of the execution of 261 people forcibly taken out of a hospital in Vukovar, eastern Croatia), on the other hand, in *Stocke*,[95] the allegations against him were "tax-related offences". It is clearly evident that the nature of the crime in each of the cases would have played a crucial role in the Courts' having reached their respective opinions.

There is no qualitative difference between abduction by force, and that by fraud. Abduction is the removal of a person from the jurisdiction of one state to another by force, the threat of force or by fraud.[96] Most countries do not distinguish between abduction by fraud and abduction by force. In recognition of this trend, in September of 1994, the XVth Congress of the International Penal Law Association adopted a resolution which stated:

> Abducting a person from a foreign country or enticing a person under false pretenses to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognized as a bar to prosecution.[97] (*emphasis added*)

However, while abduction by force will almost certainly create a strong presumption in favour of issuing a stay, the status of abduction by fraud is less clear. As the Privy Council recognized in *Liangsiriprasert*,[98] the police must be accorded a certain amount of leeway to combat sophisticated international criminal activity through the use of ruses and tricks. It was further observed in *Regina v. Latif and Shahzad*[99]

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[92] *Stocke v. Germany,* ECHR Ser. A, No. 199. The Commission's decision is dated 12 October 1989. The decision of the Court is dated 19 March 1991. *See* also *Canon Garcia v. Ecuador*, 5 November 1991, UN Doc. CCPR/C/43/D/319/1988.

[93] Rayfuse, *loc. cit*., n. 5, at 892.

[94] *Prosecutor v. Slavko Dokmanovic*, n. 89.

[95] *Stocke v. Germany*, n. 46.

[96] Shearer, I.A., *Extradition in International Law* (1971), at 72-73. *See* also Gilbert, Geoff, *Aspects of Extradition Law* (1991), at 115.

[97] "Mutual assistance in criminal matters: XVth Congress of International Penal Law Association adopts resolutions", 10 *Int'l Enforcement L. Rep.* (1994), at 385, 386, 387. *See* also Scharf, Michael P., "Irregular rendition and the Yugoslavia Tribunal", available at http://www.nesl.edu/center/Asilnews/asils98.htm, last visited 25 July 2003.

[98] *Liangsiriprasert*, [1991] 1 App. Cas, at 243; *United States v. Yunis*, 681 F. Supp. 896 (DDC 1988), 924 F. 2d 1086 (fugitive lured into international waters by promise of lucrative drug deal).

[99] [1996] 1 *WLR* 104.

that there would be no abuse of process to lure the defendants into England by deceit for their alleged part in a drug trafficking scheme.

The real question is, therefore, how far the police may go before their conduct becomes objectionable. It is submitted that cases such as *Liangsiriprasert,* where the fugitives entered Hong Kong to pick up payment for drug shipment of their own free will and "not because of any unlawful conduct of the authorities but because of their own criminality and greed", and cases like *Dokmanovic*, where a war criminal was lured by the incentive of possible compensation for his property in Eastern Slovakia which he had been forced to abandon, cannot be cases where the police exercise (although, technically speaking, an abduction) can be said to be unjustified.

The force-fraud distinction has been supported on the basis of policy arguments, namely, that the fraud does not violate the territorial sovereignty of foreign states, and does not present the risk of violence to the fugitive or third parties.[100]

Thus, in some cases where the abduction was brought about by force or deceit, the action can be justified, and the defendant should not be entitled to a stay.

5.2. Legitimate cases of threats to national security

According to noted jury consultant, Derek Bowett, sending agents into a state's territory specifically to target a criminal does not violate the territorial integrity or political independence of the state.[101]

Given that the actions of espionage or law enforcement agents within a nation's territory have never been considered a use of force under international law,[102] it follows that targeting a terrorist for abduction from another state is not necessarily a violation of international law. This can in fact be considered as an offshoot of a state's right to defend itself.

Bowett's reasoning also supports the theory that a state can seize a terrorist in another country as long as the capture is necessary to prevent future harm to its citizens and the mission's objectives are strictly confined to that task.[103] Therefore, even if the terrorist has already struck, his abduction is justifiable as preventing a future attack.

French officials permitted George Habash, head of the Popular Front for the Liberation of Palestine, an extremist offshoot of the Palestine Liberation Organization, to enter and seek medical treatment in France.[104] Another terrorist, Ahmed Jibril, who heads the Popular Front for the Liberation of Palestine-General Command,

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[100] Laflin, *loc. cit.*, n. 58, at 315.

[101] *See*, Bowett, Derek W., *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), at 55 (discussing the use of forcible self-help against terrorists).

[102] *See ibid.*, at 25.

[103] *See ibid*., at 29.

[104] *See* Fenyvesi, Charles, "Washington whispers", *U.S. News and World Rep.*, 24 February 1992, at 26 (commenting on the medical treatment of two Palestinian terrorists in Western Europe), in Michell, *loc. cit.*, n. 3.

boasted "that he, too, recently travelled for health reasons – twice to Switzerland and once to France."[105] The circumstances surrounding the failed extradition of Pinochet are another example. Countries such as India face a plethora of problems in managing the extradition from countries as diverse as Portugal, England, and Thailand of individuals accused of terrorism. If countries do not follow international conventions that provide the means to apprehend, prosecute, and/or extradite a terrorist, other states are left with little choice but to try and assert jurisdiction to avoid placing the harbouring state in a position where the latter may be subjected to retaliation.[106]

5.3. The gravity of the offence

It would be absurd to hold that terrorists and serious human rights violators should not be brought to trial by irregular methods, for example, by abduction. The interests of society require that such offenders be brought to trial. Conduct on the part of the domestic authorities amounting to an abuse of process in the case of a lesser offence might not amount to such an abuse where the alleged offence was more serious. This is clearly evident from the case of *Eichmann*, wherein the plea of Eichmann that he was abducted and should therefore not be proceeded against, was rejected, on the ground that the crimes alleged against him were of such a nature that the irregular manner of his production before court could be overlooked. This kind of an "Eichmann" exception, it is submitted, is an appropriate rule.

These methods should, however, be utilized by states only once they have exhausted all possible routes to secure the fugitive's return by normal processes. As a general rule, the prohibition of abduction has a legitimate rationale. Individuals should have the right to walk down the street without the fear of being kidnapped for unknown or undeclared reasons by a foreign government. However, under circumstances where crimes are sufficiently appalling to shock the international conscience, states must be able to balance the potential for human rights violation by abduction with the numerous human rights violations committed by notorious evildoers such as Eichmann. The moment the individual's violations far outweigh the violation of the abduction, that abduction should be permissible and should not be considered a violation of human rights.

Even if the international community accepts state-sanctioned abduction as a legitimate way to create personal jurisdiction over some alleged war criminals, concerns remain about the means utilized to execute the abduction. In order to prevent unnecessary injury to the abductees, the UN must establish procedural safeguards governing abductions. In Paust's discussion concerning state-sanctioned abduction as a human rights violation, he notes that the doctrine of human rights includes the

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[105] *Ibid.*

[106] Kash, Douglas, "Abducting terrorists under PDD-39: Much ado about nothing new", 13 *Am.U.ILR* (1997), at 139.

right to be free from abduction.[107] However, according to Paust, not all abductions fall into the category of human rights violations.

> "I do not agree ... that every abduction ... in foreign state territory without foreign state consent is ... necessarily 'arbitrary,' 'cruel,' 'inhuman,' or 'degrading' within the meaning of relevant human rights standards."[108]

Violators of *jus cogens* norms need to be brought to justice and in many such instances, as has already been witnessed in the ICTY,[109] irregular methods of capturing such violators will need to come into play. Under such circumstances, the failure to grant jurisdiction to a Court would not only defeat the essence of the strong international law rule preventing such crimes, but would also amount to handing to offenders and potential offenders the ideal route to chart out an escape.

6. CONCLUSION

Despite there being a rule against the doctrine of *mala captus bene detentus,* state-sponsored international abductions will continue in the future as states, frustrated by the inability to punish those they deem deserving, continue to resort to self-help methods of apprehension. As the clear limits of the customary rule prohibiting the rule of *mala captus bene detentus* are still being tested, increasing reliance will be placed by states on the "discretionary approach", giving states the option to justify all irregular acts utilized in gaining jurisdiction over individuals. Standing between such states and this anarchy is the rôle of international law.

Even in applying the "discretionary approach" states will necessarily have to conform to the accepted rules of international law and customary practice which have evolved since the early decision of *Alvarez Machain.* Accordingly, only in the limited cases outlined above will the state be justified in utilizing irregular methods to bring an individual within its jurisdiction.

Where the individual concerned is alleged to have committed crimes that offend the conscience of mankind, or *jus cogens* crimes, the interest of society requires that the crime be punished, and all that the defendant is entitled to demand is a fair trial by a court having jurisdiction of the subject matter, in which he has an opportunity of knowing the charge and of being fully heard. The creation of such an exception is necessary with the formation of tribunals such as the International Criminal Tribunal for the former Yugoslavia, since there might be situations in which methods such as abduction would have to be utilized to bring about the prosecution of individuals who have committed crimes that offend the very conscience of man, and who will be guarded by states with an interest in their non-prosecution. Illegal capture cannot

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[107] Paust, Jordan J., "After *Alvarez-Machain*: Abduction, standing, denials of justice, and unaddressed human rights claims", 67 *St.John'sLR* (1993), at 551, 561.

[108] *Ibid*., at 564.

[109] *Prosecutor v. Slavko Dokmanovic*, n. 88.

be used as an obstruction to the exercise of international criminal jurisdiction. The same argument would apply against terrorists who would threaten the national security of a state.

If the UN creates appropriate procedures to regulate the abduction of alleged war criminals and terrorists, and if states are bound to follow these procedures, then principles of human rights will be preserved and can co-exist with principles of justice. UN codification would acknowledge that certain abductions are not violations of human rights. However, an explicit distinction must be made between kidnappings that do not *per se* represent violations of human rights, and the methods through which the abductions are actually carried out, which can violate human rights.[110] Both states and individual defendants should be able to bring human rights actions against states that do not adhere to the UN procedural guidelines regarding state-sanctioned abductions. Signatory nations would then defer to the judgment of the international tribunal when a violation is alleged, and the UN could determine whether a state used excessive force in light of the abduction's circumstances. If the state is found to have used excessive force, the UN would impose an appropriate sanction.

In conclusion, it can be stated that the rule of law rationales opposing the *mala captus bene detentus* principle – in that it brings into disrepute the administration of justice, encourages lawlessness, violates state sovereignty, disregards international human rights law, and undermines the international extradition network – is indeed overwhelming and justified. In the future, however, Courts, although recognizing that the *mala captus bene detentus* principle is generally inconsistent with modern international law, should not hesitate to exercise jurisdiction over those whose prosecution is essential and who could not have been proceeded against without an action of abduction, or who have committed crimes that could be classified under an "Eichmann exception".

[110] Izes, Beverly, "Drawing lines in the sand: When state-sanctioned abductions of war criminals should be permitted", 31 *Colum.JL&Soc.Probs*. (1997), at 1.

LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

CHINA[1]

JUDICIAL DECISIONS

Extradition

CASE OF APPLICATION FILED BY THE REPUBLIC OF FRANCE FOR EXTRADITING MARTIN MICHEL[2]

[Extradition Ruling of the Supreme People's Court of the People's Republic of China] [Extradition No.1 [2001] of the Supreme People's Court]
Chief Judge Nan Ying and Judges Gao Jinghong, Xue Shulan
14 November 2002
Clerk: Chang Zhaohui

On 1 June 2001, the Republic of France filed an application to the People's Republic of China for extraditing Martin Michel, who is a citizen of the Republic of France and is suspected of being involved in a rape. Martin Michel, male, born on 3 March 1945, of the nationality of the Republic of France, lived in No. 353 of Republic Avenue, Barmister Plain City, the Republic of France. He entered into the territory of China in September 1998, and temporarily stayed in No. 48 of Fenghuang

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* Edited by B.S. Chimni and Joydeep Narayan Choudhuri. The years for which the State Practice has been collated are 2003 and 2004. However, in many instances, prior state practice has been included. This editorial decision was taken for two reasons: first, that readers may find useful this state practice of previous years; second, that often this previous state practice is only available in later years. The responsibility for the content of each contribution is that of the national contributor to the State Practice Section. The original footnote form has been retained in each contribution.

1 Contributed by Zhang Xinjun, School of Law, Tsinghua University, Beijing, China.

2 Gazette of the Supreme People's Court of the People's Republic of China (2004, No.9), published by the General Office of the Supreme People's Court, pp.16-17 (*Chinese*). The English translation is from *lawinfochina.com* <http://www.lawinfochina.com/display.asp?db=2&id=208>

Asian Yearbook of International Law, Volume 11 (B.S. Chimni *et al.,* eds.)

New Village, the Lianmeng County, Kunming Municipality, Yunnan Province, People's Republic of China. He was arrested for extradition on 30 October 2001 and was in custody.

Pursuant to the Extradition Law of the People's Republic of China, this Court designated the Higher People's Court of Yunnan Province of the People's Republic of China to examine the request for extradition filed by the Republic of France on 25 September 2001 by Decision on the Designation of Examination of the Extradition Request – the Criminal Extradition No.1 [2001]. The Higher People's Court of Yunnan Province made an extradition ruling in terms of Extradition No.1 [2001] of the Higher People's Court of Yunnan on 21 December 2001, which ruled that the request of the Republic of France for extraditing Martin Michel complies with the conditions for extradition as prescribed in the Extradition Law of the People's Republic of China, and reported it to this Court for examination and approval. This Court convened a collegial panel according to law and carried out re-examination of the extradition ruling of the Higher People's Court of Yunnan.

Upon re-examination, this Court confirmed that: "Martin Michel against whom a request for extradition is filed by the Republic of France is suspected of rape and attempted rape of minors under 15 and minors over 15 and [to] have parental power therewith from 1982 to 1992 in the Republic of France, and pursuant to the Criminal Law of the People's Republic of China and the Criminal Law of the Republic of France, he may be imposed with a fixed-term imprisonment of more than one year or a more serious penalty. The request of the Republic of France for extraditing Martin Michel complies with the conditions for extradition as prescribed in the Extradition Law of the People's Republic of China."

During the re-examination period of this Court, Martin Michel and his attorneys submitted that the evidence for determining Martin Michel's involvement in the rape was insufficient and if he was to be extradited to his country, he could possibly be subjected to cruel treatment. They further submitted that Martin Michel entered into the territory of China lawfully; he has a daughter with the Chinese citizen Xi, and so his fundamental rights should be protected and the request for extradition should be disapproved.

The Court held that: "The Republic of France has provided evidence and materials as required by the Extradition Law of the People's Republic of China for extraditing Martin Michel; the issue raised by Martin Michel regarding possibility of cruel treatment after returning to his country are insufficient; his lawful entry into China is not a statutory condition for disapproval of extradition and the rights and interests in relation to his daughter born by the Chinese citizen Xi will be properly settled by the Republic of France. Therefore, the claims of Martin Michel and his attorneys for disapproval of extradition will not be accepted. The ruling made by the Higher People's Court of Yunnan is correct. Based thereon, a ruling is given as follows pursuant to Item (1) of Article 26 of the Extradition Law of the People's Republic of China:

'The ruling of the Higher People's Court of Yunnan that the request of the Republic of France for extraditing Martin Michel complies with the conditions for

extradition as provided for in the Extradition Law of the People's Republic of China and is hereby approved.'"

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Incorporating a human rights clause into the Constitution
The 2004 Amendments to the Constitution of the People's Republic of China

Introductory note

The Amendments to the Constitution of the People's Republic of China, which were adopted at the Second Session of the Tenth National People's Congress of the People's Republic of China on 14 March 2004, were promulgated and put into force on the same day.

One important amendment is to incorporate a human rights clause in the Constitution. According to Article 24 of the 2004 Amendments to the Constitution of the People's Republic of China, a paragraph shall be added to Article 33 of the Constitution as paragraph 3, namely, "The state respects and protects human rights."

Text of Excerpt from the Amendments and the Constitution of 2004[3]

Amendments to the Constitution of the People's Republic of China

[Date of Promulgation: 14 March 2004]
[Effective Date: 14 March 2004]

Article 24. One paragraph shall be added to Article 33 of the Constitution as paragraph 3, that is 'The state respects and protects human rights.' And paragraph 3 shall be changed into paragraph 4 accordingly.

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (2004)

Article 33. All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China.

All citizens of the People's Republic of China are equal before the law.

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[3] For the Amendments of 2004, see, Gazette of the Standing Committee of the National People's Congress of the People's Republic of China, Special Issue, published by the General Office of the Standing Committee on the National People's Congress on March 15, 2004, pp.64-66 (*Chinese*). The excerpt appears in p.65. For the Constitution of 2004, see, *ibid*, pp.77-102 (Chinese). The excerpt appears in p.85. The English excerpts are edited by Zhang Xinjun with reference to the English translation of the Constitution of 2004 in *Zhong Hua Ren Min Gong He Guo Xian Fa (Constitution of the People's Republic of China),* People's Publishing House, 2004.

The state respects and protects human rights.
Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and the law.

Implementation of Clean Development Mechanism Projects under Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change

Interim Measures for Operation and Management of Clean Development Mechanism (CDM) Projects

Introductory note

The People's Republic of China ratified the Kyoto Protocol on 30 August 2002, making the country eligible for hosting CDM project activities. On 31 May 2004, the People's Republic of China promulgated the decree "Interim Measures for Operation and Management of Clean Development Mechanism Projects" (Interim Measures),[4] in which the National Development and Reform Committee (NDRC) is designated to be the People's Republic of China's Designated National Authority (DNA), acting on behalf of the Chinese government in managing and supervizing CDM project activities in the People's Republic of China.

The Interim Measures may be subject to a revision in the following one or more years based on experience gained through the implementation of the CDM projects. The Interim Measures consist of general provisions, permission requirements, institutional arrangement for project management and implementation, project procedures, and miscellaneous provisions.

Article 17 provides an eligibility requirement prescribing that the project proponent shall be controlled and/or owned by a Chinese entity. Also Article 24 provides for "benefit sharing," in which the Chinese Government will retain the benefit from project proponents in selling Certified Emission Reductions (CERs). This regulation on benefit sharing does not provide further details on the manner of sharing.

[4] These "Interim Measures" have been nullified by "Measures for Operation and Management of Clean Development Mechanism Projects," promulgated on 12 October 2005. *See,* Article 26 of the "Measures". The Chinese text of the updated regulation can be found at the official website of NDRC's (National Development and Reform Commission) Office of National Coordination Committee on Climate Change. < http://cdm.ccchina.gov.cn/UpFile/File538.PDF >. A change made in the new regulation is the "benefit sharing" provision in Article 24. The new Article 24 sets up a criterion for collecting fixed portion of revenue from different types of CDM projects.

Text of the Interim Measures[5]

Interim Measures for Operation and Management of Clean Development Mechanism Projects

[No.10 Ministry Order of National Development and Reform Commission, Ministry of Science and Technology, and Ministry of Foreign Affairs]
[Date of Promulgation: May 31, 2004]
[Effective Date: June 30, 2004]

I. General Provisions

Article 1. These interim measures are formulated in accordance with the provisions of the United Nations Framework Convention on Climate Change (hereinafter referred to as "the Convention") and its Kyoto Protocol (hereinafter referred to as "the Protocol"), both ratified and approved by the People's Republic of China, and the relevant decisions adopted under the Convention and the Protocol, with a view to strengthening the effective management of Clean Development Mechanism (hereinafter referred to as "CDM") project activities by the Chinese Government, protecting China's rights and interests, and ensuring the proper operation of CDM projects.

Article 2. According to the Protocol, CDM is a project-based mechanism under which developed country Parties cooperate with developing country Parties in achieving greenhouse gas (hereinafter referred to as "GHG") emission reductions. The purpose of this mechanism is to assist developing country Parties in achieving sustainable development and in contributing to the realization of the ultimate objective of the Convention as well as to assist developed country Parties in achieving compliance with their quantified GHG emission limitation and reduction commitments. The core of the CDM is to allow developed country Parties, in cooperation with developing country Parties, to acquire "certified emission reductions" (hereinafter referred to as "CERs") generated by the project activities implemented in developing countries.

Article 4. The priority areas for CDM project activities in the People's Republic of China are energy efficiency improvement, development and utilization of new and renewable energy, and methane recovery and utilization.

Article 5. In accordance with the relevant decisions adopted under the Convention and the Protocol, when implementing CDM project activities, the principles of transparency, efficiency, and accountability shall be observed.

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[5] Gazette of the State Council of the People's Republic of China (2005, No.8), published by the General Office of the State Council, pp.22-25 (*Chinese*). The English version is edited by Zhang Xinjun.

II. Permission Requirements

Article 6. CDM project activities shall be consistent with the People's Republic of China's laws and regulations, sustainable development strategies and policies, and the overall requirements for national economic and social development planning.

Article 7. The implementation of CDM project activities shall conform to the requirements of the Convention, the Protocol and relevant decisions by the Conference of Parties.

Article 9. Funding for CDM projects from the developed country Parties shall be in addition to their current official development assistance and their financial obligations under the Convention.

Article 10. CDM project activities should promote the transfer of environmentally sound technology to the People's Republic of China.

Article 11. Chinese funded or Chinese-holding enterprises within the territory of the People's Republic of China are eligible to conduct CDM projects with foreign partners.

V. Other Provisions

Article 21. Developed country Parties mentioned above refer to Parties included in Annex I of the Convention.

Article 24. Revenue from the transfer of CERs shall be owned jointly by the Government of the People's Republic of China and the project proponent, with the allocation ratio of the revenue to be decided by the Government of the People's Republic of China. Before the decision, the revenue belongs to the project proponent.

Article 25. NDRC, in consultation with MOST and MFA, is responsible for the interpretation of these interim measures.

Article 26. These Interim Measures take effect as of 30 June 2004.

Implication of UN Security Council Resolution 1526[6]

[6] <http://daccessdds.un.org/doc/UNDOC/GEN/N04/226/69/PDF/N0422669.pdf?OpenElement>

Notice of the Ministry of Foreign Affairs concerning the Implication of UN Security Council Resolution 1526

[MFA Circulation (2004) No.2]
[Date of Promulgation: May 31, 2004]

To Ministries and Commissions under the State Council, Organizations and Institutions directly under the State Council, Foreign Affairs Offices of each province, autonomous region and municipality:

On 30 January 2004, the United Nations Security Council adopted Resolution 1526 with respect to the problem of the Taleban and sanctions towards the Al-Qaida organization. The resolution is to improve sanctions measures towards Usama Bin Laden, members of the Al-Qaida organization and the Taleban as well as other individuals and entities listed in the "Comprehensive Inventory" created by the Sanctions Monitoring Committee established under UN Security Council Resolution 1267 (1999).

The resolution is an enforcement undertaking operated by the Security Council in accordance with Chapter VII of the Charter of the United Nations and is legally binding on all Member States. In order to fulfil these international obligations placed upon the Chinese Government in the resolution, all relevant organizations and institutions are requested to adopt concrete measures in accordance with the resolution to ensure implementation. During the implementation, if any serious problems concerning state policy arise, please consult in time with the Ministry of Foreign Affairs. In the event the United Nations Security Council through further resolutions modify, cancel, or extend the implementation of the aforementioned resolution, the Ministry of Foreign Affairs will give particular notice.

OTHER RELEVANT STATE PRACTICE

Reform of the United Nations

Text of Excerpt from Position Paper at the Fifty-ninth Session of the UN General Assembly[7]

Position Paper of the People's Republic of China at the Fifty-ninth Session of the UN General Assembly

[Date of Issuing: 5 August 2004]

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[7] <http://www.fmprc.gov.cn/eng/wjb/zzjg/gjs/gjzzyhy/2594/2602/t146392.htm>

2. United Nations Reforms

China supports the United Nations to keep abreast of the times and undertake necessary and reasonable reforms. The purpose of the United Nations reforms is to enhance the role of the United Nations and its capacity to meet new threats and challenges. The principle of the reforms should follow the purposes and principles of the United Nations Charter. Furthermore, the approach of the reforms is to build broad consensus on the basis of full consultations in a democratic and transparent manner.

Peace and development are mutually reinforcing. The key to the United Nations reforms is to achieve progress on development issues. In the reforms, the reasonable concerns and legitimate rights and interests of the developing countries should be fully accommodated, the developing countries should be given a bigger say in United Nations matters, and more contributions should be made by the United Nations in development.

China supports the Security Council in conducting necessary and reasonable reforms. First and foremost, the reform needs to redress the current imbalanced composition of the Security Council by following the principle of equitable geographical distribution and increasing representation of the developing countries as a priority. China is in favour of taking further measures to improve the working methods of the Security Council, so as to make it more efficient and transparent.

China supports the work of the High-level Panel on Threats, Challenges and Change initiated by Secretary-General Kofi Annan. China also looks forward to strategic analyses and recommendations from the Panel on how to tackle the major world threats of the day, which will be discussed by all Member States.

INDIA[8]

JUDICIAL DECISIONS

Scope and definition of "Environment" – Balancing environment and development –Environmental Impact Assessment – International norms in construing domestic law

K.M. CHINNAPPA v. UNION OF INDIA AND OTHERS

Supreme Court of India, October 30, 2002
AIR 2003 Supreme Court 724

[8] Contributed by V.G. Hegde, Associate Professor, School of International Studies, Jawaharlal Nehru University, New Delhi.

Facts

The appellant challenged the decision of the Government to renew the iron ore mining lease of the Kudremukh Iron Ore Company Ltd (KIOCL) for a further period of twenty years by filing an interlocutory application before the Indian Supreme Court. The mining site was located within and at the fringe of the designated area of the Kudremukh National Park, a park protected under the Wildlife (Protection) Act, 1972 ("1972 Act" hereinafter). The interlocutory application was filed in a pending 1995 case which sought to challenge the decision of the Government in allowing mining and other developmental activities within national parks and game sanctuaries. While considering this application, the Supreme Court also referred to an Expert Committee constituted in 1996 under section 3 of the Environment (Protection) Act, 1986 (hereinafter referred to as "Environment Act"). Considering the rich biodiversity of the area and investment made by the KIOCL, this Committee had suggested that the mining operations should be wound up within a period of five years or on the exhaustion of the oxidized weathered secondary ore, whichever is earlier. This Committee had, furthermore, laid down certain conditions for the KIOCL to follow during the five-year winding up period. The question also remained as to from when this five-year winding up period should start. The KIOCL, on the other hand, had contended that there was no violation of any law relating to forests and the environment while renewing the mining lease as *per* the provisions of the Mines and Minerals (Regulation and Development) Act, 1957 which, *inter alia*, provided that notwithstanding anything provided under the Act, the 1972 Act, or the Environment Act, on an application being made, the mineral lease was to be renewed for twenty years. The KIOCL, accordingly, argued that: "Since there was an existing legal right to get a renewal, which had already accrued, there was no question of any embargo on the renewal of the mining lease". Reference was also made to the subsisting contracts with foreign buyers and the large financial implications on account of the impossibility of performing the contracts.

Reasoning of the Court

The seminal issue, according to the Court, was whether the approach should be "dollar friendly" or "eco-friendly".

The first issue concerned the definition of the word "environment". The Court noted that the forests located in the Kudremukh National Park were among 18 immediately recognized "hot spots" for bio-diversity conservation in the world. The Court, while conceding that it would be difficult to define this expression, stated that, "Its normal meaning relates to the surroundings, but obviously it is a concept which is relatable to whatever object it is which is surrounded".

The Court referred to Principle No. 1 of the Stockholm Declaration of the United Nations on Human Environment, 1972, i.e., "Man has the fundamental right to freedom, equality, and adequate conditions of life in an environment of equality that permits a life of dignity and well being and he bears a solemn responsibility to protect

and improve the environment for present and future generations". In this context the Court further observed;

> "The declaration, therefore, says that for the developing countries, most of the environmental problems are caused by underdevelopment. The Declaration suggests safe actions with prudent care for economic and social balance. It is necessary to avoid massive and irreversible harm to the earthly environment and strive for achieving for the present generation and the posterity a better life in an environment more in keeping with their needs and hopes. In this context, what immediately comes to mind are the words of Pythogarus who said: '[F]or so long as man continues to be the ruthless destroyer of lower living beings, he will never know health or peace. For so long as men massacre animals, they will kill each other. Indeed, they who sow the seeds of murder and pain cannot reap joy and love.'"[9]

The Court once again referred to the 1972 Stockholm Declaration, which states:

> Man is both creature and molder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet, a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man made, are essential to his well being and to the enjoyment of basic human rights, the right to life itself.
>
> The protection and improvement of the human environment is a major issue which affects the well being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

[9] The Court makes this observation while referring to the Indian Constitutional requirements, such as Article 48-A which states "State[s] shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country"; Article 51-A (g) imposes a fundamental duty on every citizen of India to protect and improve the natural "environment" including forests, lakes, rivers and wild life and to have compassion for living creatures; Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including the right to life with human dignity encompasses within its ambit the protection and preservation of the environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. The Court also makes a brief survey of the existing and evolving nature of Indian environmental laws in the context of changing times. It states, "… Nature and history are two components of the environment in which we live, move and prove ourselves. This Court in Sachindanand Pandey and another v. State of West Bengal and others (AIR 1987 SC 1109) and Virender Gaur v. State of Haryana, (1995 AIR SCW 306) has highlighted these aspects".

The Court further noted,

> At the global level, the right to life is now recognized as a fundamental right to an environment adequate for health and well being of human beings. (*See* World Commission on Environment and Development – Our Common Future (1987.)) To commemorate the tenth anniversary of the Stockholm Conference, the World Community of States assembled in Nairobi (May 10-18, 1982) to review the action taken to implement the Stockholm Declaration. It expressed serious concern about the state of the environment world wide and recognized the urgent need of intensifying the effort at the global, regional and national levels to protect and improve it.[10]

The Court also referred to the balance which needs to be struck between public interest and private gain. It stated, "It cannot be disputed that no development is possible without some adverse effect on the ecology and environment and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment". Against this background, the Court noted that Environmental Impact Assessment Reports were of great importance. While on this issue, the Court made a reference to the objectives of such assessment set out in the Directive of the Council of the European Economic Community to its Member States.[11] The Court also referred to the Preamble and Articles 1, 6, 7, and 14 (a) of the Convention on Biological Diversity which, *inter alia,* provided the basis for the balancing of environmental concerns with particular emphasis on the sustainable use of biological resources.[12] In the words of the Court,[13]

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[10] The Court also noted in Para 32 "The United Nations General Assembly adopted on October 29, 1982, World Charter for Nature. The chapter declares on the awareness that: '(a) mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients. (b) Civilization is rooted in nature which has shaped human culture and influenced all artistic and scientific achievement and living in harmony with nature gives mankind the best opportunities for the development of his creativity, and for rest and recreation'. On the application of Public Trust Doctrine as enunciated by the Indian Supreme Court in *M.C. Mehta v. Kamal Nath and others* (1997 (1) SCC 388), the Court stated, '…our legal system based on English Common Law includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. [The] public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership'".

[11] The Court quoted in full the objectives of the Directive which, *inter alia*, stated that the effect of a project on the environment must be assessed in order to take into account various concerns, such as health, and to contribute to the quality of life and to the maintenance of the diversity of life, and to maintain the reproductive capacity of the eco-system.

[12] India is party to the Convention on Biological Diversity, 1992. India has now also enacted an implementing legislation, namely, The Biological Diversity Act, 2002. While Article 1 outlines the objectives of the Convention, Article 6 refers to the General Measures for Conservation and Sustainable Use. Article 7 is with regard to identification and monitoring of the components of biological diversity important for its conservation and sustainable use. Article 14 (a) deals with "Impact Assessment and Minimizing Adverse Impacts".

> Sustainable development is essentially a policy and strategy for continued economic and social development without detriment to the environment and natural resources on the quality of which continued activity and further development depend. Therefore, while thinking of developmental measures, the needs of the present and the ability of the future to meet its own needs and requirements have to be kept in view.

The Court concluded by casting a duty on the Government under Article 21 of the Constitution of India to protect the environment and by referring to two salutary principles of the law of the environment – (i) the principle of sustainable development, and (ii) the precautionary principle. The Court observed:

> It needs to be highlighted that the Convention on Biological Diversity has been acceded to by our country and, therefore, it has to implement the same. As was observed by this Court in *Vishaka and others v. State of Rajasthan and others* ((1997) 6 SCC 241), in the absence of any inconsistency between the domestic law and international conventions, the rule of judicial construction is that regard must be had to international convention and norms even in construing domestic law. It is, therefore, necessary for the Government to keep in view international obligations while exercising discretionary powers under the Conservation Act unless there are compelling reasons to depart therefrom.

The Court, while disposing of the interlocutory application, upheld the time period fixed by the Expert Committee constituted under section 3 of the Conservation Act. That means, the Court concluded, mining should be allowed until the end of 2005 by which time the weathered secondary ore available in the already broken area should be exhausted. This was, the Court further noted, subject to fulfilment of the recommendations made by the Expert Committee on ecological and other aspects.

Implementing the United Nations Convention on Privileges and Immunities through domestic legislation – Scope of judicial scrutiny or review by municipal courts

G. BASI REDDY ETC. v. INTERNATIONAL CROP RESEARCH INSTITUTE AND ANOTHER

Supreme Court of India, February 14, 2003
AIR 2003 Supreme Court 1764

Facts

The Appellant was an employee of the International Crops Research Institute (ICRISAT), an international organization located in Hyderabad, India. ICRISAT was

[13] Para 45. The observations of the Court touch some ideas relating to the principles of intergenerational equity.

set up by the Consultative Group on International Agricultural Research (CGIAR), an informal association of about fifty Governments and non-government bodies. The Food and Agricultural Organization (FAO), United Nations Development Programme (UNDP), United Nations Environmental Programme (UNEP), and the World Bank were the co-sponsors of CGIAR, which eventually set up ICRISAT.

The Appellant's services were terminated by the ICRISAT and this termination was challenged by the Appellant's invoking the writ jurisdiction of the High Court of Karnataka under Article 226 of the Indian Constitution.[14] The High Court of Karnataka dismissed Appellant's writ petition on the ground that ICRISAT was an international organization and was immune from being sued because of a Notification issued in 1972 under the United Nations (Privileges and Immunities) Act, 1947. This 1947 enactment provided for the implementation of the United Nations Convention on Privileges and Immunities. The UN Convention appeared as a Schedule in the 1947 enactment and the Convention was applied by India with suitable modifications by issuing Notifications from time to time. Accordingly, both the UN agencies and other international organizations were granted certain privileges and immunities. While section 2 of the enactment dealt with UN agencies specifically, section 3 of the enactment covered what was termed as "other international organizations". Section 3 was to become operational only upon an agreement or a Memorandum of Understanding (MOU) between India (the host country) and the international organization (in the present case, ICRISAT).

Such a MOU was concluded between India and ICRISAT on 28 March 1972 which, *inter alia,* provided for the grant of certain privileges and immunities to the ICRISAT and its personnel, applying, with modifications, the provisions of the UN Convention on Privileges and Immunities. ICRISAT undertook within the framework of the MOU to put in place an employment policy and conditions for the local employees. The appellant contended before the Supreme Court that "prohibition on the employees to take recourse to Municipal Courts in connection with the settlement of disputes relating to employment would not come within the ambit of that immunity nor could immunity be granted against the power of judicial review".[15] He also argued that "the Government could neither enter into a treaty or any international agreement nor issue a notification pursuant thereto which may have the effect of infringing the fundamental or constitutional rights of the citizens in derogation of Constitutional provisions".

Reasoning of the Court

The Court, while defining the legal character of an international organization (in the present case, ICRISAT), noted:

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[14] Article 226 of the Indian Constitution confers authority on the High Courts to issue writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto,* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III of the Indian Constitution (which relates to Fundamental Rights) and "for any other purpose".

[15] Para 22.

> ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides, ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that the ICRISAT owes a duty to the Indian public to provide research and training facilities.[16]

On the issue of judicial scrutiny or review of the MOU concluded between India and the ICRISAT, the Court, referring to its earlier jurisprudence and distinguishing it from the present case, pointed out:

> Furthermore, it is doubtful whether the agreement between the Indian Government and ICRISAT is specifically enforceable as such in domestic courts, particularly when the agreement does not form part of any domestic legislation. The case of *Dadu v. State of Maharashtra* (AIR 2000 Supreme Court 3203) relied upon by the appellant has no bearing on the issues which arise for consideration in the case before us. In that case, the constitutional validity of section 32-A of the Narcotics Drugs and Psychotropic Substances Act, 1985 which prohibited appellate Courts from suspending sentence despite the appeal being admitted was questioned. The impugned section clearly ran contrary to the provisions of the Criminal Procedure Code which allowed the appellate courts discretionary powers to suspend sentences. One of the arguments raised by the Respondent-State to justify this apparent contradiction was that the section had been enacted in discharge of the Government of India's international obligations under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. The Court held that the Convention clearly and unambiguously showed that the Convention was made subject to 'constitutional principles and the basic concept of the legal system prevalent in the polity of the member country'. The State's argument was rejected as it was found as a fact that there was no international agreement which obliged countries, notwithstanding the constitutional principles and basic concept of its legal system, to put a blanket ban on the power of the Court to suspend the sentence awarded to a criminal under the Act. There was no conflict between the Government's international obligation and the domestic law. In the present case there is no question of any conflict. What is sought for, on the other hand, is an enforcement of a clause in an international agreement.

[16] The Court, accordingly, held that the writ petition of the Appellant was not maintainable against ICRISAT.

The Court, while dismissing the Appellant's case, held that it did not find the Personnel Policy Statement framed by ICRISAT for dealing with internal discipline in any way violating the terms of the agreement between India and ICRISAT.

Balancing environment and development – Disclosures, transparency and compensation in environmentally sensitive projects – Precautionary principle – Principle of "harm"

M.C. MEHTA v. UNION OF INDIA AND OTHERS

Supreme Court of India, 18 March 2003
AIR 2004 Supreme Court 4016

Facts

Mining activity was being carried out in the vicinity of Delhi which was on the periphery of Aravalli hills, an environmentally sensitive zone. Accordingly, certain norms and guidelines were framed by the State Pollution Control Boards of Delhi and Haryana to regulate and monitor the mining activity. These norms and guidelines were set by the State Pollution Control Boards pursuant to an earlier order of the Supreme Court of India on 20 November 1995. Despite this, indiscriminate mining activity was going on. An Expert Committee technically assessed the status and impact of the mining activity within this zone. The Supreme Court of India relied heavily on this report and the recommendations to assess the rate of compliance on a case-by-case basis. The decision of the Supreme Court primarily looked at the compliance standards pursuant to its earlier order, as mentioned above. Each mining unit was examined on a case-by-case basis taking into account the stipulated conditions. The Court also established a continuing monitoring mechanism and stated, "Violation of any of the conditions would entail the risk of cancellation of mining lease. The mining activity shall continue only on strict compliance of the stipulated conditions". The Court also decided to continue to hear the case again after receiving the reports of the Monitoring Committee.

Reasoning of the Court

While listing the legal parameters, the Court referred to both the Constitutional requirement[17] and India's international obligations under various international con-

[17] See paras 45, 46, and 47. Article 48-A of the Constitution of India stipulates that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country; Article 51-A, *inter alia*, provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures. Article 21 providing for the "right to life" also includes provision for the most vital necessities, namely, air, water, and soil.

ventions. The Court also laid emphasis on the strict compliance with statutory norms. The Court noted:

> "The definition of 'sustainable development' which Brundtland gave more than three decades back still holds good. The phrase covers the development that meets the needs of the present without compromising the ability of the future generation to meet their own needs. In Narmada Bachao Andolan v. Union of India and others (AIR 2000 Supreme Court 3751) this Court observed that sustainable development means the type or extent of development that can take place and which can be sustained by nature/ecology with or without mitigation. In these matters, the required standard now is that the risk of harm to the environment or to human health is to be decided in [the] public interest, according to a 'reasonable person's' test."

There are a number of key components of the strict compliance standard in the field of environment, particularly in mining activity. These, as listed and analyzed by the Court, are "transparency", "good faith", "accountability", "restoration", and "compensation".

The Court referred to the "environment and development" debate and pointed out that they were "not enemies". It noted:

> If, without degrading the environment or minimizing adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development, in that eventuality, the development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc., including the need to improve employment opportunities and the generation of revenue. A balance has to be struck.

The Court, however, observed:

> […] Principle 15 of the Rio Conference of 1992 relating to the applicability of the precautionary principle which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing effective measures to prevent environmental degradation is required to be kept in view. In such matters, many a time, the option to be adopted is not very easy or in a straitjacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to the economic interest. In case of doubt, however, protection of [the] environment would have precedence over the economic interest. [The] [p]recautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented

even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment.[18]

Scope and application of the concept of double taxation avoidance agreements

COMMISSIONER OF INCOME TAX v. P.V.A.L. KULANDAGAN CHETTIAR

Supreme Court of India, 26 May 2004
AIR 2004 Supreme Court 3411

Facts

The Respondent, a resident of India, owned immovable properties in Malaysia. During the course of the income-tax assessment year, the respondent earned income from these Malaysian properties and also earned short-term capital gains by selling part of his immovable property located in Malaysia. Both these incomes of the respondent were assessed as taxable in India by the Income Tax Officer. The respondent filed an appeal before the Commissioner of Income Tax challenging the decision of the Income Tax Officer. The Commissioner held that under Article 7(1) of the Agreement between the Government of India and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income[19] (hereinafter "Double Taxation Avoidance Agreement"), unless the respondent had a permanent establishment of the business in India, such a business income in Malaysia could not be included in the total income of the respondent assessee and, therefore, no part of the capital gains arising to the respondent in the foreign country could be taxed in India.[20] Both the Income Tax Tribunal and the High Court upheld the view taken by the Commissioner of Income

[18] It may be noted that from the "precautionary principle" the Court had moved towards the question of "harm". It did not go into the definitional aspects of "harm", i.e., whether it should be "significant" harm, "grave" harm or an "irreversible" harm. The legal analysis of "harm" has been extensively debated within international law, in particular within the International Law Commission (ILC); see the ILC's commentary to its 1994 draft articles on *International Liability for Injurious Consequences arising out of Acts Not Prohibited by International Law*, Yearbook of International Law Commission, 1994, Vol.2, pt.2; also refer to the ILC's commentary on the draft article 7 of the *Law of the Non-Navigational Uses of the International Watercourses* , Yearbook of International Law Commission, 1994, vol.2, pt.2.

[19] The Treaty was signed in October 1976 and became operational from the fiscal year 1 April 1977. See Para 12 which incorporated the arguments of the respondent.

[20] The Income Tax Department had argued that wherever the enabling words such as "may be taxed" were used there was no prohibition or embargo upon the authorities exercising powers under the Indian Income Tax Act, 1961 from assessing the category or class of income concerned. In support of this view, the Department had referred to the commentaries on the Articles of the Model Convention of 1977 on Avoidance of Double Taxation presented by the Organization for Economic Co-operation and Development (OECD). The Madras High Court had rejected this reference, stating that it would not be a safe or acceptable guide or aid for such construction.

Tax on the ground that the provisions of the Double Taxation Avoidance Agreement would alone determine the issue. The Income Tax Department appealed to the Supreme Court of India pointing out that the Double Taxation Avoidance Agreement provided enough flexibility to tax the respondent's income from an immovable property located in Malaysia. The case brought into focus, within the framework of the bilateral agreement, two different methods of avoidance of double taxation in two different jurisdictions, namely, (a) the credit method and (b) the avoidance method.[21] While the Income Tax Department continued to hold the view that both methods are incorporated in the Agreement, the respondent emphasized in the plea that the Agreement provided exclusively for the "avoidance" method. The Supreme Court of India upheld the respondent's view and dismissed the Department's case.

Reasoning of the Court

The first question posed by the Court was regarding the nature of the principle forming the basis for the functioning of the Double Taxation Avoidance Agreement. The Court referred to the traditional view with regard to the concept of "double taxation", i.e., wherein "two or more taxes must be (1) imposed on the same property (2) by the same State or Government (3) during the same taxing period, and (4) for the same purpose. There is no double taxation strictly speaking where (a) the taxes are imposed by different States (b) one of the impositions is not a tax (c) one tax is against property and the other is not a property tax, or (d) the double taxation is indirect rather than direct." The Court noted that the Indian law on the subject had travelled very far from this traditional stage of double taxation avoidance framework.

It further noted that section 90 of the Indian Income Tax Act. 1961 (hereinafter "Income-tax Act") provided for "Agreement with foreign countries" in cases where (a) for granting of relief in respect of income on which both income tax under the Act and income tax in that country have been paid, or (b) for the avoidance of double taxation of income under the Act and under the corresponding law in force in that country, or (c) for exchange of information for the prevention of evasion or avoidance of income tax chargeable under the Act or under the corresponding law in force in that country, or investigation of a case of such evasion or avoidance, or (d) for recovery of income tax under the Act and under the corresponding law in force in that country. Section 90(2) also provided that where such agreement has been entered into for granting relief from tax, or as the case may be, avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent that they are more beneficial to that assessee. In

[21] See Para 9; The Court noted the argument of the Income Tax Department (through the Attorney General) that these two methods would have to be decided with reference to the provisions in the Agreement; "that wherever the expression used in the Treaty is 'income shall be taxable only in' or 'shall not be taxed in' or 'shall be exempt from tax in' what is contemplated is the avoidance method; that, on the other hand, whenever the expression used is 'income may be taxed' what is contemplated is the relief or the credit method. However, the Court pointed out that 'Art. XXII (2) of the Indo-Malaysian Treaty also indicates that the said Treaty contemplated the credit method'."

other words, in a given case, the Agreement would prevail over the provisions of the Income-tax Act. The Court clarified the legal position between the Income Tax Act and the Agreement in the following way:[22]

> Where liability to tax arises under the local enactment provisions of sections 4 and 5 of the Act which provide for taxation of the global income of an assessee chargeable to tax thereunder, the liability is subject to the provisions of the agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation as envisaged under section 90 to the contrary, if any, and such an agreement will act as an exception to or modification of sections 4 and 5 of the Income Tax Act … In case of any conflict between the provisions of the Agreement and the Act, the provisions of the Agreement would prevail over the provisions of the Act, as is clear from the provisions of section 90 (2) of the Act.[23]

The Court had to deal with some of the basic principles relating to international taxation, in particular on capital gains. While noting the arguments that "tax actually paid" and "tax payable" were two different concepts, the Court noted:

> […] [T]hat under the principles of international law, the fiscal jurisdiction of a State to tax any form of income generally arises from either the location of the source of income within its territory or by virtue of the residence of the assessee within its territory. However, in contrast to the State where income is sourced, the country residence is entitled to tax the assessee on its global income and, in other words, the assessee is subject to unlimited fiscal liability in the State of residence … Thus, the State of which the assessee is a resident has inherent jurisdiction to tax the assessee's income from property situated in another State.

The Court, while dismissing the appeals, stated:[24]

> Taxation policy is within the power of the Government and section 90 of the Income Tax Act enables the Government to formulate its policy through treaties entered into by it and even such treaty treats the fiscal domicile in one State or the other and, thus, prevails over the other provisions of the Income Tax Act. It would be un-

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[22] See Para 8.

[23] See Para 9. The Agreement would not prevail in all cases. The forms of income could vary and may not otherwise be specified in the Treaty. Accordingly, it was argued, "… Art. XXII (2) is not a residuary article in respect of forms of income not otherwise specified in the Treaty; that wherever it was intended that there should be a residuary clause, it has been specifically so provided in various other Treaties, most Treaties, including the OECD Model Treaty and the Indo-Mauritius Treaty, have specifically residuary clauses in addition to the Art. XXII (2) where it is stated that subject to the provisions of paragraph 2 of Article XXII items of income of a resident of a contracting State, wherever arising, which are not expressly dealt with the foregoing articles of this Convention, shall be taxable only in that Contracting State".

[24] See Paras 21 and 22.

necessary to refer to the terms addressed in OECD or in any of the decisions of foreign jurisdiction or in any other agreements.

Privileges and immunities of an international organization – whether International Development Association amenable to writ jurisdiction of municipal courts?

TRACTOR & FARM EQUIPMENT LTD. v. SECRETARY TO GOVERNMENT OF ASSAM, DEPARTMENT OF AGRICULTURE, GAUHATI AND OTHERS

High Court of Gauhati, Assam (India), 22 January 2004
AIR 2004 Gauhati 73

Facts

The issue related to the award of a contract for the supply of 449 tractors to the Department of Agriculture, Government of the State of Assam to be procured by the Government of Assam on funds being made available to it, on credit by the International Development Association (IDA). This credit was being made available under a tripartite agreement between the Government of India, the Government of the State of Assam, and the IDA.

At the tendering stage, dispute arose among some bidders as regards the specification of the tractors to be supplied. One of the bidders filed a writ petition in the Gauhati High Court. The legal issue was whether the IDA, being an international organization and with certain privileges and immunities under the International Development Association (Status, Immunities and Privileges) Act, 1960, would be amenable to the writ jurisdiction under Article 226 of the Indian Constitution.

Reasoning of the Court

The Court, *inter alia*, while tracing the origin and scope of work of the IDA, i.e., to assist developing countries in various project and developmental activities by providing credit, considered the legal issue as to whether it was immune from the judicial process of India. While on this aspect, the Court noted:[25]

> […] [I]t is pertinent to note that immunity from judicial process for an independent sovereign State rests on the principles of international law. Such immunity is granted on the ground that the exercise of jurisdiction of a Court over the sovereign independent State would be incompatible with the dignity and independence of the superior authority enjoyed by every sovereign State. This principle is not founded on any technical rules of law, but upon broad considerations of public policy, inter-

[25] See Para 81. The Court, on a conceptual note, stated, "Thus, no activities carried out, in India, by a foreign State or international body is wholly immune from the judicial process of this country except to the extent as the law enacted in this behalf may, otherwise, indicate". See Para 86.

> national law and comity. Unlike English Courts, where immunity is primarily based on convention and is almost absolute in nature, such immunity is governed, in India, by the provisions of the law enacted by Parliament in terms of the provisions of the Constitution. It is Article 253 which forms, in India, the basis for grant of such immunity. According to this Article, Parliament has the power to make law for the whole or any part 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. Except limited immunity, which the Constitution of India gives to its own heads of the State, no other immunity can be given to any one including an independent sovereign State without an Act of the Parliament framed in terms of Article 253. No wonder, therefore, that for the purpose of giving immunity to various organizations of the United Nations Organisation, the United Nations (Privileges and Immunities) Act, 1947, exists.

The Court, after examining the International Development Association (Status, Immunities and Privileges) Act, 1960, pointed out that "This Act confers some status, immunities and privileges on the IDA, its officers and employees. Certain immunities will naturally mean that the immunity of the IDA is not absolute. In other words, it is, indeed, subject to the judicial process of this country and except in respect of the immunities, which have been granted under the said Act, the IDA cannot claim any other immunity.[26]

While looking at the role of the IDA in the whole transaction in question, the Court stated:[27]

> In the case at hand, the supply of tractors is not a mere commercial transaction. It is the State which has floated the tender inviting bids. The IDA does not remain as a mere financier or provider of funds. It, rather, intrinsically involves itself in the selection of the bidders and the material supplied. In a situation, such as this, when the provider of funds involves itself so deeply in the activities of the State or associates itself inseparably with the whole selection process of the State, it cannot be said that such activities of [the] IDA will not be amenable to the writ jurisdiction under Article 226. By involving itself in the whole selection process, the IDA cannot be regarded as a person not amenable to the writ jurisdiction under Article 226.

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[26] See Para 87.

[27] Para 101. The Court also clarified that "We wish to make it clear, while deciding the question of immunities of the IDA from the writ jurisdiction of the High Court under Art. 226, that this decision of ours is for the limited purpose of the facts of the present case and neither our observations made herein above nor our decision should be regarded as a law having been laid down that the IDA, in all cases, will be regarded as a person within the meaning of Article 226". See Para 107.

OTHER RELEVANT STATE PRACTICE

Measures to Eliminate International Terrorism

Indian Statement to the *Ad Hoc* Committee established by General Assembly Resolution 51/210 of 17 December 1996 at the Sixth Committee of the United Nations General Assembly on 31 March 2003

India, while making a statement in the Sixth Committee, referred to the steps taken by it within the legal framework to tackle International Terrorism. It stated:

> The international community has recognized the need for cooperation among all States in the efforts to eliminate the scourge of terrorism. Toward this end, member States under the aegis of the United Nations have so far successfully developed a legal framework of twelve International Conventions to address specific aspects of international terrorism. India is a party to all these Conventions. The Government of India has also decided very recently to ratify the International Convention for Suppression of the Financing of Terrorism.

As regards India's position on the Comprehensive Convention against International Terrorism, while noting that the *Ad Hoc* Committee had been successful in reaching agreement on most of the provisions of the text of the draft Convention, it stated:

> Yet, some important provisions, namely Article 2 on definitions, Article 2 bis on the scope of the Convention and Article 18 on exclusion of security forces are still outstanding. A review of the outstanding issues done in the last *Ad Hoc* Committee session was very helpful in identifying issues that requires compromises.

On the issue of the relationship of the Comprehensive Convention with earlier Conventions, the Indian position was stated thus:

> On the question of relationship with earlier conventions there appears to be a general agreement that the Comprehensive Convention should not supersede or override, but should add value to and supplement the sectoral conventions. We are supportive of this approach.

Children and Armed Conflict

Indian Statement at the Security Council on 20 January 2004 (responding to the Report of the Special Representative of the Secretary General for Children and Armed Conflict)

The Indian statement, *inter alia*, referred to certain international legal issues, with particular reference to "monitoring and reporting". It stated:

> In the sub-section on monitoring and reporting, there is a conclusion that a body of standards constitutes the basis for monitoring. The list consists of a number of instruments that do not command universal acceptance or adherence. How does the Special Representative expect to deal with monitoring the situation of a Member State that is not Party to the Optional Protocol, or the Statute of the International Criminal Court or the ILO Convention No. 182? The Member State in question, while otherwise committed to the norms and commitments concerning the promotion and protection of the rights of children, would be right in maintaining that it would not be bound by any instrument to which it is not a Party. The Special Representative must recognize that neither he, nor anyone else for that matter, can seek to impose on the Member States the standards derived from these non-universal instruments.
>
> We would like to voice one more concern about the agenda for monitoring and reporting. There is a well-established machinery for dealing with alleged violations of human rights by the government of a State which is Party to a specific human rights instrument. The procedures in this respect are well-known and time honoured. The likely interface between this procedure and the monitoring-reporting mechanism that would come into existence as a result of the Special Representatives recommendations is not at all clear to us. Moreover, the treaty bodies have their own system of dealing with non-compliance by parties of their treaty obligations. There is this ever-present danger of duplication and overlap.

Justice and the Rule of Law: Role of the United Nations

Indian Statement at the Security Council on 6 October 2004

The Indian statement was made in the open meeting of the Security Council on the topic "Justice and the Rule of Law: the United Nations Role". This statement was made in the context of United Nations involvement in post-conflict peace-building exercise. India, while concurring with some aspects of the Secretary-General's Report, stated:

> We agree with the Secretary-General that the careful sequencing of activities relating to rule of law reforms and transitional justice with post-conflict elections is vital, not only to ensure their success and legitimacy but also to preserve the fragile peace processes in societies emerging from conflict. UN peace-keeping operations are envisaged as short-term interventions. While the idea of incorporating components of rule of law reforms and transitional justice activities in a UN Peace-keeping Operation may be unexceptional, we ought to remember that building the rule of law and fostering democracy are long-term processes. These are beyond the capability of personnel traditionally involved in peace-keeping operations. But they can lay a vital foundation if they embody, in their outlook and behavior, a long-standing democratic and multi-cultural tradition.

> In the past decade, the UN has resorted increasingly to establishing a wide range of special criminal tribunals, including *ad hoc* criminal tribunals as subsidiary organs of the Security Council. Their track record has been mixed. In some cases they have succeeded in establishing accountability for perpetrators and instilling greater public confidence in post-conflict societies that have enabled these societies to move forward. The exact balance between retributive justice and an amnesty should not be determined *a priori* or ideologically, but strictly by pragmatic considerations of enduring peace.

International Convention against the Reproductive Cloning of Human Beings

Indian Statement in the Sixth Committee on 21 October 2004

While supporting the promotion of scientific and technological research in the fields of biology and genetics, India supported the idea of banning cloning. It stated thus:

> […] [R]eproductive cloning is [so] unethical, morally unacceptable and contrary to due respect for the human person that it cannot be justified or acceptable. For this reason, India, through a set of ethical guidelines on biomedical research, had banned [the] reproductive cloning of human beings through nuclear transplantation since 1997. We are convinced of the urgent necessity to elaborate an International Convention banning reproductive cloning, for which consensus already exists in the General Assembly.

On the issue of transfer of technology and research in certain vital areas such as stem cells, India stated:

> We live in an era where transfer of technology from the developed to the developing countries has become increasingly difficult to accomplish. Developing countries, especially those of which have a strong scientific and industrial base, have been facing ever-increasing overt and covert restrictions on their technological research in certain vital areas. For these reasons, we do not agree with the view that research should be allowed only on certain stem cells and not on another category of stem cells. Researchers must have all options and science must decide the relative efficacies of different kinds of stem cells. We believe that every country has a right to choose appropriate technological methods and procedures as long as those are in tune with universally accepted standards of human dignity.

India, while reiterating its legal and ethical position on cloning, concluded:

> We would like to reiterate our position that different forms and methods of cloning other than reproductive cloning can be regulated by national legislation with stringent conditions and regulatory approvals on a case by case basis.

Convention on Jurisdictional Immunities of States and Their Property

Indian Statement in the Sixth Committee on 25 October 2004

While supporting the adoption of the Convention on Jurisdictional Immunities of States and their Property, India stated thus:

> This draft Convention represents a fair and delicate balance between the concerns expressed by Member States. The draft Convention does not give complete satisfaction to every Member State; yet it satisfies, at a broader level, every State as it has been evolved on consensus. My delegation recognizes that difficult concessions have been made by Member States in arriving at consensus. The draft convention is, by no means, perfect; yet we can live with it.

India favoured the adoption of the draft articles on Jurisdictional Immunities in the form of a Convention. It noted:

> […] [W]e believe that the rules can be stipulated with clarity, uniformity and certainty in a Convention. We also believe that a binding legal instrument on Jurisdictional Immunities of States and Their Property would clarify the scope and nature of immunities of States and their property with regard to legal proceedings concerning their commercial activities. Such a an instrument will be a significant contribution to the development of international law, keeping in view the interest of the developing countries.

IRAN[28]

JUDICIAL DECISIONS

Use of force – Right of self-defence – Armed attack – Necessity – Proportionality – Legitimate military target – Freedom of commerce and navigation – Reparation

CASE CONCERNING OIL PLATFORMS (IRAN v. THE UNITED STATES)[29]

International Court of Justice
Judgment of 6 November 2003

Facts

On 2 November 1992, Iran instituted proceedings against the United States in respect of a dispute arising out of the attack on and destruction of three offshore

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[28] Contributed by Jamal Seifi, Faculty of Law of Shahid Beheshti (National) University of Iran.
[29] <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>

oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively.

In its Application, Iran contended that these acts constituted a "fundamental breach" of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter "the 1955 Treaty"). The Application invoked, as a basis for the Court's jurisdiction, Article XXI, paragraph 2, of the 1955 Treaty, which provided: "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

The United States raised a preliminary objection to the jurisdiction of the Court. By a Judgment dated 12 December 1996 the Court rejected the preliminary objection of the United States according to which the 1955 Treaty did not provide any basis for the jurisdiction of the Court and found that it had jurisdiction, on the basis of Article XXI, paragraph 2, of the 1955 Treaty, to entertain the claims made by Iran under Article X, paragraph 1, of that Treaty but not on the basis of Articles 1 and IV (1), as originally contended by Iran. Article X (1) provided: "Between the territories of the two High Contracting Parties, there shall be freedom of commerce and navigation."

Subsequently, the United States raised a counter-claim concerning Iran's actions in the Persian Gulf during 1987-88 which, among other things, involved mining and other attacks on US flag or US owned vessels, which the Court declared admissible.

Subsequent to the Court's judgment of 1996 on jurisdiction, Iran limited its claim and contended that in attacking and destroying the oil platforms on 19 October 1987 and 18 April 1988, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bore responsibility for the attacks; and that the United States was under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused.

As a counter-claim, the United States contended that, in attacking vessels in the Persian Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the latter breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty; and that it was under an obligation to make full reparation to the United States for its breach of the 1955 Treaty.

The Court pointed out that both Iran's claim and the counter-claim of the United States could be upheld only so far as a breach or breaches of Article X, paragraph 1, of the 1955 Treaty might be shown, even though other provisions of the Treaty may be relevant to the interpretation of that paragraph.

Factually, the dispute related to a period in the Iran-Iraq war which later became known as the "Tanker War". In the period between 1984 and 1988, a number of

commercial vessels and warships of various nationalities, including neutral vessels, were attacked by aircraft, helicopters, missiles, or warships, or struck mines in the waters of the Persian Gulf. Naval forces of both belligerent parties were operating in the region, but Iran had denied responsibility for any actions other than incidents involving vessels refusing a proper request for stop and search. The United States attributed responsibility for certain incidents to Iran, whereas Iran suggested that Iraq was responsible for them.

Two specific attacks on shipping were of particular relevance in this case. On 16 October 1987, the Kuwaiti tanker *Sea Isle City*, reflagged to the United States, was hit by a missile near the Kuwait harbour. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked two Iranian offshore oil production installations in the Reshadat ["Rostam"] complex. On 14 April 1988, the warship USS *Samuel B. Roberts* struck a mine in international waters near Bahrain while returning from an escort mission; four days later the United States employed its naval forces to attack and destroy simultaneously the Nasr ["Sirri"] and Salman ["Sassan"] complexes.

These attacks by United States forces on the Iranian oil platforms were claimed by Iran to constitute breaches of the 1955 Treaty; and the attacks on the *Sea Isle City* and the USS *Samuel B. Roberts* were invoked in support of the United States' claim to act in self-defence.

Application of Article XX, paragraph 1 (d), of the 1955 Treaty

The United States had relied on Article XX, paragraph 1(d), of the Treaty as determinative of the question of the existence of a breach of its obligations under Article X. The paragraph provided that:

> The present Treaty shall not preclude the application of measures:
> … (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

Although the Court considered that Article XX, paragraph 1(d), could constitute a possible defence on the merits, i.e., whether the United States actions were justified in protecting the essential security interests of the United States, it began by an inquiry into the content and application of this paragraph, even before examining whether the United States had committed a breach of Article X(1) of the Treaty in the first place. The Court explained its reversal of the logical sequence of consideration of the matter on the ground that:

- The original dispute between the Parties related to the legality of the actions of the United States, in the light of international law on the use of force; and
- The importance of such matters to the international community was obvious (Paras. 37-38).

The Court held that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of, *inter alia*,

Article XX, paragraph 1(d) of that Treaty extended, where appropriate, to the determination as to whether the action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, to the provisions of the Charter of the United Nations and customary international law (Paras. 40-41).

The Court therefore first examined the application of Article XX, paragraph 1(d), of the 1955 Treaty which, in the circumstances of this case, involved the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence. The Court stated that on the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considered to be "necessary" for the protection of its essential security interests. The Court, however, stated that in the case in dispute, the question whether the measures taken were "necessary" overlapped with the question of their validity as acts of self-defence. This reasoning provided an opportunity for the Court to examine whether the United States' actions in attacking Iranian Oil Platforms in the Persian Gulf constituted an act of self-defence. If not, the United States' actions would be an unlawful use of force and unjustified by Article XX.1 (d) of the Treaty (Para. 43).

Attack of 19 October 1987 on Reshadat

The first installation attacked, on 19 October 1987, was the Reshadat complex, which was also connected by submarine pipeline to another complex, named Resalat. At the time of the United States attacks, these complexes were not producing oil due to damage inflicted by prior Iraqi attacks. Iran had maintained that repair work on the platforms was close to completion in October 1987. The United States had, however, challenged this assertion. As a result of the attack, one platform was almost completely destroyed and another was severely damaged and, according to Iran, production from the Reshadat and Resalat complexes was interrupted for several years.

In its communication to the Security Council at the time of the attack, the United States explained its attack as a consequence of "a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation"; it referred in particular to a missile attack on the *Sea Isle City* as being the specific incident that led to the attack on the Iranian platforms. Before the Court, it had based its arguments specifically on the attack on the *Sea Isle City*, but had continued to assert the relevance of the other attacks.

The Court pointed out that in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States had to show that "attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. The United States must also show that its actions were necessary and proportional to the armed

attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence." (Para 51)

Having examined with great care the evidence and arguments presented on each side, the Court found that the evidence indicative of Iranian responsibility for the attack on the *Sea Isle City,* either individually or taken cumulatively with other attacks on the shipping in the region, was not sufficient to support the contentions of the United States. Thus, the Court concluded that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City*, had not been discharged (Para. 61).

Attacks of 18 April 1988 on Nasr and Salman and "Operation Praying Mantis"

The second occasion on which Iranian oil installations were attacked was on 18 April 1988, with the attacks on the Salman and Nasr complexes. Iran stated that the attacks caused severe damage to the production facilities of the platforms; that the activities of the Salman complex were totally interrupted for four years, its regular production being resumed only in September 1992, and reaching a normal level in 1993; and that activities in the whole Nasr complex were interrupted and did not resume until nearly four years later.

The nature of the attacks on the Salman and Nasr complexes, and their alleged justification, was presented by the United States to the United Nations Security Council in a letter from the United States Permanent Representative of 18 April 1988, which stated, *inter alia,* that the United States had "exercised their inherent right of self-defence under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf", namely, the mining of the USS *Samuel B. Roberts*. According to the United States, "This [was] but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf" (Para. 67).

The Court noted that the attacks on the Salman and Nasr platforms were not an isolated operation aimed simply at the oil installations, as had been the case with the attacks of 19 October 1987; they formed part of a much more extensive military action, designated "Operation Praying Mantis", conducted by the United States against what it regarded as "legitimate military targets". Armed force was used, and damage done to a number of targets, including the destruction of two Iranian frigates and other Iranian naval vessels and aircraft (Para. 68).

The Court examined whether the United States had discharged the burden of proof that the USS *Samuel B. Roberts* was the victim of a mine laid by Iran. The Court noted that mines were being laid at the time by both belligerents in the Iran-Iraq war, so that evidence of other mine-laying operations by Iran was not conclusive as to the responsibility of Iran for this particular mine. The main evidence that the mine struck by the USS *Samuel B. Roberts* was laid by Iran was the discovery of moored mines in the same area, bearing serial numbers matching other Iranian mines, in particular those found aboard the vessel *Iran Ajr*. This evidence was regarded by the Courts as highly suggestive, but not conclusive (Para. 71).

The main question for the Court was whether that incident sufficed in itself to justify action in self-defence, as amounting to an "armed attack". The Court stated that it did not "exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence'; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS *Samuel B. Roberts*, the Court is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an 'armed attack' on the United States by Iran, in the form of the mining of the USS *Samuel B. Roberts*" (Para. 72).

Criteria of necessity and proportionality

Further, the Court pointed out that in the present case a question of whether certain action is "necessary" arises both as an element of international law relating to self-defence and on the basis of the actual terms of Article XX, paragraph 1(d), of the 1955 Treaty, whereby the Treaty does "not preclude … measures … necessary to protect [the] essential security interests" of either party. The Court, therefore, turned to the criteria of necessity and proportionality in the context of the international law on self-defence.

The Court indicated that it was not convinced that the evidence available supported the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms. In any case, the Court held that as regards the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*, it was not satisfied that the attacks on the platforms were necessary to respond to these incidents.

As to the requirement of proportionality, the Court found that as a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither "Operation Praying Mantis" as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, could be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.

Thus, the Court concluded that the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 could not be justified, under Article XX, paragraph 1(d), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty (Paras. 76-77).

Iran's claim under Article X, paragraph 1 of the 1955 Treaty

After considering the United States' justifications, the Court considered Iran's claim as to whether the United States had breached its obligations under Article X

(1) of the Treaty, disrupting freedom of commerce between the territories of the two Parties, by attacking the oil platforms. The Court had to decide that:

- The platforms were engaged in commerce;
- The United States' attacks took place against commercial facilities;
- The attacks disrupted the platforms' commercial activities; and
- As a result, freedom of commerce between the territories of Iran and the US was disrupted as guaranteed by Article X (1) of the Treaty.

The Court concluded that:

- The word 'commerce' in Article X, paragraph 1 of the Treaty of 1955 included commercial activities in general and not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce;
- The protection of Article X (1), however, embraced the *freedom of commerce* but was limited by the phrase 'between the territories of the two High Contracting Parties';
- Acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and storage with a view to export should be regarded as disrupting freedom of commerce;
- The activities of the platforms should be regarded, in general, as commercial in nature; it did not, however, necessarily follow that any interference with such activities involved an impact on the freedom of commerce between the territories of Iran and the United States;
- Where a State destroys another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce. In destroying the platforms, whose function, taken as a whole, was precisely to produce and transport oil, the military actions made commerce in oil, at that time and from that source, impossible, and to that extent prejudiced freedom of commerce. While the oil, when it left the platform complexes, was not yet in a state to be safely exported, the fact remains that it could be already at that stage destined for export, and the destruction of the platform prevented further treatment necessary for export;
- The Court, therefore, found that the protection of freedom of commerce under Article X, paragraph 1 of the 1955 Treaty applied to the platforms attacked by the United States, and the attacks, thus, impeded Iran's freedom of commerce (Paras. 79-89).

However, on consideration of the question of interference with freedom of commerce "between the territories of the High Contracting Parties", the Court held that no such interference took place, because:

- At the time of the attack of 19 October 1987 no oil whatsoever was being produced or processed by the Reshadat and Resalat platforms, since these had been put out of commission by earlier Iraqi attacks; and
- The embargo imposed by Executive Order 12613 was already in force when the attacks on the Salman and Nasr platforms were carried out; and that it had not been shown that the Reshadat and Resalat platforms would, had it not been for the attack of 19 October 1987, have resumed production before the embargo was imposed (Paras. 91-92)

The Court, thus, concluded that:

> [W]ith regard to the attack of October 19, 1987 on the Reshadat platforms, that there was at the time of those attacks no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms, inasmuch as the platforms were under repair and inoperative; and that the attacks cannot therefore be said to have infringed the freedom of commerce in oil between the territories of the High Contracting Parties protected by Article X, paragraph 1 of the 1955 Treaty, particularly taking into account the date of entry into force of the embargo effected by Executive Order 12613. The Court notes further that, at the time of the attacks of April 18, 1988 on the Salman and Nasr platforms, all commerce in crude oil between the territories of Iran and the United States had been suspended by that Executive Order, so that those attacks also cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the 1955 Treaty.
>
> The Court is therefore unable to uphold the submissions of Iran that in carrying out those attacks the United States breached its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty. In view of this conclusion, the Iranian claim for reparation cannot be upheld. (Para. 98)

United States' Counter-Claim

In the view of the Court, the United States had to show that: (a) its freedom of commerce or freedom of navigation between the territories of the High Contracting Parties to the 1955 Treaty was impaired; and that (b) the acts which allegedly impaired one or both of those freedoms are attributable to Iran. The Court noted that the provision of Article X (1) contained an important territorial limitation: "In order to enjoy the protection provided by that text, the commerce or the navigation is to be *between the territories* of the United States and Iran. The United States bore the burden of proof that the vessels which were attacked were engaged in commerce or navigation between the territories of the United States and Iran."

The Court then examined each of Iran's alleged attacks from the standpoint of this requirement of the 1955 Treaty and concluded that none of the vessels described by the United States as being damaged by Iran's alleged attacks was engaged in commerce or navigation "between the territories of the two High Contracting Parties". Therefore, the Court concluded that there had been no breach of Article X, para-

graph 1, of the 1955 Treaty in any of the specific incidents involving the ships referred to in the United States pleadings.

The United States had also presented its claim in a generic sense. It had asserted that as a result of the attacks on US and other vessels, laying mines, and otherwise engaging in military actions in the Persian Gulf, Iran rendered the Gulf unsafe and, thus, breached its obligation with respect to freedom of commerce and freedom of navigation which the United States should have enjoyed under Article X, paragraph 1, of the 1955 Treaty. The Court observed:

> […] While it is a matter of public record that as a result of the Iran-Iraq war, navigation in the Persian Gulf involved much higher risks, that alone is not sufficient for the Court to decide that Article X, paragraph 1, was breached by Iran. It is for the United States to show that there was an *actual impediment* to commerce or navigation *between* the territories of the two High Contracting Parties. However, the United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran. The Court also notes that the examination above of specific incidents shows that none of them individually involved any interference with the commerce and navigation protected by the 1955 Treaty; accordingly the generic claim of the United States cannot be upheld. (Para. 123)

The Court, thus, found that the counter-claim of the United States concerning the breach by Iran of its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty, whether based on the specific incidents listed or as a generic claim, must be rejected.

Interestingly, while rejecting the claim of Iran and the counter-claim of the United States, the Operative Paragraph of the Judgment included the following finding, which was not specifically included in the relief sought by Iran:

> [The Court] finds that the actions of the United States of America against Iranian oil platforms on October 19, 1987 and April 18, 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 (d), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force; finds further that the Court cannot, however, uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the obligations of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld… (Para. 125, Emphasis added)

Implementation of international treaties in domestic law

THE EFFECTS OF SECURITY COUNCIL RESOLUTIONS IN NATIONAL LAW

Judgement of November 2002 of Branch 213 of the Tehran Court

Introduction

Principles 77 and 125 of the Constitution of the Islamic Republic of Iran require that international treaties must be ratified by the Parliament and signed by the President. At the same time, Article 9 of the Civil Code of Iran provides that treaties duly ratified by Iran shall have the force of law. However, the place of treaties within the legal system of Iran is very much in need of theoretical and judicial exploration and pronouncements. From a domestic law point of view, it is clear that treaties do not have the force of higher laws such as the Constitution. However, the force of treaties in the event of conflict with ordinary laws, i.e., parliamentary legislation, is not well developed. Further, the extent to which courts are to apply international law other than treaties that have been ratified by Iran is uncertain.

The Judgment

In a case decided by Branch 213 of Tehran court[30] in 2002, it was held that the obligations arising from binding resolutions of the Security Council of the United Nations constituted binding international obligations applicable in the judicial proceedings before Iranian courts. The dispute, *inter alia*, concerned the propriety of the expropriation of a vessel by a UAE court pursuant to the UNSC resolutions relating to the Iraqi oil embargos and the subsequent transfer of its ownership to an Iranian party. The court held that the seizure of the vessel was done pursuant to Article 24(1) of the Charter of the UN. Further, in accordance with Article 25 of the Charter, all members of the UN, including Iran, were bound by the resolutions of the Security Council. Thus, the court affirmed that the seizure and confiscation was made in accordance with the UN Charter and should, therefore, be respected by an Iranian court.

[30] Unpublished. Information concerning this case is taken from the following article: "Nader Saed, National Enforcement of International Obligations and the Role of Iranian Court" (in Persian), *Journal of Legal Research*, Vol. 6 (2004), pp. 118-122).

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Promotion and Protection of International Investment
Foreign Investment Promotion and Protection Act (FIPPA 2002)

In recent years the Iranian government has embarked upon certain legislative reforms aimed at facilitating foreign investment. An aspect of this reform was the revision of the existing law governing foreign direct investment that resulted in the enactment of the Foreign Investment Promotion and Protection Act (FIPPA) by the Expediency Council in May 2002. The legislation provides an enhanced institutional and procedural framework for dealing with various matters concerning foreign investment.

The Institutional and Procedural Framework

The Act has established a single institution for the admission and supervision of foreign investment. The Act has created "the Organization for Investment and Economic and Technical Assistance of Iran (OIETAI) as the sole official authority for the promotion of foreign investment in the country and for the investigation of all issues pertaining to foreign investment" (Article 5). The OIETAI is run by a Foreign Investment Board ("the Board") for the purpose of receiving and processing applications for foreign investment. The chairman of the Board is the President of OIETA, who is, *ex officio*, the Deputy Minister of Economic Affairs and Finance. Other members of the Board include the Deputy Minister of Foreign Affairs, the Deputy President of the State Management and Planning Organization, the Deputy Governor of the Central Bank, and the Deputy Ministers of relevant ministries, as the case may require (Article 6).

The timetable for review of the foreign investment applications by the Secretariat of the OIETAI is 15 days, during which it will have to conduct a preliminary review, and then send the application and its own recommendations to the Board (note to Article 6). The Board has one month to review the application and notify the applicant of its final decision.

Within the OIETAI, the Act has set up "the Centre for Foreign Investment Services" (hereinafter the "Centre"). In order to "facilitate and expedite issues related to the admission and activity of Foreign Investment in the country, all relevant agencies are required to designate a fully authorized representative to the Organization by the highest authority of the agency. The representatives shall act as the liaison for all issues related to their respective agency vis-à-vis the Organization" (Article 7). The Centre, *inter alia*, is responsible for the provision of information and advice to foreign investors; coordination required with regard to securing necessary licenses and permits; issuance of visas and work permits; issues such as registration of joint venture companies; the importation and repatriation of capital; customs and tax affairs; coordination among different departments of the agencies represented in the Centre, and finally, monitoring the performance of the decisions made with regard to the

foreign investment (Chapter 4 of the Implementing Regulations (hereinafter "Imp. Reg."), Articles 16 and 20).

The Organization is required "to ensure the access of the general public to all information related to investments, foreign investors, investment opportunities, Iranian partners, fields of activity and other information available to the Organization" (Article 21). For this purpose, all ministries, organizations, state-owned enterprises, and other public institutions should provide the Organization with reports on foreign investments implemented, as well as the information required for foreign investors (Article 22).

Investment

Foreign capital is classified as cash, machinery, and equipment, intangibles such as patents and trademarks, the transferable profits of foreign investors in Iran, and other items approved by the Council of Ministers (Article 1). There are two main categories of foreign investment: foreign direct investment (FDI), on the one hand, and all non-direct forms of investment including contractual partnership, buy-back agreements, and turn-key contracts, such as Build-Operate-Transfer (BOT) contracts, in which the profits are solely the result of the economic performance of the project, and do not depend on government or bank guarantees, on the other (Article. 3.b).

Conditions for Admission of Foreign Investment

The foreign investment must satisfy certain conditions before it can enter the country. First, the foreign investment should be useful "for the purpose of development and promotion of productive activities, including industry, mining, agriculture and services." Second, the foreign investment should result in economic growth, technological improvement, the enhancement of manufacturing quality, an increase in employment opportunities, and an increase in exports. Third, the foreign investment must not threaten national security and public interest, damage the environment, disrupt the national economy, or hurt the production by domestic investments. Fourth, the investment should not result in concessionary rights to the foreigner[31] (Article 2(a), (b) and (c)).

Further, the Act sets certain limitations on the market share of foreign investment at the time of issuance of the licence. The Act provides:

> The ratio of value of the goods and services produced by the foreign investments, contemplated in this Act, to the value of the goods and services supplied to the local market, at the time of issuance of the Investment License, shall not exceed 25 per cent in each economic sector and 35 per cent in each field (sub-sector). The fields and extent of investment in each field shall be determined in the by-law to be approved by the Council of Ministers. Foreign Investment for the production of goods

[31] Article 81 of the Constitution of the Islamic Republic of Iran expressly prohibits the granting of concessionary rights to foreigners.

> and services for export purposes, other than crude oil, shall be exempt from the aforementioned ratios. (Article 2(d) of the Act)

Guarantees

A. *Transfer of Capital and Profits*

Foreign investors are allowed to transfer abroad the principal of their capital (Article 13), the profits derived from their investment (Article 14), and the payments of instalments for expenses such as patent rights and trademarks (Article 15). For all types of transfer, the approval of the Board and the confirmation of the Minister of Economic Affairs and Finance are required. The foreign currency required for the transfer of profits or the principal of the capital or other payments can be either directly purchased from the banking system, or obtained by exporting manufactured products, services or other goods (Article. 17).

The Act also provides guarantees against the political risk of adverse legislation concerning non-direct investments, contractual partnership, buy-back, and BOT contracts: If "as a result of promulgation of legislation or Government decrees, the execution of the financial agreements is prohibited or interrupted, the resulting losses, up to the maximum of instalments at maturity, shall be provided for and paid by the Government" (Article 17.2 and Imp. Reg. Art. 30).

B. *Guarantees against Expropriation*

The Act provides guarantees against expropriation (Articles 8 and 9). Article 8 contains the principle of "national treatment" and provides that "foreign investment under the Act shall enjoy all rights, protections and facilities available to local investment." Article 9 states the main guarantees against expropriation:

> Foreign Investments shall not be subject to expropriation and nationalization, unless for public interests, by means of legal process, in a non-discriminatory manner, and against payment of appropriate compensation on the basis of the real value of the investment immediately before the expropriation.

Also, the Act provides for guarantee of purchase and states that in BOT and joint venture contracts, if the governmental agency which is party to the contract is the sole purchaser of the goods and services, or if it supplies those goods and services to the public at subsidized rates, under the applicable regulations, the purchase is guaranteed (Article 4.B.22).

Regional arbitration

The Law on the Establishment of the Tehran Regional Arbitration Centre

This Single Act, enacted by the Expediency Council in May 2003,[32] is in pursuance of ratification of the Agreement between Iran and the Asia-Africa Legal Consultative Organisation (AALCO) concerning the establishment of the Tehran Regional Arbitration Centre (TRAC). The Act provides that Iran shall provide facilities for the establishment of TRAC, which will be based in Tehran. TRAC is to:

- Promote international commercial arbitration in the region;
- Cooperate and coordinate with arbitration institutions in the region;
- Facilitate arbitration under its auspices;
- Assist in enforcement of arbitral awards;
- Assist *ad hoc* arbitrations especially if conducted under UNCITRAL Arbitration Rules.

TRAC will function in accordance with its Arbitration and Administration Rules to be prepared by its Director and approved by the Secretary-General of the AALCO.[33] TRAC has legal personality under Iranian laws and enjoys privileges and immunities close to the immunity accorded to international organizations and their staff. TRAC is administered by a Director who shall have Iranian nationality.

[32] In case of disagreement between the Parliament (the Majlis) and the Guardian Council, which supervises the constitutionality of the Majlis' legislation, the Expediency arbitrates and makes the legislation when necessary to resolve the disagreement.

[33] We understand that it has so been adopted.

JAPAN

JUDICIAL DECISIONS[34]

Refusal of Loan to Non-Permanent Foreign Residents – Meaning of "Racial Discrimination" in the International Convention on the Elimination of Racial Discrimination (CERD)

S. H. v. ASAHI BANK LTD.

Tokyo District Court, 12 November 2001
Hanrei Jihou [Judicial Reports] No. 1789 (2002) 96

The plaintiff, a journalist and citizen of the United States, had stayed in Japan since June, 1990 as a resident "journalist". He cohabited with a Japanese woman and became a parent in August, 1998. In June, 1999, wishing to settle in Japan and to buy an apartment, he applied for a housing loan to the respondent. The respondent rejected his application, because he was not a permanent resident.

The plaintiff claimed an indemnity, arguing that the respondent's act constituted a tort. The Tokyo District Court rejected his claim.

The Court held that the respondent's act was based on reasonable grounds, pointing out that non-permanent foreign residents were not guaranteed permission to stay in Japan after a maximum period of three years. The repayment period of the housing loan was considerably longer and the huge cost of recovery of the loan would have to be borne if the applicant was compelled to leave Japan. It also held that the respondent's act was not contrary to Article 26 of the International Covenant on Civil and Political Rights (ICCPR), taking these circumstances into consideration.

Concerning compatibility with the CERD, the Court held that the respondent's act did not constitute "racial discrimination", because it was based on the status of residence under the Immigration Control and Refugee Recognition Act. It quoted a provision of the Convention, which provides for its non-applicability to "distinction … between citizens and non-citizens" (Article 1(2)). In this context, the Court defined "race" and "colour" as group of persons sharing certain biological characteristics, "national or ethnic origin" as group of persons sharing certain cultural characteristics, and "descent" as ancestors' race, colour, or national or ethnic origin.

The plaintiff appealed to the Tokyo High Court.

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[34] Contributed by Obata Kaoru, Faculty of Law, Nagoya University, Japan; member of the Study Group on Decision of Japanese Courts Relating to International Law.

Tokyo High Court, 29 August 2002
Kinyu Shoji Hanrei [Financial and Commercial Law Reports] No.1150 (2002) 20

The Tokyo High Court rejected the appeal on substantially the same grounds as those of the District Court's judgment. The plaintiff has appealed to the Supreme Court.

Use of Leather Handcuffs as Disciplinary Equipment against a Prisoner – International Standards for Treatment of Prisoners

X. v. THE STATE OF JAPAN

Chiba District Court, 7 February 1996
Shomu Geppo [Monthly Reports of Judicial Matters] Vol.48 (2002), 2086

The plaintiff was allegedly ill-treated by prison officers when he was detained as an accused at the Chiba prison. "Leather handcuffs" and "metal handcuffs" were put on him while he was confined in a protection cell. "Leather handcuffs" consist of a leather belt with two wrist-bands by which both wrists are tied on the back or belly. Protection cells are solid rooms in prison for the isolation of problem prisoners, permanently supervized by video camera. The plaintiff claimed damages. The Chiba District Court accepted a part of his claim.

The Court did not find the fact of ill-treatment and also did not recognize the illegality of the confinement in the protection cell.

Responding to the plaintiff's invocation of the Standard Minimum Rules for the Treatment of Prisoners (SMRTP),[35] which prohibits the application of a "handcuff" as a punishment (para. 33), the Court found no binding nature of the Rules, nor identified the "leather handcuffs" as "handcuff" under the Rules.

The Court, pointing out that the Prison Act and the Regulation for Implement of the Prison Act permits the application of a leather or metal handcuff as far as necessary to prevent outrage, escape or suicide, held that these provisions in themselves were not contrary to the Constitution nor the ICCPR,[36] although Articles 7 and 10 (1) of the latter were regarded as self-executing. The Court, however, keeping Article 18[37] of the Constitution and the above Articles of the ICCPR in

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[35] Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offender, held at Geneva in 1955, and approved by the Economic and Social Council resolutions 633 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[36] The Human Rights Committee, the supervisory body of CCPR, expressed its specific concern over frequent use of protective measures such as leather handcuffs in Japanese prisons. *See Concluding Observations of the Human Rights Committee: Japan, 19/11/98*, U.N. Doc. CCPR/C/79/Add.102, para. 27 (f).

[37] "No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited."

mind, held that use of leather handcuffs and other disciplinary equipment should be kept to the bare minimum, and that application of leather handcuffs during confinement in a protection cell should be "permitted for the strictly limited cases where, for example, the prisoner is expected to commit suicide or self-laceration." The Court found that there was no such necessity and, therefore, the simultaneous use of two handcuffs was illegal in this case.

The respondent appealed to the Tokyo High Court.

Tokyo High Court, 15 February 2001
Shomu Geppo [Monthly Reports on Judicial Matters] Vol. 48 (2002) 2075

In the appeal, the Tokyo High Court maintained the holdings of the Chiba District Court as far as they concerned the existence of the alleged ill-treatment, the legality of the confinement in a protection cell, and the compatibility with the SMRTP.

The Tokyo High Court, pointing out the difference between requirements for the confinement in a protection cell and the application of handcuffs, found no special prohibition for simultaneous use of them. According to the Court, such interpretation was not contrary to the Constitution or the ICCPR.

The Court, therefore, cancelled that part of the Chiba District Court judgment in which it found illegality of simultaneous use, and rejected the plaintiff's claim.

No appeal was made, and the Tokyo High Court's judgment became final.

Compatibility of the Civil Registration Clause in the Act for Relief for Wounded Soldiers and Families of Killed Soldiers with the Principle of Non-discrimination

SEOK SEONG GI AND SUCCESSORS OF LATE JIN SEOK IL v. THE MINISTER OF HEALTH AND LABOUR

Supreme Court, First Petty Bench, 5 April 2001
Shomu Geppo [Monthly Reports on Judicial Matters] Vol. 49 (2003) 1500

The appellant Seok and Mr. Jin were Koreans, and were severely wounded when they served as soldiers or paramilitary personel in the Japanese military during World War II. They claimed for the cancellation of the decision by the Minister of Health to reject their applications for a disability pension under the Act for Relief for Wounded Soldiers and Families of Killed Soldiers. The Minister had applied the civil registration clause which excludes the persons to whom the Civil Registration Act is not applicable. The Supreme Court, sustaining the judgments of the Tokyo District Court and Tokyo High Court, unanimously rejected the appeal.

The Supreme Court, pointing out that the Peace Treaty with Japan[38] identified claims by Koreans as the subject for special arrangements between Japan and Korea

[38] 136 *UNTS*, at 45.

(Article 4, paragraph (a)), found that compensation to former Korean soldiers or paramilitary personnel was to be settled by diplomatic negotiation. Under these circumstances, according to the Court, the civil registration clause was not unreasonable and, therefore, not unconstitutional.[39]

Even after the conclusion of the Agreement on the Settlement of the Problems concerning Properties and Claims, and the Economic Cooperation between Japan and Korea[40] in 1965, both governments considered that compensation to Korean residents in Japan was a matter of the other government's responsibility.

As a result of this gap in interpretation between Japan and Korea, the Court recognized a discriminatory situation between the wounded Koreans resident in Japan and those Japanese under similar circumstances. However, it denied the unconstitutionality of the situation. Referring to its own case law, according to which a wide margin of appreciation should be recognized for legislation on the matter of compensation for war damage,[41] the Supreme Court found that the question as to whether or not similar relief be extended to Koreans resident in Japan was a matter of a highly political and diplomatic nature for which complicated and highly policy-related considerations and judgment would be necessary. The margin for the legislature was not overstepped, and to maintain the civil registration clause was, therefore, not contrary to Article 14[42] of the Constitution.

Justice Fukusawa Takehisa appended a concurring opinion, in which he found the discriminatory situation almost contrary to equality under the law, and wished on humanitarian grounds for a clearer legal solution for wounded former soldiers and paramilitary personnel.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS[43]

Passive Personal Jurisdiction
Amendment of the Penal Code to Reintroduce Passive Personal Jurisdiction

On 7 August 2003, the amended Penal Code entered into force, which revives passive personal jurisdiction that is provided for as follows:

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[39] The Supreme Court referred to its judgment of 28 April 1992, 38 *Shomu Geppo* [Monthly Reports on Judicial Matters] (1992), at 2579, concerning similar claims by Taiwanese; reported in 36 *Japanese Annual of International Law* (1994), at 182.

[40] 583 UNTS, at 173.

[41] Supreme Court (in full bench) judgment of 27 November 1968, 22 *Minshu* [Supreme Court Reports: Civil Cases] (1968), at 2808; an unofficial English translation, last visited on 21 May 2005, is provided at: http://courtdomino2.courts.go.jp/promjudg.nsf?OpenDatabase&Start=676; reported in 13 *Japanese Annual of International Law* (1969), at 121.

[42] "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin…"

[43] Contributed by Aoki Takashi, Faculty of Law, Seiwa University, Chiba, Japan.

Article 3bis: The Code shall apply to those who are not Japanese nationals that commit any of the following crimes outside Japan against Japanese nationals:
(1) Crimes specified in Articles 176 through 179 (forcible indecency, rape, quasi-forcible indecency, quasi-rape, and their attempt) and Article 181 (forcible indecency, etc. resulting in death or bodily injury);
(2) Crimes specified in Article 199 (murder) and their attempt;
(3) Crimes specified in Article 204 (injury) and Article 205 (injury resulting in death);
(4) Crimes specified in Article 220 (arrest and detention) and Article 221 (arrest, etc. resulting in death or injury);
(5) Crimes specified in Articles 224 through 228 (abduction and kidnapping of the minor, abduction and kidnapping for commercial and like purposes, abduction, etc. for ransom, abduction, etc. for the purpose of transporting the abducted person to foreign countries, reception, etc. of an abducted person, and such attempt); and
(6) Crimes specified in Article 236 (robbery) and Article 238 through Article 241 (constructive robbery, robbery through causing unconsciousness, robbery resulting in death or bodily injury, rape on the occasion of robbery and rape on the occasion of robbery resulting in death) and attempt of these crimes.[44]

A clause in the original Penal Code of 1907 that had similar provisions based upon the principle of passive personal jurisdiction was deleted in 1947. During the Diet discussion on the present amendment, a government official explained that the deletion of the clause was justified "in view of the legislation of some other countries and the principle of international faith as enshrined in the new Constitution of Japan (of 1947), or of the domestic social conditions and international situation surrounding Japan at that time." The reason for its revival was that "nowadays, an increasing number of countries have enacted legislation to punish foreigners who have committed certain crimes against their nationals abroad, because these individuals have more chances to fall victim to such crimes outside their home country as international migration of people becomes extensive".[45]

An immediate motive for the recent amendment was the *Tajima* incident that occurred in April 2002. A Japanese officer was killed by two Philippine members of the crew on board the *Tajima*, an oil tanker operated by a Japanese shipping company under the Panamanian flag, on the high seas. The vessel put in at Himeji in the Inland Sea, with Japan Coast Guard officers aboard with the consent of the Philippine government. She was scheduled to leave Himeji two days after her stay at that port. Panama, the flag State, was the only State that could exercise its criminal jurisdiction over the incident because the Japanese Penal Code did not apply to a case where a crime was committed by an alien on a foreign ship on the high seas,

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[44] Unofficial translation. *See* <http://homepage2.nifty.com/paper/lawcollection.htm#collection1>.
[45] *Minutes of the Diet, the House of the Representatives, Committee on Judicial Affairs, No.12*, 13 May 2003, the 156th Session of National Diet, at 7.

and the Philippine law does not provide for its criminal jurisdiction over its national who commits homicide abroad.

Moreover, the Japanese legal system requires the flag State to request extradition in order to take forcible measures such as arrest and detention. More than a month elapsed before the Japanese authorities received the Panamanian request for detention on 14 May and arrested the suspected Filipinos the following day. Pending the receipt of the request, the *Tajima* was obliged to stay at the port to enable her master to keep the suspects in confinement in the exercise of his authority to maintain good order inside the vessel.

The embargo on the *Tajima* caused a hindrance to its satisfactory operation and an intolerable financial loss. Concern that similar incidents might frequently occur in view of a large number of merchant ships under flags of convenience operated in Japanese interests was shared by the government departments and companies concerned. Nevertheless, it would seem that the amendment was intended to improve the protection of Japanese nationals abroad – not only Japanese seamen on "flag of convenience" ships, but also Japanese nationals in general – by incorporating into the law the possibility of the punishment of criminals irrespective of their nationality.

OTHER RELEVANT STATE PRACTICE[46]

Inviolability of consular premises
Incident at the Japanese Consulate General in Shenyang, People's Republic of China

At about 2:00 p.m. on 8 May 2002 (local time), five people attempted to enter the premises of the Consulate General of Japan in Shenyang, People's Republic of China. As similar incidents involving North Korean asylum-seekers had frequently occurred in China, the five people were suspected of being North Korean nationals; they engaged in a struggle with armed Chinese police officers who were on duty around the front gate area. Of these five, two men rushed into the premises of the Consulate General. Two women and a girl also entered the premises, but were soon dragged out of it by the police. Minutes later the armed police entered the premises in an attempt to apprehend the two men and eventually took all of the five people to the Chinese public security department.

The Government of Japan expressed its view that the action of the Chinese side was extremely questionable in the light of the relevant rules of international law and as a matter of humanitarian concern, and regarded it as highly regrettable. It claimed, *inter alia*, that the fact that the police entered the premises of the Consulate General without its head's consent constituted a gross violation of the inviolability of consular premises as stipulated in Article 31 of the Vienna Convention on Consular Relations

[46] Contributed by Aoki Takashi, Faculty of Law, Seiwa University, Chiba, Japan.

of 1963, declaring it unacceptable in view of the circumstances at the time of the incident.[47]

Based on this view, the Government of Japan made repeated high-level demands to China both in Beijing and Tokyo following the incident, and lodged a strong formal protest with the Government of China on the breach of the inviolability of the consular premises, requesting the immediate handover of the five people forcibly taken away from the premises of the Consulate General.

On the other hand, the Chinese side, while identifying those five individuals, claimed that the measures it took in this matter were in accord with the Vienna Convention, and that they were taken away to ensure the Consulate General of safety.

A few days later, the Chinese Government publicly admitted the incident and published the result of its inquiry thereinto, alleging that the Chinese police entered the premises after they obtained the consent of one of the Vice-Consuls, that another official of the Consulate agreed to the apprehension of the persons concerned when he was told of the circumstances, and that the same official expressed his appreciation to the armed police officers.

The Government of Japan was unable to accept this explanation and published an outline of the facts established by an inquiry of the Foreign Ministry: the Japanese Vice-Consul gave his consent neither to the armed Chinese policemen entering the premises, nor to their forcibly apprehending the two men.[48]

Disagreement between the two governments affected the treatment of the five persons. China took the position that it was a matter of priority to ascertain the facts and that Japan should not concern itself with the five persons' departure to a third country. On the other hand, Japan, while maintaining the importance of a humanitarian resolution of their fate, requested China to apologize for the alleged illegal intrusion and to provide the Japanese side with an opportunity to hold a hearing direct with the detained people about their identity and their intended destination.

The conflicting positions concerning the facts and the legality of the Chinese policemen's conduct remained unsettled, although the five persons were eventually allowed to leave China for the Republic of Korea *via* the Philippines two weeks later. The day after their arrest, the Chinese side reportedly confirmed their North Korean nationality officially and stated that China was not required to consult any other country about their departure as it was a matter within its sovereign jurisdiction; further, that China's decision was made in accordance with international law, domestic law, and humanitarian principles based on the will of the individuals concerned.

At a meeting held in Thailand on 19 June 2002, the foreign ministers of the two countries, while repeating their respective positions, agreed to commence consultations for a treaty or agreement on cooperation in consular matters to prevent a recurrence of such incidents. At the first meeting of consultation on the framework of consular cooperation held in the summer, the Chinese side disclosed its perception that both

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[47] *Minutes of the Diet, the House of the Representatives, the Special Committee on Responses to Armed Attacks, No.5*, 9 May 2002, the 154th Session of National Diet, at 6.

[48] Official position of the government and a summary of the facts, dated 13 May 2002, can be obtained from <http: //www.mofa.go.jp/region/asia-paci/china/shengyang.html>.

sides were responsible for the Shenyang incident, thus changing its position to accept its responsibility for the incident. As at the end of 2004 no consular treaty has been concluded.

Right of passage in the territorial sea
Intrusion into the Territorial Sea by an Unidentified Submarine

Early on the morning of 10 November 2004, an unidentified submarine briefly entered Japan's territorial waters off Okinawa Islands. More than two and a half hours later, Maritime Self-Defence Force patrol aircraft were despatched to track it down on an order for a maritime security operation under Article 82 of the Self-Defence Force Law, which provides that the Director General of the Defence Agency has the authority to send MSDF troops on a patrol "to maintain security on the sea".

The issuance of the order was unduly delayed; it was criticized in certain quarters, concerned about the Chinese Navy's increasing build-up and extensive activities including marine scientific research, resource explorations in the seas around Japan, etc. However, the government denied there was a problem with the measures it had taken, stating that it had followed standard procedures.[49]

In 1996, upon the ratification of the UN Convention on the Law of the Sea, the Cabinet approved a guideline that allows the Self-Defence Agency's head to dispense with the normal procedure of convening a Cabinet meeting to mobilize the Self-Defence Forces to chase in Japan's territorial waters a foreign submarine that submerges and does not fly a flag.[50] This is the first time that the guideline has ever been applied.

The government of Japan confirmed on the same day that the submarine was cruising submerged in Japan's territorial sea near the Sakishima Archipelago, some 400 kms south-west of the main island of Okinawa. The Government, having identified its type and nationality as a Chinese nuclear-powered one, lodged a strong protest with China and demanded an apology for the roughly two-hour territorial sea intrusion.[51]

On 16 November China, after admitting that one of its submarines had intruded into Japan's territorial waters, reportedly expressed its regret, attributing the incident to "technical errors" during "the process of normal training". The Japanese Government interpreted it as an apology,[52] and at a meeting of the Foreign Ministers of the two countries that took place on the occasion of the APEC Ministerial Meeting in late November, the Japanese foreign minister stressed the necessity for preventing

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[49] *Minutes of the Diet, the House of the Representatives, Committee on Judicial Affairs, No.4*, 12 November, the 161st Session of National Diet, at 2.

[50] *1997 Bouei Hakusho* [Security of Japan] 181.

[51] Press Conference by the Foreign Minister, 12 November 2004. Only the Japanese version is made public at present, *see* < http://www.mofa.go.jp/mofaj/press/kaiken/gaisho/g_0411. html #5-A>.

[52] Press Conference by the Foreign Minister, 16 November 2004. Only the Japanese version is made public at present, *see* <http://www.mofa.go.jp/mofaj/press/kaiken/gaisho/g_0411.html #7-A>.

reoccurrence of such intrusions, and the Chinese counterpart accepted the protest and agreed on such necessity.[53]

KOREA[54]

JUDICIAL DECISIONS

Copyright

COPYRIGHT PROTECTION OF NORTH KOREAN PUBLICATIONS

The Seoul District Court, 2001GaHap173, 16 January 2004

In December 1993, Yun Jeong Ae, the representative of the Science Encyclopedia Publishing Group in North Korea, licensed Lee Sun Dong, the plaintiff, to reproduce copies of Donguibogam (Renowned Oriental Medicine Textbook) in South Korea for fifteen years in return for US$10,000. On 10 May 1994, the plaintiff, the representative of the Yeo Gang Press, published the translated edition of Donguibogam after revising the North Korean dialects.

In 1997, Kim Yong Tae, an oriental medicine student in the Kyung Hee University, offered Kim Geun Jung to publish the Chinese-Korean edition of Donguibogam from Yeo Gang Press. The edition had been prepared by Kim Yong Tae and his colleagues by incorporating and editing the Chinese edition and its translation. Being aware of the fact, Kim Geun Jung, the representative of the Bubin Publishers Co., published the Bubin edition of Donguibogam after revision by Chinese-Korean translators. The plaintiff filed the case against the representative of the Bubin Publishers Co. and the Chinese-Korean translators for compensation of damages suffered from the infringement of the copyright.

The defendants alleged that the licensing contract between the Science Encyclopedia Publishing Group in North Korea and the plaintiff constituted a "Cooperative Project" under Articles 2 and 4 of the Interchange and Cooperation Act between North and South Korea, and that the said licensing contract was void since it failed to obtain approval from the Minister of Unification and the Minister of Culture and Tourism as required by the same Act.

The Court held that the requirement of approval from the Ministers did not affect the effectiveness of the contract and dismissed the defendants' claim. Therefore, on 16 January 2004, the Seoul District Court held that Kim Geun Jung and Kim Yong

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[53] *APEC Kakuryohkaigi ni okeru Nicchu Gaishokaidan (Gaiyoh)* [Summary of Meeting of Foreign Ministers of China and Japan at the 16th APEC Ministerial Meeting]. Only the Japanese version is made public at present, *see* <http://www.mofa.go.jp/mofaj/kaidan/ g_machimura/apec_g8_04/ j_china_gh.html>

[54] Contributed by Eric Yong-Joong Lee, Professor of International Law, Dongguk University College of Law, Korea

Tae, the defendants, had infringed the copyright of the plaintiff. Accordingly, the Court decided that the defendants and the translators shall compensate the damages suffered through the infringement.

Freedom of Information Act

SHIN CHEON SU AND 98 OTHERS V. THE MINISTER OF FOREIGN AFFAIRS AND TRADE

The Seoul Administration Court, 2002 Ku Hap 33943, 13 February 2004

The case related to compensation for damages suffered from forced engagement in labour during the Japanese occupation of Korea. The petitioners requested the Ministry of Foreign Affairs and Trade to disclose the diplomatic document written during the Korea-Japan talk in 1965 to find out whether their claim had been nullified by the agreement. However, the Ministry had refused to disclose the same document.

The Court said:

(1) The Freedom of Information Act gives people a general right of access to information held and managed by public authorities. The respondent asserts that the document contains the records of the decision making process to reach the final decision by the two nations and that the document is being reviewed by the respondent. However, it does not constitute a reasonable ground for rejecting disclosure of the document. In addition, the document is essential for interpretation of the talk.

The people who suffered damages that resulted from the Japanese colonial rule have not been fully compensated by the Government in accordance with the Compensation Act. Furthermore, failure to claim the damages within the specified period or the fact that the types of damages suffered are not classified in the Act concerned does not constitute reasonable ground for depriving them of the right to claim compensation for damages.

It may be argued that the document meets the confidentiality requirements specified in Clause 2 of Section 1 of Article 7 of the Freedom of Information Act. However, enforcement of the regulation must not limit the public's constitutional "right to know". The materials provided in the Korea-Japan talks would be reliable for determining the right to claim.

The Court also held:

(1) the time remaining for the petitioners to determine such right is limited considering their age; and (2) the need to keep the information confidential has been largely diminished because 30 years has passed since the document was produced. The

diplomatic inconvenience that may arise due to disclosure of the document could be acceptable in the light of the past history of Korea and Japan.

The benefits of disclosing both document Number 36 which contains the provisions on the right to claim agreed in the Korea-Japan talk and documents Numbers 48, 55, 56, and 57 are exceptional and specific. On the other hand, the public interests to be protected by not disclosing such documents are inconsequential compared to those benefits to be held by the petitioners. Therefore, the Government shall disclose the document in accordance with Article 12 of the Freedom of Information Act.

Suffrage

SUFFRAGE FOR OVERSEAS CITIZENS

The Seoul District Court, 2003Na12524, 5 September 2003

The phrase "overseas citizens" refers to those who have Korean citizenship, but have emigrated and have been granted permanent resident status in other countries or have been staying abroad for an extended period of time. Section 2 of Article II of the Constitution states: "The nation shall protect the overseas citizens as specified by law."

The case revolves around the suffrage of Korean residents in Japan whose right to vote has been denied by the Government of Korea.

It may be noted that the offspring of Koreans who had been compelled to move to Japan since the forced affiliation between Korea and Japan in 1910 are no longer treated as foreigners by the Government of Japan. However, their legal rights are not considered to be equal to those of native Japanese. The plaintiffs were permanent residents in Japan of Korean nationality aged 20 and over.

The plaintiffs' position was that pursuant to Articles 2 and 10, Section 1 of Article 11, Articles 24 and 25, Section 1 of Article 41, and Section 1 of Article 67 of the Constitution, the plaintiffs have the right of suffrage and the Government has a duty to enact and enforce legislation for protection of such right. Whereas the registered residents in Korea are governed by the "Election Law", there is no governing law on the absentee voting procedure for the overseas citizens.

The absence of any legislation or inadequate legislation for such procedure constitutes an illegal act of the Government which infringes the equal rights and suffrage rights of the plaintiffs.

The Court ruled that the grounds of denying the suffrage right of overseas citizens are summarized as follows: (1) since suffrage is associated with national obligations such as military service, tax payment, etc, it cannot be granted to overseas citizens who do not fulfil those obligations; (2) since the election campaign overseas cannot be controlled as strictly as in Korea, fairness in the election process is hard to achieve; (3) the entire absentee voting process for overseas citizens including the nomination of candidates, election campaigning, and sending and collecting ballots overseas is not sufficiently practicable to be performed, and (4) considering the reality of Korea's

being divided, granting suffrage to overseas citizens will motivate some parties to influence the result in favour of their interests in North Korea by casting votes to close the marginal gap in the number of ballots.

Limiting the suffrage to overseas citizens is not only legitimate for the purpose of legislation, but also balanced between the public requirements to be protected, on the one hand, and protection of the constitutional rights against invasion, on the other.

Furthermore, it does not invade the constitutional rights beyond the limitation of Section 2 of Article 37 of the Constitution, nor it can be concluded as a violation of law or lack of objective justice. Therefore, limiting suffrage to overseas citizens is not unlawful to the plaintiffs.

The Appellate Court affirmed the trial court's ruling and dismissed the plaintiffs' appeal for lack of reasons.

NEPAL[55]

JUDICIAL DECISIONS

Border dispute between two neighbouring countries are the subject matter of diplomatic relations

ADVOCATE RAMJI BISTA v. HIS MAJESTY'S GOVERNMENT, COUNCIL OF MINISTERS AND OTHERS

Decided by Special Bench of the Supreme Court of Nepal, led by Hon. Hari Prasad Sharma, J and Hon. Dillip Kumar Poudya & Hon. Khil Raj Regmi JJ. decided on 25 July 2003, reported in 45 Nepal Kanoon Patrika 11-12, pp. 890-907 (2003)

The writ petitioner Advocate Ramji Bista had raised the issue of cession of Nepalese territory by His Majesty's Government in favour of the Government of India contravening the Sugauli Treaty of 1815 between India and Nepal and also in contravention of the Constitution of the Kingdom of Nepal, 1990.[56] Mr. Bista had specifically challenged the act of cession at Jhapa, one of the districts in the eastern part of Nepal, claiming that the act of shifting the *Junge Pillars*[57] from their original place by the Chief District Officer (CDO) of Jhapa under the direction of the Indo-Nepal Joint Technical and Border Determination Committee was unconstitu-

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[55] Contributed by Surendra Bhandari, Ph. D., Executive Director of Law Associates Nepal. Email: lan@lawassociatesnepal.com

[56] The Treaty of Peace between the Honourable East India Company and Maha Rajah Bikram Sah of Nepal concluded on 2nd December 1815 is known as the Sugauli Treaty.

[57] *Junge Pillars* are the signposts of the Indo-Nepal border. The masonry pillars were erected to mark the boundary of the two States after the 1860 Treaty between India and Nepal.

tional as well as inconsistent with the Sugauli Treaty. He had further claimed that due to the act of cession by the CDO, 800 hectares of Nepalese territory had been annexed to India.

One of the respondents in the case, His Majesty's Government, Council of Ministers had responded before the Supreme Court that there had been no agreements concluded between India and Nepal after the commencement of the Constitution of the Kingdom of Nepal, 1990. The Indo-Nepal border was determined based on the Sugauli Treaty of 1816 and the Land Survey of 1974-75. Based on the Treaty and the Survey, the middle point of the Mechi River was accepted as the Indo-Nepal border at Jhapa, where the stream of the Mechi River was annually being changed due to the state of the watercourse of the River. In view of the frequent changes of watercourse, the original boundary could not be identified. Therefore, to determine the border between India and Nepal at Jhapa, an Indo-Nepal Joint Technical and Border Determination Committee had decided to follow the Fixed Boundary Principle for determining the boundary as agreed under the 1988 Understanding between Nepal and India. As *per* the decision of the Committee, the CDO from Nepal and the District Magistrate from India had established temporary pillars as signposts of the border, which had contravened neither the Constitution nor the Sugauli Treaty.

Furthermore, the Ministry of Land Reform and Management, another respondent, had expressed that by renewing the border between India and Nepal, some of the pieces of lands surveyed during the Land Survey of 1965 at Jhapa have now become part of Indian territory and that the Government of Nepal cannot claim such territory as an inalienable part of Nepal. There is a problem on the issue of determination of the border between Nepal and India, yet it is a common problem of both the countries that needs to be addressed not by a judicial determination of the court, but by the mutual cooperation and understanding between India and Nepal.

The Supreme Court discussed many issues. Among them, it delved into the issue as to whether, as the result of shifting the original *Junge Pillars,* the land of Nepal had been ceded, and whether the Nepalese citizens (400 families) who have inhabited Nepal for centuries had been transferred into the territorial jurisdiction of India. The Supreme Court observed that His Majesty's Government of Nepal had accepted the recommendations of the Tenth Meeting of the Indo-Nepal Joint Technical and Border Determination Committee held in Kathmandu in 1988 for determining the Indo-Nepal border based on the Fixed Boundary Principle. Nepal and India have a 1778-km open border. Of that, 565 kms consists of river border, which is not fixed and frequently changing. Against this backdrop, the Committee had recommended for the Fixed Boundary Principle and both governments are working under the agreed Understanding of 1988.

Further, the Court observed that changes in the watercourse of a boundary river undoubtedly create problems for both of the countries. The problem can be addressed either on the basis of the record of the original watercourse signpost, or on the mid-stream signpost of the river when it slowly and gradually changes its watercourse. A record is necessary on both of these situations. Where there is a lack of record it creates problems; disputes may arise in determining the border. Therefore, in such a situation it seems wise to accept the fixed boundary principle. However, it is a

subject matter of policy or of diplomatic relations between the two countries as to whether they adopt a River Boundary Principle or Fixed Boundary Principle in determining their boundary based on principles of international law, customary practice, and tradition.

Moreover, the Court observed that the Court may exercise its authority of judicial review under the Constitution to test and examine the acts of government that are permanent in nature. The issue of shifting the *Junge Pillars* was not a permanent decision of the government; it was merely a temporary measure. It becomes final or permanent when both governments ratify the recommendation of the Joint Committee under the domestic laws of the respective countries. In such a situation, the Court could not intervene in the temporary acts of the government. However, the Court directed the government not to take any decision on changing the original boundary in contravention of the Constitution.

Detention – Right to life – Detainee has been detained by the government

MS. ANU PRADHAN ON BEHALF OF DETAINEE CHETNATH DHUNGANA v. HIS MAJESTY'S GOVERNMENT, MINISTRY OF DEFENCE AND OTHERS

Decided by Division Bench led by Hon. Govinda B. Shrestha, J. and Hon. Khil Raj Regmi, J. decided on 10 December 2003, reported in 45 Nepal Kanoon Patrika 7-8, pp. 603-607 (2003)

This case involved a *habeas corpus* writ petition. The petitioner had claimed before the court to issue an order to release her husband from illegal detention. Her husband, Mr. Chetnath Dhungana, was arrested by security personnel in civil clothes without their showing a warrant, an arrest order, or any notice of detention. Nobody, including the petitioner, was informed about Mr. Dhungana's whereabouts. The writ petitioner tried to obtain information on the whereabouts of her husband, but the government provided no information. In such a situation she approached the Supreme Court of Nepal.

In the writ petition, the petitioner had claimed that the detention of her husband was unconstitutional as it had contravened Articles 11 (1), 11 (2), 12 (2), 14(5), and 14 (6); also, that it had violated Articles 1, 3, 5, 7, 9, 18, and 19 of the Universal Declaration of Human Rights, Articles 6 (1), 7, and 9 of the International Covenant on Civil and Political Rights, and Articles 1 and 2 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

The Supreme Court in its decision made no reference to the rights and provisions under the international human rights instruments as claimed by the petitioner. Rather, the Court rejected the writ petition on the ground that court could not enforce the right to life when it is not known as to where the detainee had been detained by the government. It gave immunity to the government from its responsibility to provide the whereabouts of its citizens, especially under detention.

Maternity leave as a fundamental or human right

ADVOCATE PRAKASH MANI SHARMA v. HIS MAJESTY'S GOVERNMENT, MINISTRY OF WOMEN, CHILDREN AND SOCIAL WELFARE AND OTHERS

Decided by Special Bench led by Hon. Krishna Kumar Verma, J. and Hon. Harischandra P. Upadhyaya and Hon. Khil Raj Regmi, J. decided on 11 September 2003, reported in 45 Nepal Kanoon Patrika 9-10, pp. 726-737 (2004)

The writ petitioner had asked the court to issue an order of *mandamus* for providing maternity leave to a female worker as *per* international standards, practices in neighbouring countries, including India, and as prescribed by the ILO Convention Concerning Maternity Protection, 2000. It was also claimed that the existing laws of the Kingdom of Nepal do not have uniform provisions on the issue of maternity leave and are discriminatory. Some laws provide maternity leave for sixty days, some for fifty-two days, and some for forty-five days. These inconsistent provisions also defy the equality provisions under the Constitution of the Kingdom of Nepal 1990 and Articles 3 and 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, and, therefore, the petitioner asked the Court to declare these laws *ultra vires* the Constitution.

The writ petitioner had also specifically asked the court to issue an order against the government for making the necessary provisions towards providing fourteen weeks' maternity leave for women workers working in all types of offices or enterprises without any discrimination.

His Majesty's Government, Council of Ministers, one of the respondents, in its response, mentioned that the issue of maternity leave made a distinction between the female workers working in government offices, on the one hand, and non-government offices, on the other. The government was not responsible for enacting laws to remove these distinctions. It was the responsibility of the Parliament and, therefore, a writ petition should not be issued against the government.

The court concluded that the distinctions in different laws of the country on maternity leave are not tantamount to discrimination, as maternity leave is not a statutory right of the female worker, but is merely a contractual one. Therefore, the differences in maternity leave provisions could not be a ground for holding the existing laws to be *ultra vires* the Constitution on the ground of equality. All types of leaves, including maternity leave, are not the statutory rights of the recipient and, therefore, there could be no obligation on the state to enact a law for providing a similar type of maternity leave for women workers working in all types of services. The court further emphasized that providing statutory protection for maternity leave contravenes the established principle of law that "leave is not a subject matter of right but a facility"

International humanitarian law – Scope of the Geneva Convention

ADVOCATE RAJARAM DHAKAL AND OTHERS v. RT. HON. PRIME MINISTER AND OTHERS

Decided by Division Bench led by Hon. Hari Prasad Sharma, J. and Hon. Khil Raj Regmi, J. decided on 9 January 2004, reported in 45 Nepal Kanoon Patrika 9-10, pp. 782-737 (2004)

The writ petitioners had asked the Supreme Court to issue an order of *mandamus* and/or *a certiorari* to give effect to the Geneva Convention. The petitioners had claimed that since 1996, due to Maoist insurgency in the country, armed conflict between the Maoists and the State had escalated, killing thousands of innocent civilians. This had also been reported in the reports of the Amnesty International, in the monitoring reports of the Human Rights Commission of Nepal, and in the reports of other civil society organisations that were working in the area of human rights. Nepal had ratified the Geneva Convention on 7 February 1964, but had done nothing to give effect to the Geneva Convention. Under section 9 of the Treaty Act, 1991 of the Kingdom of Nepal, the government was responsible for developing the necessary mechanism to give effect to international law including by enacting necessary and appropriate laws. Therefore, the petitioners had asked the court to direct the government to make necessary and appropriate laws to give effect to the Geneva Convention.

The Office of the Prime Minister, in its response to the Supreme Court, had mentioned that His Majesty's Government of Nepal had already enacted the Human Rights Commission Act, 1997 and that the National Human Rights Commission was also established under the Act. In that context, His Majesty's Government of Nepal had fulfilled its commitment arising from the international human rights instruments and the Geneva Conventions. Therefore, a writ should not to be issued against the government.

The Council of State (Upper House), one of the respondents in the case, had responded that it was not the responsibility of Parliament to decide about what kinds of laws were required as it was the responsibility of the government to produce Bills in the Parliament. The treaty responsibility belongs to the executive body and, therefore, it was also the responsibility of the executive body to assess the need for the requirement of appropriate laws and bring Bills in the Parliament. Therefore, the writ petition should not be issued.

The Court decided that under Article 2 of all four Geneva Conventions, the Conventions apply only between the warring High Contracting Parties. The Conventions are humanitarian laws. Humanitarian laws apply only when there is a war or armed conflict between two or more High Contracting Parties. Human rights laws apply both in war and in peace. Therefore, the nature and condition of human rights laws and humanitarian laws are different. The Court declined to give effect to the Geneva Conventions stating that "the present situation of Nepal is not a condition of war between High Contracting Parties".

The Court further referred to Article 49 of the First Convention, Article 50 of the Second Convention, Article 129 of the Third Convention, and Article 146 of the Fourth Convention; it ordered the government to undertake responsibility for enacting necessary legislation to provide effective penal sanctions against those committing or ordering commission of any grave breaches of the Conventions.

PAKISTAN[58]

JUDICIAL DECISIONS

Protection of Fundamental Rights

ALL PAKISTAN NEWSPAPER SOCIETY (PETITIONERS) v. FEDERATION OF PAKISTAN (RESPONDENTS)

Constitutional Petition No. 35 of 2002, date of hearing 5-8 April 2004, decided 8 April 2004

The case arose from a dispute between the Newspaper Society and the Government of Pakistan over the award of wages for employees in the newspaper industry. On 8 July 2000, the Government of Pakistan set up the Seventh Wage Board under the Newspapers Employees (Conditions of Service) Act (LVIII) of 1973 for the purposes of determining the remuneration and wages paid to the employees in the newspaper industry. The Board, comprised of ten members (representing in equal number the employers and employees), under the chairmanship of Mr Justice Raja Afrasiab Khan, Retd. Judge of the Supreme Court of Pakistan, made the pronouncement of the award on 25 October 2001. The substance of this award was unacceptable to the owners of the newspaper agencies, and a number of representations were made on their behalf to the Government of Pakistan through the Secretary, Information and Media Development, and the Secretary, Labour Manpower and Overseas Pakistanis. Upon the failure to obtain any relief through informal measures, the petitioners instituted judicial proceedings invoking the original jurisdiction of the Supreme Court. The petitioners challenged, *inter alia,* the constitutionality of the Newspapers Employees (Conditions of Service) Act 1973 as being violative of the fundamental rights of the petitioners and *ultra vires* the Constitution (the Constitution of the Islamic Republic of Pakistan 1973, as amended) and the award being void *ab initio* and with no legal effect and consequences.

The Registrar of the Supreme Court refused to entertain the petition and made the following pronouncement:

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[58] Contributed by Javaid Rehman, Professor of International Law and Human Rights, Brunel University, United Kingdom.

> Take notice that the above cited Constitutional Petition filed by you is not entertainable as it relates to the grievance of a section of the people and not the whole of the nation; as such, it does not come within the ambit of Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 as held by this Court in its judgment titled as *Syed Mehdi v. PIA & another*, reported as 1998 SCMR 793.[59]

An appeal Civil Misc. Appeal No 23/2002 was launched against the Registrar's order before a Judge in Chamber under Order V, Rule 3 of the Supreme Court Rules, 1980. In reversing the Registrar's order and allowing the appeal for the petition to be heard by the Supreme Court, the Judge made the order that:

> In view of the rule laid down in the judgment dated 9.10.1996 passed in Constitutional Petition No.30 of 1996, *Civil Aviation Authority, Islamabad and others v. Union of Civil Aviation Employees and another* (PLD 1997 SC 781) and a number of other cases relied upon by the learned counsel for the appellant, this civil misc. appeal is accepted, order dated 8.7.2002 of the Registrar set-aside and the office is directed to entertain the constitutional petition, register it and fix before the Bench.[60]

In the course of the hearing, the Supreme Court had to make the preliminary ruling as to whether the Single Judge was correct in allowing the appeal and in regarding the present petition as an application for enforcement of Fundamental Rights under Article 184(3) of the Constitution of the Islamic Republic of Pakistan 1973 (as amended).

Article 184(3) of the Constitution provides:

> … [T]he Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article.

The Apex Court dismissed the petition and took the position, *inter alia,* that the relevant matter was not one of public importance. It was, therefore, inappropriate to place reliance on the Court's original jurisdiction for seeking remedial action. In its examination of the meaning and substance of "a question of public importance", the Court noted that:

> It is to be observed that a number of judgments were cited at the bar by both the sides to elucidate as to what is the definition of public importance. Mr. Abid Hassan Minto, learned counsel, emphasized that the basic judgment in this behalf is in the case of *Manzoor Elahi v. Federation of Pakistan* (PLD 1975 SC 66). The relevant paragraph there from reads as under thus:-

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[59] *All Pakistan Newspaper Society (Petitioners) v. Federation of Pakistan (Respondents),* Constitutional Petition No. 35 of 2002, Date of hearing April 5-8, 2004; Decided April 8, 2004 para. 4.
[60] *Ibid*.

> 'Now, what is meant by a question of public importance. The term "public" is invariably employed in contradistinction to the terms private or individual, and connotes, as an adjective, something pertaining to, or belonging to the people, relating to a nation, State or community. In other words, it refers to something which is to be shared or participated in or enjoyed by the public at large, and is not limited or restricted to any particular class of the community. As observed by the Judicial Committee of the Privy Council in *Hamabai Framjee Petit v. Secretary for India-in-Council* (ILR 39 Bom 279), while construing the words "public purpose", such a phrase, whatever else it may mean – "must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned". This definition appears to me to be equally applicable to the phrase "public importance".'[61]

> Raja Muhammad Akram, learned ASC, contended that after the pronouncement of the above judgment, a good number of cases have been decided by this Court involving the question of life and liberty of a citizen, but in none of the cases the controversy relating to a dispute of the payment of wages between the employer and an employee has been considered to be a question of public importance. We may observe that as far as the petitioners are concerned, they have got a fundamental right to establish the business of newspapers but it is not their fundamental right as to the freedom of managing finances to run the business, which also includes payment of wages to its/their employees because if he/they have no finances, then his/their business is bound to collapse and mere non-availability of the funds would not involve fundamental rights of the petitioners nor will it give rise to a question of public importance because if this argument is accepted then in respect of every industrial dispute between employers and employees relating to the payment of wages, either of them would be filing a petition under Article 184(3) of the Constitution without considering whether such dispute has given rise to the question of public importance or not.[62]

Thus, we feel no hesitation in holding that each case put up before the Court under Article 184(3) of the Constitution has to be determined on its own merits, as it has been observed in the case of *Benazir Bhutto* (*ibid*), relevant paragraph there from is reproduced herein below:

> Having regard to the connotation of the words 'public importance' it will be for the Supreme Court to consider in each case whether the element of 'public importance' is involved in the enforcement of the Fundamental Rights irrespective of the individual's violations of the infractions of a group or a class of persons.[63]

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[61] *Id.* para. 19.
[62] *Id.* para. 20.
[63] *Id.* para. 21.

OTHER RELEVANT STATE PRACTICE

Rights of the Child

Pakistan's Second Periodic Report to the Committee on the Rights of the Child CRC/C/65/Add.21, April 2003

The second periodic report from Pakistan was presented to the Committee on the Rights of the Child. The report provides substantial information, *inter alia,* on measures to harmonize national law and policy with the provisions of the Convention, e.g., the National Commission for Child Welfare and Development (NCCWD); the review of national legislation; legal aid; mechanisms for coordinating policies relating to children and for monitoring the implementation of the Convention, e.g., a child labour survey; the National Project for Rehabilitation of Child Labour; an awareness campaign for the elimination of child labour; the National Code Committee; National Expert Committees on Priority Areas; the District Based Monitoring System (DBMS), and measures to develop awareness of the Convention.

The report also provides information regarding, *inter alia,* the definition of the child (within various contexts); the mechanisms developed for protecting the civil and political rights of the child; protection of the child from abuse and neglect; the position of children with disabilities, and the mechanisms that are being envisaged or adopted for children belonging to religious minorities or those from tribal populations.

In its consideration of the report,[64] the Committee notes with appreciation the following developments, inter alia, Pakistan's withdrawal (on 23 July 1997) of the general reservation to the Convention,[65] Pakistan's ratification of the ILO No. 182 on the Worst Forms of Child Labour Convention 2001 (No. 182),[66] the formulation of a revised National Plan of Action and of the Code of Ethics for Media on Reporting of Children's Issues, the adoption in 2002 of the Ordinance for the Prevention and Control of Human Trafficking and the Protection of Breastfeeding and Child Nutrition Ordinance, the Juvenile Justice System Ordinance in 2000, and the 1995 Compulsory Primary Education Act.[67]

The Committee notes a range of factors and difficulties obstructing the implementation of the Convention. Amongst the more significant ones have been the socio-economic challenges, population growth, armed conflict in many parts of the region, and the substantial number of refugees entering into Pakistan from Afghanistan.[68]

The Committee expresses its concern on a number of issues, the most salient ones amongst these being:

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[64] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, CRC/C/15/Add.217 (27 October 2003).
[65] *Id.* B (3).
[66] *Id.* B (4).
[67] *Id.* B (5).
[68] *Id.* C (6).

(a) Legislative changes are not being fully implemented and recognized within the State party and that some existing laws may still need to be reviewed;[69]
(b) Laws implementing the Convention on the Rights of the Child are not *de facto* applied in the Northern Tribal Territories and, therefore, children living in these territories do not fully enjoy their rights under the Convention;[70]
(c) The Zina and Hadood Ordinances are in conflict with the principles and provisions of the Convention.[71]

The Committee makes a number of recommendations. Among the most significant ones are:

- To scrutinize existing legislative and administrative measures at Federal and Provincial Levels to ensure the implementation of the Convention.[72]

- A review and revision of the Zina and Hadood Ordinances to ensure their compatibility with the Convention.[73]

- Adopting measures to ensure that the Pakistan Commission for the Welfare and Protection of the Rights of the Child is provided with adequate financial and human resources.[74]

- According a priority to increasing budgetary allocation for children, particularly towards their health and educational development.[75]

- Making all possible efforts to ensure the enjoyment of the rights in the Convention without discrimination, in particular, on the basis of gender, religion or disabilities.[76]

- Ensuring that the best interest of the child is appropriately integrated into all legislation, and judicial and administrative decisions.[77]

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[69] *Id.* paragraph 9 (a).
[70] *Id.* paragraph 9 (b).
[71] *Id.* paragraph 9 (c).
[72] *Id.* paragraph 10.
[73] *Ibid.*
[74] *Id.* paragraph 12 (a).
[75] *Id.* paragraph 21.
[76] *Id.* paragraph 30.
[77] *Id.* paragraph 33.

- Promoting and facilitating the views of children and ensuring their participation in all matters affecting them in all spheres of the society.[78]

- Allocation of appropriate resources for the health, development, educational, leisure and cultural activities of children.[79]

- Assessing the reasons and scope of violence against children, in particular, violence against girls.[80]

- Continuing and strengthening efforts to integrate children with disabilities into educational and recreational programmes used by children without disabilities, in particular, through improvement in physical access of disabled children to public service buildings, including schools.[81]

- Making all possible efforts to improve the living conditions (in particular health and education) of refugee children and those children who have been internally displaced.[82]

PHILIPPINES[83]

JUDICIAL DECISIONS

State immunity from suit – By whom and when it can be availed

KHOSROW MINUCHER v. HON. COURT OF APPEALS AND ARTHUR SCALZO [G.R. No. 142396, 11 February 2003]

The Supreme Court denied the motion of the petitioner to reverse the ruling of the Court of Appeals which held that the private respondent Scalzo is sufficiently clothed with diplomatic immunity during his term of duty and thereby immune from the criminal and civil jurisdiction of the "Receiving State" pursuant to the terms of the Vienna Convention. Minucher was charged with violation of RA 6425 otherwise known as the Dangerous Drugs Act of 1972 after a "buy-bust operation" which was initiated by Scalzo. At that time, Scalzo was a special agent of the US Drug Enforcement Agency assigned to the US Embassy in Manila. After Minucher was acquitted

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[78] *Id.* paragraph 37(a)(c).
[79] *Id.* paragraph 52.
[80] *Id.* paragraph 41.
[81] *Id.* paragraph 51.
[82] *Id.* paragraphs 66 (a)–(e).
[83] Contributed by Harry Roque Jr, Faculty Member, College of Law, University of Philippines, Diliman, Quezon City.

from the charges, he sued Arthur Scalzo for damages for what he claimed to have been trumped-up charges of drug trafficking.

Scalzo contended that the Vienna Convention on Diplomatic Relations, to which the Philippines is a signatory, granted him absolute immunity from the suit. The Supreme Court held that the Vienna Convention on Diplomatic Relations was a codification of centuries-old customary law and, by the time of its ratification on 18 April 1961, its rules of law had long become stable. However, it clarified that although the Vienna Convention on Diplomatic Relations provides for immunity to the members of diplomatic missions, it does so, nevertheless, with an understanding that the same be restrictively applied. Only "diplomatic agents" under the terms of the Convention are vested with blanket diplomatic immunity from civil and criminal suits. The Convention defines "diplomatic agents" as the heads of missions or members of the diplomatic staff, thus by implication withholding the same privileges from all others. The Supreme Court held that "the main yardstick in ascertaining whether a person is a diplomat entitled to immunity is the determination of whether or not he performs duties of diplomatic nature". The Court went on to say that an Assistant Attaché to the United States diplomatic mission, the position that Scalzo was occupying, is not generally regarded as a member of the diplomatic mission and is, therefore, not granted diplomatic immunity. However, the Court conceded that the act of vesting a person with diplomatic immunity is a prerogative of the executive branch. In *World Health Organization v. Aquino*, the Court has recognized that, in such matters, the hands of the courts are virtually tied.

Even though the diplomatic immunity of Scalzo was still contentious, the Court decided to resolve the petition under the related doctrine of State immunity from suit. The Court held that the "precept that a State cannot be sued in the courts of a foreign state" is a long-standing rule of customary international law then closely identified with the personal immunity of a foreign sovereign from suit and, with the emergence of democratic states, made to attach not just to the person of the head of state, or his representative, but also distinctly to the state itself in its sovereign capacity. If the acts giving rise to a suit are those of a foreign government done by its foreign agent, although not necessarily a diplomatic personage, but acting in his official capacity, the complaint could be barred by the immunity of the foreign sovereign from suit without its consent. Suing a representative of a state is believed to be, in effect, suing the state itself. The proscription is not accorded for the benefit of an individual, but for the State in whose service he is, under the maxim – *par in parem, non habet imperium* – that all states are sovereign equals and cannot assert jurisdiction over one another.

A foreign agent, operating within a territory, can be cloaked with immunity from suit, but only as long as it can be established that he is acting within the directives of the sending state. The consent of the host state is an indispensable requirement of basic courtesy between the two sovereigns. The consent or *imprimatur* of the Philippine government to the activities of the United States Drug Enforcement Agency, however, can be gleaned from the official exchanges of communication between agencies of the government of the two countries, certifications from officials of both the Philippine Department of Foreign Affairs and the United States Embassy,

as well as the participation of members of the Philippine Narcotics Command in the "buy-bust operation" conducted at the residence of Minucher at the behest of Scalzo. Thus, the Court held that Scalzo, an agent of the United States Drug Enforcement Agency allowed by the Philippine government to conduct activities in the country to help contain the problem on the drug traffic, is entitled to the defence of state immunity from suit.

Waiver of Sovereign Immunity from suit

THE REPUBLIC OF INDONESIA, HIS EXCELLENCY AMBASSADOR SOERATMIN, AND MINISTER COUNSELLOR AZHARI KASIM v. JAMES VINZON, DOING BUSINESS UNDER THE NAME AND STYLE OF VINZON TRADE AND SERVICES

[G.R. No. 154705. 26 June 2003]

The Republic of Indonesia, represented by its Counsellor, Siti Partinah, entered into a Maintenance Agreement in August 1995 with respondent James Vinzon, sole proprietor of Vinzon Trade and Services. The Maintenance Agreement stated that respondent shall, for a consideration, maintain specified equipment at the Indonesian Embassy and at the Wisma Duta, the official residence of the petitioner Ambassador Soeratmin. After the petitioner decided to terminate the agreement, the respondent filed a complaint claiming that the termination was arbitrary and unlawful. The petitioner claimed that that the Republic of Indonesia, as a foreign sovereign State, has sovereign immunity from suit and cannot be sued as a party-defendant in Philippines. The respondent alleged that the Republic of Indonesia has expressly waived its immunity from suit, basing this claim upon the following provision in the Maintenance Agreement:

> Any legal action arising out of this Maintenance Agreement shall be settled according to the laws of the Philippines and by the proper court of Makati City, Philippines.

The Court stated that International law is founded largely upon the principles of reciprocity, comity, independence, and equality of States which were adopted as part of the law of our land under Article II, Section 2 of the 1987 Constitution.[84] The rule that a State may not be sued without its consent is a necessary consequence of the principles of independence and equality of States.[85]

The Court, however, acknowledged that the rules of International Law are neither unyielding nor impervious to change. The increasing need of sovereign States to enter into purely commercial activities remotely connected with the discharge of their governmental functions brought about a new concept of sovereign immunity. This concept, the restrictive theory, holds that the immunity of the sovereign is recognized

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[84] *United States of America v. Guinto*, 182 SCRA 644, 653 (1990).

[85] *United States of America,* et al *v. Ruiz*, 136 SCRA 487 (1987).

only with regard to public acts or acts *jure imperii*, but not with regard to private acts or acts *jure gestionis*.[86] The Court held that the mere entering into a contract by a foreign State with a private party cannot be construed as the ultimate test of whether or not it is an act *jure imperii* or *jure gestionis*. If the foreign State is not engaged regularly in a business or commercial activity, and in this case it has not been shown to be so engaged, the particular act or transaction must then be tested by its nature. If the act is in pursuit of a sovereign activity, or an incident thereof, then it is an act *jure imperii*.[87]

The Court then stated that the existence alone of a paragraph in a contract stating that any legal action arising out of the agreement shall be settled according to the laws of Philippines and by a specified court of Philippines is not necessarily a waiver of sovereign immunity from suit. It held that the aforesaid provision contains language not necessarily inconsistent with sovereign immunity. On the other hand, such provision may also be meant to apply where the sovereign party elects to sue in the local courts, or otherwise waives its immunity by any subsequent act. Submission by a foreign state to local jurisdiction must be clear and unequivocal. It must be given explicitly or by necessary implication.

The Court then held that the establishment of a diplomatic mission is an act *jure imperii* and that the establishment of a diplomatic mission encompasses its maintenance and upkeep. States may enter into contracts with private entities to maintain the premises, furnishings and equipment of the embassy, and the living quarters of its agents and officials.

Compliance with international law required even from revolutionary governments

REPUBLIC OF THE PHILIPPINES v. SANDIGANBAYAN, MAJOR GENERAL JOSEPHUS Q. RAMAS AND ELIZABETH DIMAANO

[G.R. No. 104768. 21 July 2003]

The Republic of the Philippines, represented by the Presidential Commission on Good Government (PCGG), questioned the decision of the Sandiganbayan declaring that the properties confiscated from Elizabeth Dimaano's house as illegally seized and, therefore, inadmissible in evidence. The search and seizure was conducted by the Constabulary on 3 March 1986 or five days after the successful EDSA (*Epifanio de los Santos Avenue)* revolution. Petitioner argues that a revolutionary government was operative at that time and that it effectively withheld the operation of the 1973 Constitution which guaranteed the private respondent's exclusionary right.

The court held that during the interregnum, that is, *after* the actual and effective takeover of power by the revolutionary government following the cessation of resistance by loyalist forces *up to* 24 March 1986 (immediately before the adoption

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[86] *The Holy See v. Rosario,* et. al., 238 SCRA 524 (1994).

[87] *United States v. Rodrigo*, 182 SCRA 644 (1990).

of the Provisional Constitution), the Bill of Rights of the 1973 Constitution was not in force. As was succinctly stated in President Aquino's Proclamation No. 3 dated 25 March 1986, the EDSA Revolution was "done in defiance of the provisions of the 1973 Constitution."[88] The resulting government was indisputably a revolutionary government bound by no constitution or legal limitations except treaty obligations that the revolutionary government, as the *de jure* government in the Philippines, assumed under international law. However, the court held that the rights found in the Bill of Rights of the 1973 Constitution were almost the same as those found in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. It further held that the revolutionary government, after installing itself as the *de jure* government, assumed responsibility for the State's good faith compliance with the Covenant[89] to which Philippines was a signatory. The Court also interpreted the Universal Declaration of Human Rights, adopted by Philippines, as part of the generally accepted principles of international law and binding on the

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[88] Proclamation No. 3, "Provisional Constitution of the Republic of the Philippines," provides:
WHEREAS, the new government under President Corazon C. Aquino was installed through a direct exercise of the power of the Filipino people assisted by units of the New Armed Forces of the Philippines;
WHEREAS, the heroic action of the people was done in *defiance of the provisions of the 1973 Constitution*, as amended…

[89] Among the rights of individuals recognized in the Covenant are: (1) No one shall be arbitrarily deprived of his life [Article 6(1)]; (2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [Article 7]; (3) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release [Article 9(1 and 3)]; (4) Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of the charges against him [Article 9(2)]; (5) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. No one shall be arbitrarily deprived of the right to enter his own country [Article 12(1, 2 and 3)]; (6) Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law [Article 14(2)]; (7) Everyone shall have the right of freedom of thought, conscience and religion [Article 18(1)]; (8) Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression [Article 19(1 and 2)]; (9) The right of peaceful assembly shall be recognized [Article 21]; (10) Everyone shall have the right of freedom of association with others [Article 22(1)]; (11) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law [Article 26].

State.[90] Thus, the revolutionary government was also obligated under international law to observe the rights of individuals under the Declaration.[91]

The fact is that the revolutionary government did not repudiate the Covenant or the Declaration in the same way it repudiated the 1973 Constitution. As the *de jure* government, the revolutionary government could not escape responsibility for the State's good faith compliance with its treaty obligations under international law. During the interregnum, when no constitution or Bill of Rights existed, directives and orders issued by government officers were valid so long as these officers did not exceed the authority granted to them by the revolutionary government. However, the directives and orders should have also not violated the Covenant or the Declaration.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Restoration of citizenship

Republic Act No. 9225 "Citizenship Retention and Re-acquisition Act of 2003"

Signed into law by the President of the Philippines on 29 August 2003**,** the Citizenship Retention and Re-acquisition Act of 2003 intends to restore Philippine citizenship to natural-born citizens who lost their Philippine citizenship by reason of their naturalization as citizens of a foreign country. The law also intends for natural born citizens of the Philippines who become citizens of a foreign country after the implementation of the Act to retain their Philippine citizenship upon taking of an oath.

Under this law, those who retain or re-acquire Philippine citizenship will be able to enjoy full civil and political rights and will be subject to all attendant liabilities and responsibilities under existing laws of the Philippines on the following conditions:

(1) Those intending to exercise their right of suffrage must meet the requirements under Section 1, Article V of the Constitution, Republic Act No. 9189, otherwise known as "The Overseas Absentee Voting Act of 2003" and other existing laws;
(2) Those seeking to hold elective public office in the Philippines shall meet the qualification for holding such public office as required by the Constitution and existing laws and, at the time of the filing of the certificate of candidacy, make

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[90] *Andreu v. Commissioner of Immigration*, 90 Phil. 347 (1951); *Chirskoff v. Commissioner of Immigration*, 90 Phil. 256 (1951); *Borovsky v. Commissioner of Immigration*, 90 Phil. 107 (1951); *Mejoff v. Director of Prisons*, 90 Phil. 70 (1951).

[91] Among the rights enshrined in the Declaration are: (1) Everyone has the right to own property alone or in association with others [Article 17(1)]; (2) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives [Article 21(1)]; (3) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment [Article 23(1)].

a personal and sworn renunciation of any and all foreign citizenship before any public officer authorized to administer an oath;

(3) Those appointed to any public office shall subscribe and swear to an oath of allegiance to the Republic of the Philippines and its duly constituted authorities prior to their assumption of office: *Provided*, that they renounce their oath of allegiance to the country where they took that oath;

(4) Those intending to practice their profession in the Philippines shall apply with the proper authority for a license or permit to engage in such practice; and

(5) That right to vote or be elected or appointed to any public office in the Philippines cannot be exercised by, or extended to, those who:
   (a) are candidates for or are occupying any public office in the country of which they are naturalized citizens; and/or
   (b) are in active service as commissioned or non-commissioned officers in the armed forces of the country of which they are naturalized citizens.

Anti-money laundering legislation

Republic Act No. 9194 "Amendment of Anti-Money Laundering Act Of 2001"

Signed into law by the President of the Philippines on 7 March 2003 was the Amendment of Anti-Money Laundering Act of 2001. The new legislation addresses the main legal deficiencies in the Philippines anti-money laundering regime previously identified by the Financial Action Task Force (FATF).[92] Because of this, members of the FATF have decided not to apply any countermeasures[93] to the Philippines in addition to Recommendation 21.[94]

Under RA 9194, money laundering is defined as a crime whereby the proceeds of an unlawful activity are transacted, making them appear to have originated from legitimate sources. Under the law, it is committed by the following:

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[92] The FATF is an independent international body whose Secretariat is housed at the OECD. The twenty-nine member countries and governments of the FATF are: Argentina; Australia; Austria; Belgium; Brazil; Canada; Denmark; Finland; France; Germany; Greece; Hong Kong, China; Iceland; Ireland; Italy; Japan; Luxembourg; Mexico; the Kingdom of the Netherlands; New Zealand; Norway; Portugal; Singapore; Spain; Sweden; Switzerland; Turkey; the United Kingdom, and the United States. Two international organizations are also members of the FATF: the European Commission and the Gulf Co-operation Council. South Africa and Russia are observer countries.

[93] The counter-measures agreed in June 2001 are contained in the FATF Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (22 June 2001) at: www.fatf-gafi.org/NCCT_en.htm.

[94] Recommendation 21 applies to all countries on the Non-Cooperative Countries and Territories list and states that "Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies."

(a) Any person knowing that any monetary instrument or property represents, involves, or relates to, the proceeds of any unlawful activity, transacts or attempts to transact said monetary instrument or property.
(b) Any person knowing that any monetary instrument or property involves the proceeds of any unlawful activity performs or fails to perform any act as a result of which he facilitates the offence of money laundering referred to in paragraph (a) above.
(c) Any person knowing that any monetary instrument or property is required under this Act to be disclosed and filed with the Anti-Money Laundering Council (AMLC), fails to do so.

Under RA 9194, the AMLC will be composed of the Governor of the Bangko Sentral ng Pilipinas as Chairman, the Commissioner of the Insurance Commission and the Chairman of the Securities and Exchange Commission as members. Under the law, the functions of the AMLC are as follows:

(1) to require and receive covered or suspicious transaction reports from covered institutions;
(2) to issue orders addressed to the appropriate Supervising Authority or the covered institutions to determine the true identity of the owner of any monetary instrument or property subject of a covered transaction or suspicious transaction report or request for assistance from a foreign State, or believed by the Council, on the basis of substantial evidence, to be, in whole or in part, wherever located, representing, involving, or related directly or indirectly, in any manner or by any means to the proceeds of an unlawful activity.
(3) to institute civil forfeiture proceedings and all other remedial proceedings through the Office of the Solicitor General;
(4) to cause the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offences;
(5) to investigate suspicious transactions and covered transactions deemed suspicious after an investigation by AMLC, money laundering activities and other violations of this Act;
(6) to apply before the Court of Appeals, *ex parte,* for the freezing of any monetary instrument or property alleged to be the proceeds of any unlawful activity as defined in Section 3(I) hereof;
(7) to implement such measures as may be necessary and justified under this Act to counteract money laundering;
(8) to receive and take action in respect of, any request from foreign states for assistance in their own anti-money laundering operations provided in this Act;
(9) to develop educational programmes on the pernicious effects of money laundering, the methods and techniques used in the money laundering, the viable means of preventing money laundering and the effective ways of prosecuting and punishing offenders;
(10) to enlist the assistance of any branch, department, bureau, office, agency, or instrumentality of the government, including government-owned and govern-

ment-controlled corporations, in undertaking any and all anti-money laundering operations, which may include the use of its personnel, facilities and resources for the more resolute prevention, detection, and investigation of money laundering offences and prosecution of offenders; and

(11) to impose administrative sanctions for the violation of laws, rules, regulations, and orders and resolutions issued pursuant thereto.

Under the law, the AMLC is also given the authority to inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon order of any competent court in cases of violation of this Act, when it has been established that there is probable cause that the deposits or investments are related to an unlawful activity as defined in Section 3(I) hereof or a money laundering offence under Section 4 hereof, except that no court order shall be required in cases involving unlawful activities defined in Sections 3(I)1, (2) and (12). This is notwithstanding the provisions of Republic Act No. 1405, as amended, Republic Act No. 6426, as amended, Republic Act No. 8791, and other laws. Also, the Bangko Sentral ng Pilipinas (BSP) is given the authority to inquire into or examine any deposit of investment with any banking institution or non-bank financial institution when the examination is made in the course of a periodic or special examination, in accordance with the rules of examination of the BSP.

Anti-trafficking in persons legislation

Republic Act No. 9208 "Anti-Trafficking in Persons Act of 2003"

Signed into law by the President of the Philippines on March 26, 2003, the Anti-Trafficking in Persons Act of 2003[95] intends to promote human dignity, protect the people from any threat of violence and exploitation, eliminate trafficking in persons, and mitigate pressures for involuntary migration and servitude of persons, not only to support trafficked persons, but more importantly, to ensure their recovery, rehabilitation, and reintegration into the mainstream of society.

The law is in accordance with the State policy to recognize the equal rights and inherent human dignity of women and men as enshrined in the United Nations Universal Declaration on Human Rights, United Nations Convention on the Rights of the Child, United Nations Convention on the Protection of Migrant Workers and their Families, United Nations Convention Against Transnational Organized Crime including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Es-

[95] Providing a strong framework for the anti-trafficking law are universally accepted instruments and conventions to which the Philippines is a signatory, among which are: the United Nations Universal Declaration on Human Rights; United Nations Convention on the Rights of the Child; United Nations Convention on the Protection of Migrant Workers and Their Families; United Nations Convention Against Transnational Organized Crime including its Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children; and the Convention on the Elimination of All Forms of Discrimination Against Women.

pecially Women and Children, and all other relevant and universally accepted human rights instruments and other international conventions to which the Philippines is a signatory.

Under Section 3 of the law, trafficking in persons refers to the recruitment, transportation, transfer or harbouring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders by means of threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, servitude, or the removal or sale of organs.

The law also states that recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall also be considered as "trafficking in persons" even if it does not involve any of the means set forth in the first paragraph of Section 3.

Under Section 4 of the law, it shall be unlawful for any person, natural or juridical, to commit any of the following acts of "trafficking in persons":

(a) To recruit, transport, transfer; harbour, provide, or receive a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, or debt bondage;
(b) To introduce or match for money, profit, or material, economic or other consideration, any person or, as provided for under Republic Act No. 6955, any Filipino woman to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling or trading him/her to engage in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, or debt bondage;
(c) To offer or contract marriage, real or simulated, for the purpose of acquiring, buying, offering, selling, or trading any person to engage in prostitution, pornography, sexual exploitation, forced labour or slavery, involuntary servitude, or debt bondage;
(d) To undertake or organize tours and travel plans consisting of tourism packages or activities for the purpose of utilizing and offering persons for prostitution, pornography, or sexual exploitation;
(e) To maintain or hire a person to engage in prostitution or pornography;
(f) To adopt or facilitate the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, or debt bondage;
(g) To recruit, hire, adopt, transport or abduct a person, by means of threat or use of force, fraud, deceit, violence, coercion, or intimidation for the purpose of removal or sale of organs of said person; and
(h) To recruit, transport or adopt a child to engage in armed activities in Philippines or abroad.

Under Section 5 of the law, the following acts which promote or facilitate trafficking in persons shall be unlawful:

(a) To knowingly lease or sublease, use, or allow to be used any house, building or establishment for the purpose of promoting trafficking in persons;
(b) To produce, print and issue or distribute unissued, tampered or fake counselling certificates, registration stickers, and certificates of any government agency which issues these certificates and stickers as proof of compliance with government regulatory and pre-departure requirements for the purpose of promoting trafficking in persons;
(c) To advertize, publish, print, broadcast or distribute, or cause the advertisement, publication, printing, broadcasting, or distribution by any means, including the use of information technology and the internet, of any brochure, flyer, or any propaganda material that promotes trafficking in persons;
(d) To assist in the conduct of misrepresentation or fraud for purposes of facilitating the acquisition of clearances and necessary exit documents from government agencies that are mandated to provide pre-departure registration and services for departing persons for the purpose of promoting trafficking in persons;
(e) To facilitate, assist or help in the exit and entry of persons from/to the country at international and local airports, territorial boundaries and seaports who are in possession of unissued, tampered or fraudulent travel documents for the purpose of promoting trafficking in persons;
(f) To confiscate, conceal, or destroy the passport, travel documents, or personal documents or belongings of trafficked persons in furtherance of trafficking or to prevent them from leaving the country or seeking redress from the government or appropriate agencies; and
(g) To knowingly benefit from, financial or otherwise, or make use of, the labour or services of a person held in a condition of involuntary servitude, forced labour, or slavery.

Section 6 of the law also enumerates the following which are considered as qualified trafficking:

(a) When the trafficked person is a child;
(b) When the adoption is effected through Republic Act No. 8043, otherwise known as the "Inter-Country Adoption Act of 1995" and said adoption is for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude or debt bondage;
(c) When the crime is committed by a syndicate, or in large scale. Trafficking is deemed committed by a syndicate if carried out by a group of three or more persons conspiring or confederating with one another. It is deemed committed in large scale if committed against three or more persons, individually or as a group;

(d) When the offender is an ascendant, parent, sibling, guardian or a person who exercises authority over the trafficked person or when the offence is committed by a public officer or employee;
(e) When the trafficked person is recruited to engage in prostitution with any member of the military or law enforcement agencies;
(f) When the offender is a member of the military or law enforcement agencies; and
(g) When by reason or on occasion of the act of trafficking in persons, the offended party dies, becomes insane, suffers mutilation, or is afflicted with Human Immuno-deficiency Virus (HIV) or the Acquired Immune Deficiency Syndrome (AIDS).

Under Section 8 of the law, the complainant for trafficking should be any person who has personal knowledge of the commission of any offence under Republic Act No. 9208, the trafficked person, the parents, spouse, siblings, children, or legal guardian may file a complaint for trafficking.

The criminal action covered by Republic Act No. 9208 shall be filed where the offence was committed, or where any of its elements occurred, or where the trafficked person actually resided at the time of the commission of the offence: *Provided*, that the court where the criminal action is first filed shall acquire jurisdiction to the exclusion of other courts.

The following penalties and sanctions are imposed under Section 10 for the offences enumerated in the law:

(a) Any person found guilty of committing any of the acts enumerated in Section 4 shall suffer the penalty of imprisonment of twenty years and a fine of not less than One million pesos but not more than Two million pesos;
(b) Any person found guilty of committing any of the acts enumerated in Section 5 shall suffer the penalty of imprisonment of fifteen years and a fine of not less than Five hundred thousand pesos but not more than One million pesos;
(c) Any person found guilty of qualified trafficking under Section 6 shall suffer the penalty of life imprisonment and a fine of not less than Two million pesos but not more than Five million pesos;
(d) Any person who violates Section 7 hereof shall suffer the penalty of imprisonment of six years and a fine of not less than Five hundred thousand peso but not more than One million pesos;
(e) If the offender is a corporation, partnership, association, club, establishment or any juridical person, the penalty shall be imposed upon the owner, president, partner, manager, and/or any responsible officer who participated in the commission of the crime or who shall have knowingly permitted or failed to prevent its commission;
(f) The registration with the Securities and Exchange Commission (SEC) and license of the erring agency, corporation, association, religious group, tour or travel agent, club or establishment, or any place of entertainment to operate shall be cancelled

and revoked permanently. The owner, president, partner or manager thereof shall not be allowed to operate similar establishments in a different name;

(g) If the offender is a foreigner, he shall be immediately deported after serving his sentence and be barred permanently from entering the country;

(h) Any employee or official of government agencies who shall issue or approve the issuance of travel exit clearances, passports, registration certificates, counselling certificates, marriage license, and other similar documents to persons, whether juridical or natural, recruitment agencies, establishments or other individuals or groups, who fail to observe the prescribed procedures and the requirement as provided for by laws, rules and regulations, shall be held administratively liable, without prejudice to criminal liability under this Act. The concerned government official or employee shall, upon conviction, be dismissed from service and be barred permanently from holding public office. His/her retirement and other benefits shall likewise be forfeited; and

(i) Conviction by final judgment of the adopter for any offence under this Act shall result in the immediate rescission of the decree of adoption.

Section 11 penalizes any person who buys or engages the services of trafficked persons for prostitution as follows:

(a) First offence – six months of community service as may be determined by the court and a fine of Fifty thousand pesos; and

(b) Second and subsequent offences – imprisonment of one year and a fine of One hundred thousand pesos.

Trafficking cases shall prescribe in ten years though trafficking cases committed by a syndicate or in a large scale as defined under Section 6 shall prescribe in twenty years. The prescriptive period shall commence to run from the day on which the trafficked person is delivered or released from the conditions of bondage and shall be interrupted by the filing of the complaint or information, and shall commence to run again when such proceedings terminate without the accused being convicted or acquitted or are unjustifiably stopped for any reason not imputable to the accused.

Trafficked persons who institute a separate civil action for the recovery of civil damages shall be exempt from the payment of filing fees.

The court shall order the confiscation and forfeiture, in favour of the government, of all the proceeds and properties derived from the commission of the crime, unless they are the property of a third person not liable for the unlawful act in addition to the penalty imposed. However, all awards for damages shall be taken from the personal and separate properties of the offender. If such properties are insufficient, the balance shall be taken from the confiscated and forfeited properties.

When the proceeds, properties and instruments of the offence have been destroyed, diminished in value or otherwise rendered worthless by any act or omission, directly or indirectly, of the offender, or it has been concealed, removed, converted, or transferred to prevent the same from being found or to avoid forfeiture or confiscation,

the offender shall be ordered to pay the amount equal to the value of the proceeds, property or instruments of the offence.

All fines imposed under the law and the proceeds and properties forfeited and confiscated pursuant to it shall accrue to a Trust Fund to be administered and managed by the Council to be used exclusively for programmes that will prevent acts of trafficking and protect, rehabilitate, and reintegrate trafficked persons into the mainstream of society. Such programmes shall include, but not limited to, the following:

(a) Provision for mandatory services set forth in Section 23 of this Act;
(b) Sponsorship of a national research programme on trafficking and establishment of a data collection system for monitoring and evaluation purposes;
(c) Provision of necessary technical and material support services to appropriate government agencies and non-government organizations (NGOs);
(d) Sponsorship of conferences and seminars to provide venue for consensus building amongst the public, academia, government, NGOs, and international organizations; and
(e) Promotion of information and education campaign on trafficking.

The law also enumerates government programs that establish and implement preventive, protective, and rehabilitative programs for trafficked persons. The following agencies are mandated to implement the identified programmes;

(a) Department of Foreign Affairs (DFA) – shall make available its resources and facilities overseas for trafficked persons regardless of their manner of entry to the receiving country, and explore means to further enhance its assistance in eliminating trafficking activities through closer networking with government agencies in the country and overseas, particularly in the formulation of policies and implementation of relevant programmes.
    The DFA shall take necessary measures for the efficient implementation of the Machine Readable Passports to protect the integrity of Philippine passports, visas and other travel documents to reduce the incidence of trafficking through the use of fraudulent identification documents.
    It shall establish and implement a pre-marriage, on-site and pre-departure counselling programme on intermarriages.
(b) Department of Social Welfare and Development (DSWD) – shall implement rehabilitative and protective programmes for trafficked persons. It shall provide counselling and temporary shelter to trafficked persons and develop a system for accreditation among NGOs for purposes of establishing centres and programmes for intervention in various levels of the community.
(c) Department of Labour and Employment (DOLE) – shall ensure the strict implementation and compliance with the rules and guidelines relative to the employment of persons locally and overseas. It shall likewise monitor, document and report cases of trafficking in persons involving employers and labour recruiters.

(d) Department of Justice (DOJ) – shall ensure the prosecution of persons accused of trafficking and designate and train special prosecutors who shall handle and prosecute cases of trafficking. It shall also establish a mechanism for free legal assistance for trafficked persons, in coordination with the DSWD, Integrated Bar of the Philippines (IBP) and other NGOs and volunteer groups.
(e) National Commission on the Role of Filipino Women (NCRFW) – shall actively participate and coordinate in the formulation and monitoring of policies addressing the issue of trafficking in persons in coordination with relevant government agencies. It shall likewise advocate for the inclusion of the issue of trafficking in persons in both its local and international advocacy for women's issues.
(f) Bureau of Immigration (BI) – shall strictly administer and enforce immigration and alien administration laws. It shall adopt measures for the apprehension of suspected traffickers both at the place of arrival and departure, and shall ensure compliance by the Filipino fiancés/fiancées and spouses of foreign nationals with the guidance and counselling requirements as provided for in this Act.
(g) Philippine National Police (PNP) – shall be the primary law enforcement agency to undertake surveillance, investigation and arrest of individuals or persons suspected to be engaged in trafficking. It shall closely coordinate with various law enforcement agencies to secure concerted efforts for effective investigation and apprehension of suspected traffickers. It shall also establish a system to receive complaints and calls to assist trafficked persons and conduct rescue operations.
(h) Philippine Overseas Employment Administration (POEA) – shall implement effective pre-employment orientation seminars and pre-departure counselling programmes to applicants for overseas employment. It shall likewise formulate a system of providing free legal assistance to trafficked persons.
(i) Department of the Interior and Local Government (DILG) – shall institute a systematic information and prevention campaign and likewise maintain a databank for the effective monitoring, documentation, and prosecution of cases on trafficking in persons.
(j) Local Government Units (LGUs) – shall monitor and document cases of trafficking in persons in their areas of jurisdiction, effect the cancellation of licenses of establishments which violate the provisions of this Act and ensure effective prosecution of such cases. They shall also undertake information campaigns against trafficking in persons through the establishment of the Migrants Advisory and Information Network (MAIN) desks in municipalities or provinces in coordination with the DILG, Philippine Information Agency (PIA), the Commission on Filipinos Overseas (CFO), NGOs, and other concerned agencies. They shall encourage and support community based initiatives which address the trafficking in persons.

In implementing this Act, the agencies concerned may seek and enlist the assistance of NGOs, people's organizations (Pos), civic organizations, and other volunteer groups.

Trafficked persons are recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking enumerated under this Act or for obeying the order made by the trafficker in relation thereto. The consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.

Trafficked person are entitled to the witness protection programme under Section 18 of the law.

Under Section 19, trafficked persons in the Philippines who are nationals of a foreign country shall also be entitled to appropriate protection, assistance and services available to trafficked persons under this law provided that they shall be permitted continued presence in the Philippines for a length of time prescribed by the Council as necessary to effect the prosecution of offenders.

Section 20 establishes an Inter-Agency Council Against Trafficking, to be composed of the Secretary of the Department of Justice as Chairperson and the Secretary of the Department of Social Welfare and Development as Co-Chairperson and shall have the following as members:

(a) Secretary, Department of Foreign Affairs;
(b) Secretary, Department of Labour and Employment;
(c) Administrator, Philippine Overseas Employment Administration;
(d) Commissioner, Bureau of Immigration;
(e) Director-General, Philippines National Police;
(f) Chairperson, National Commission on the Role of Filipino Women; and
(g) Three representatives from NGOs, who shall be composed of one representative each from among the sectors representing women, overseas Filipino workers (OFWs) and children, with a proven record of involvement in the prevention and suppression of trafficking in persons. These representatives shall be nominated by the government agency representatives of the Council for appointment by the President for a term of three years.

The members of the Council may designate their permanent representatives who shall have a rank not lower than an assistant secretary or its equivalent to meetings, and shall receive emoluments as may be determined by the Council in accordance with the existing budget and accounting rules and regulations.

The Council shall have the following powers and functions according to Section 21:

(a) Formulate a comprehensive and integrated program to prevent and suppress the trafficking in persons;
(b) Promulgate rules and regulations as may be necessary for the effective implementation of this Act;
(c) Monitor and oversee the strict implementation of this Act;
(d) Coordinate the programs and projects of the various member agencies to effectively address the issues and problems attendant to trafficking in persons;

(e) Coordinate the conduct of massive information dissemination and campaign on the existence of the law and the various issues and problems attendant to trafficking through the LGUs, concerned agencies, and NGOs;
(f) Direct other agencies to immediately respond to the problems brought to their attention and report to the Council on action taken;
(g) Assist in filing of cases against individuals, agencies, institutions or establishments that violate the provisions of this Act;
(h) Formulate a program for the reintegration of trafficked persons in cooperation with DOLE, DSWD, Technical Education and Skills Development Authority (TESDA), Commission on Higher Education (CHED), LGUs and NGOs;
(i) Secure from any department, bureau, office, agency, or instrumentality of the government or from NGOs and other civic organizations such assistance as may be needed to effectively implement this Act;
(j) Complement the shared government information system for migration established under Republic Act No. 8042, otherwise known as the "Migrant Workers and Overseas Filipinos Act of 1995" with data on cases of trafficking in persons, and ensure that the proper agencies conduct a continuing research and study on the patterns and scheme of trafficking in persons which shall form the basis for policy formulation and programme direction;
(k) Develop the mechanism to ensure the timely, coordinated, and effective response to cases of trafficking in persons;
(l) Recommend measures to enhance cooperative efforts and mutual assistance among foreign countries through bilateral and/or multilateral arrangements to prevent and suppress international trafficking in persons;
(m) Coordinate with the Department of Transportation and Communications (DOTC), Department of Trade and Industry (DTI), and other NGOs in monitoring the promotion of advertisement of trafficking in the internet;
(n) Adopt measures and policies to protect the rights and needs of trafficked persons who are foreign nationals in the Philippines;
(o) Initiate training programmes in identifying and providing the necessary intervention or assistance to trafficked persons; and
(p) Exercise all powers and perform such other functions necessary to attain the purposes and objectives of this Act.

The law also aims to ensure recovery, rehabilitation and reintegration of trafficked persons into the mainstream society. Thus, concerned government agencies are required to render the following services to trafficked persons:

(a) Emergency shelter or appropriate housing;
(b) Counselling;
(c) Free legal services which shall include information about the victims' rights and the procedure for filing complaints, claiming compensation and such other legal remedies available to them, in a language understood by the trafficked person;
(d) Medical or psychological services;
(e) Livelihood and skills training; and

(f) Educational assistance to a trafficked child.

Sustained supervision and follow through mechanism that will track the progress of recovery, rehabilitation and reintegration of the trafficked persons shall be adopted and carried out.

Section 24 enumerates other services for trafficked persons and these are:

(a) Legal Assistance. – Trafficked persons shall be considered under the category "Overseas Filipino in Distress" and may avail of the legal assistance created by Republic Act No. 8042, subject to the guidelines as provided by law.
(b) Overseas Filipino Resource Centres. – The services available to overseas Filipinos as provided for by Republic Act No. 8042 shall also be extended to trafficked persons regardless of their immigration status in the host country.
(c) The Country Team Approach. – The country team approach under Executive Order No. 74 of 1993 shall be the operational scheme under which Philippine embassies abroad shall provide protection to trafficked persons insofar as the promotion of their welfare, dignity, and fundamental rights are concerned.

The DFA, in coordination with DOLE and other appropriate agencies, shall have the primary responsibility for the repatriation of trafficked persons, regardless of whether they are documented or undocumented as stated under Section 25.

If, however, the repatriation of the trafficked persons shall expose the victims to greater risks, the DFA shall make representation with the host government for the extension of appropriate residency permits and protection, as may be legally permissible in the host country.

In order to have the sufficient funding in the implementation of the law under Section 28, heads of the departments and agencies concerned are supposed to include in their programs and issue such rules and regulations, the funding of which shall be included in the annual General Appropriations Act.

TAJIKISTAN[96]

JUDICIAL DECISIONS[97]

Implementation of the law of terrorism by the Judiciary

THE RESOLUTION[98] OF THE SUPREME COURT OF THE REPUBLIC OF TAJIKISTAN "ON THE PRACTICE OF IMPLEMENTATION OF THE LAW ON TERRORISM BY THE COURTS"[99]

The Supreme Court of the Republic of Tajikistan
2 October 2003

"Terrorism is one of the most dangerous crimes of the present world of both national and international character. Terrorism is aimed at undermining state authority and at creating a sense of fear and helplessness among the population caused by organized and cruel violence committed by terrorists."

In response to the many questions raised by the courts on the implementation of the law on terrorism, the Supreme Court of Tajikistan has determined:

1. Attention of the courts must be drawn to the nature of terrorism. Terrorism is one of the forms of criminal breach which is based on an intention of the perpetrator to spread fear and panic among others, paralyze social activities of citizens, and paralyze the normal functioning of state bodies with the aim of achieving anti-social objectives.

2. The Courts should recall that questions of suppression of terrorism are reflected not only in the Criminal Code of the Republic of Tajikistan, but also in the UN International Convention for the Suppression of Terrorist Bombing of 15 December 1997; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 14 December 1973, and the Law of the Republic of Tajikistan on "Suppression of Terrorism" of 16

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[96] Contribued by Tahmina Karimova, Intern, International Criminal Court, The Hague.

[97] The Tajik Judicial System stands for a well structured and complex organization. The Constitutional Court, Supreme Court, and Supreme Economic Court are set at the top of the judicial hierarchy in accordance with the Constitution of Tajikistan. Each of the courts has its own place in the system and is endowed with competencies that are pertinent exclusively to it. [Article 1 of the Law *"On the Constitutional Court of Republic of Tajikistan"*, adopted 2 November 1995 Ahbori Majlisi Olii Jumhurii Tojikiston (Registry of the Tajik Parliament) Issue 21, p. 223].

[98] Provided by the Supreme Court of Tajikistan

[99] The text of the resolution reflected in the paper is not complete and does not correspond to the original, as some of the parts had to be shortened and summarized due to considerations of space.

November 1999. These normative acts define the basics for the suppression of terrorism in Republic of Tajikistan and the courts should be guided by these rules.

3. Generally, the term "terrorism" is understood to include explosion, arson, the firing of arms, and other acts that create the risk of casualties, cause considerable material loss, or other dangerous infringements upon public life with an intention to infringe upon public security, terrorize the population, or influence the decision making process of the authorities as well as the threat to commit these acts for the same purposes.

4. Terrorism is a multi-object crime […] The frightening effect of terrorism is aimed, as a general rule, at an unidentified range of people (populations of entire cities, and districts, or specific officials).

5. Terrorism is committed through actions expressed in two forms. Firstly, explosions, arson, organization of accidents and devastations, the rendering out of order of vital objects, the utilization of radioactive and poisonous substances, or other acts that create risk of casualties, cause considerable material loss or other dangerous consequences and, secondly, terrorism can be expressed in the threat to commit the abovementioned acts.

Threat is an intention to commit an act of terrorism that is accompanied by a statement testifying to the actuality and seriousness of such an intention. The threat to commit any other action does not constitute the content of terrorism, but can constitute the content of other crimes (for instance, Article 120 of the Criminal Code of Tajikistan: the threat to commit homicide, or Article 328 of the same code: use of violence against an official).

6. Crime is deemed completed on the condition that the enumerated acts are committed and they create real danger; the real danger is evaluated on the basis of materials containing information about the time, place, circumstances, means, expert analysis, etc. The risk of casualties should be understood as the existence of a risk to the life of at least one person. As for the extent of material damage, it is assessed on the basis of the cost and importance of material valuables…

7. Qualified types of terrorism are provided by Article 179, parts 2 and 3, of the Criminal Code of the Republic of Tajikistan.

8. Any person of sound mind who by the time of the commission of crime has reached the age of 14 can be considered as a subject of terrorism. […] The courts should take into account that persons who are not members of terrorist organization, but have committed the crime of terrorism on behalf of an organization or have participated in the establishment of an organization, or have provided finance, training, and arms, qualify nevertheless as members of a terrorist organization.

9. Terrorism is committed as a result of a direct intention to infringe upon public security, terrorize the population, or influence the decision making process of the authorities, or inflict physical harm on an official or a public person or any other representative of the authorities. The subjective element of terrorism that has caused the accidental death of a person or other heavy damage is qualified as double guilt, i.e., the direct intention to commit a terrorist act, and negligence (both thoughtless and careless) towards other consequences. Public security should be understood as a state of safety of vital interests of the society, i.e., a combination of needs, the satisfaction of which provides preservation and the progressive development of the society.

10. Commentaries to Article 179 of the Criminal Code refer to a norm of inducement that permits the release of a person who has participated in preparations of an act of terrorism from criminal responsibility, if he or she warns the authorities in a timely manner or has facilitated the prevention of an act of terrorism by other means on the condition that actions of this person do not constitute the content of another crime. Warning "in a timely manner" purports to represent the opportunity to prevent the terrorist act or consequences provided in Article 179 of the Code.

11. Terrorism differs from other crimes that are similar in their objective characteristics (Article 255 of the Criminal Code: the intentional destruction of and damage to property; Article 309: sabotage). The crime of terrorism does not contain the element of intent to damage the economic system of Tajikistan as in the case of sabotage (Article 309 of Criminal Code). […] The difference between terrorism and a terrorist act (Article 310 of Criminal Code) lies in the direction of the intent, i.e., in the case of a terrorist act, an attempt on the life of the victim is committed as a consequence of his/her status as an official (a representative of authority) or in revenge for his/her activities. Terrorism creates danger to an unidentified section of the population and pursues the aim to violate public security, terrorize the population or influence the decision making process of the authorities.

12. The courts should consider that criminal cases of terrorist character as well as civil cases concerning reparations for damages caused as a result of terrorist activity may be heard in closed sessions in accordance with decision of the relevant court.

13. In each case of terrorism, the courts should clarify the causes and conditions that prompted the commission of such a crime and, in addition, find out shortcomings in preventive works, disclose violations in the preliminary investigation stage and react to such situations in accordance with Article 16 of Criminal Procedural Code."

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Suppression of extremism
The Law "On the Suppression of Extremism"[100]
Adopted 8 December 2003

The law establishes the legal and executive framework for the suppression of extremism in Tajikistan for the purposes of, *inter alia,* guaranteeing the respect of human rights and freedoms, ensuring the integrity and security of the state, and ensuring the compliance of Tajikistan with its obligations under international law in the area of suppression of extremism, etc. The Constitution, the Criminal Code, the present law, and international treaties recognized by Tajikistan constitute the legal basis for the suppression of extremism in the territory of the country.

The suppression of this phenomenon will be carried out on the basis of principles of recognition and respect for human rights and freedoms, principles of legality, the security of Tajikistan, the priority of measures aimed at preventing extremist activities, principles of cooperation, and the accountability of those responsible for acts of extremism.[101] The law defines "extremism" as a manifestation of extreme forms of actions that bring about destabilization or a change in the constitutional system, the seizure of power, and incitement to racial, national, social, and religious hatred. Defining "extremist actions", the relevant provision adds to the abovementioned list mass disturbances, acts of vandalism, and propaganda of the exclusiveness, superiority or inferiority of citizens on the ground of their attitude towards religion, or their belonging to a specific social, racial, or linguistic group. Additionally, public appeal to commit these acts and financing and other ways of supporting extremism constitute acts of extremism.[102]

The suppression of extremism is mainly coordinated by the Ministry of Security, the Ministries of Foreign and Internal Affairs, the Ministry of Justice, the Committee on Protection of the State Border, and others.[103] Article 9 provides a number of measures that state agencies may undertake as a preventive action against extremism. The following acts against which preventive action can be taken are prohibited: the setting up of an extremist organization; conducting activities related to the propaganda of extremism including dissemination of extremist material; permitting entrance and/or exit and granting residence to persons involved in extremist activities, and holding meetings, demonstrations and any other public performances that violate the laws of Tajikistan. The list of prohibited acts may expand if obligations under international treaties to which Tajikistan is a party so require.

The legislation, in addition, regulates issues of the accountability of public associations, and religious and other non-commercial organizations responsible for conducting extremist activities. Dissemination of material of extremist content and

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[100] The Law "On Suppression of Extremism" provided by the Encyclopaedia of Tajik Law *Adliya.*
[101] *Ibid.* Article 4
[102] *Ibid.* Article 3
[103] *Ibid.* Article 7

usage of the worldwide web and mass media for extremist purposes are also subject to the restrictions of this set of rules. A ban on public association, religious and other non-commercial organizations, the mass media, etc. as a result of the conduct of extremist activities can be appealed against in judicial bodies.

Free Economic Zones

The Law "On Free Economic Zones in the Republic of Tajikistan"[104] Adopted 29 April 2004

In general terms, the law "On Free Economic Zones in the Republic of Tajikistan" defines the organizational, legal, and economic framework that provides the basis for the setting up, functioning, and liquidation of free economic zones. According to the normative act, a free economic zone is a separate (limited) segment of the territory of Tajikistan that is ruled by a special fiscal regime and customs, affords the simplified entrance and exit of non-residents, and provides concessionary conditions on the use of natural resources.[105]

Free economic zones are established to create favourable conditions to attract foreign investment, technology and managerial experience; to develop the perspectives of the region with the support of foreign investments using the material and financial means of domestic enterprises and organizations; to generate a modern social and industrial infrastructure; to enrich the domestic market with goods and products, and to enhance the level of employment as well as the standards of living of the population.[106]

Free economic zones may take different functional structures. They may, among others, specialize in such areas as manufacturing, science and technology, export, import, trade, tourism, recreation, investment, stock-exchange, banking, and other areas as provided by law.[107] The law sets rules governing the borders, subjects of the free economic zones, and rules governing the registration procedure of the subjects.[108] The state guarantees the respect of rights and interests of all individuals and legal personalities functioning in the territory of the free economic zone.[109] An administration formed by the government of Tajikistan will be in charge of managing free economic zones. Functions of administration include working out programmes of development of free economic zones; the protection of the interests of producers and consumers; ensuring the integrity and effective functioning of the zones; creating necessary conditions to attract domestic and foreign investments, and

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[104] The Law "On Free Economic Zones in the Republic of Tajikistan" provided by the Encyclopaedia of Tajik Law, *Adliya.*
[105] *Ibid.* Article 1
[106] *Ibid.* Article 2
[107] *Ib*id. Article 4
[108] *Ibid.* Articles 5,6,7
[109] *Ibid.* Article 8

controlling the implementation of the legal regime set in the free economic zone, etc.

As mentioned before, free economic zones imply special customs and fiscal regimes; under the former, the government affords full or partial abolition of customs tariffs on the import of goods, the simplified circulation of goods and vehicles, and cessation of non-tariff policy measures. The special fiscal regime means full or partial tax exemption for the activities carried out by subjects in free economic zones.[110] The concluding provisions of the law set down rules to homogenize budgetary issues, employment, insurance and dispute settlement.

Anti-trafficking in Persons legislation

The Law "On the Suppression of the Traffic in Persons"[111]
Adopted 30 June 2004

The Tajik legislation enacted the law "On the Suppression of the Traffic in Persons" on 30 June 2004 for the purpose of the implementation of state policy in the sphere of the suppression of the traffic in persons, for compliance with international obligations and to reduce the risk of persons of becoming victims of such a crime.[112] The law provides the definition of the "traffic in persons" and defines the latter as:

> Sale of persons with or without their consent by means of deception, of recruitment, of transport, of harbouring, of transfer, of abduction, of fraud, of the abuse of power or of a position of vulnerability, or of giving and receiving payments or benefits to achieve the consent of a person having control over another person, and other forms of compulsion for the purpose of further sale, involvement in sexual and criminal activity, exploitation in armed conflicts, in pornographic business, forced labour or services, slavery or practices similar to slavery, servitude, debt bondage or adoption for commercial purposes.

In general terms, the definition above corresponds to a certain extent with the definition provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Convention against Transnational Organized Crime in terms of identifying some of the means of trafficking provided by international instruments (i.e., deception, abduction, fraud, etc.). The Tajik law in this regard avoids outlining "threat or use of force" as one of the means of trafficking; instead, the legislative act provides the more generalized term of "other forms of coercion". While the definition given in the Protocol identifies the recruitment, transfer, harbouring, or receipt of persons as forms of trafficking, the Tajik

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[110] *Ibid.* Article 14

[111] The Law "On the Suppression of the Traffic in Persons" provided by the Encyclopaedia of Tajik Law *Adliya.*

[112] *Ibid.* Article 3

legislation categorizes the abovementioned as means of trafficking, along with deception, abduction and fraud.

The law covers all categories of trafficked people, i.e., not only women and children, but also men. The law additionally defines the terms "trafficker of persons", "victim of trafficking", "recruitment", "exploitation", "forced labour", "slavery", "debt bondage", etc. It also provides the scope of offences that are connected to the traffic in persons and regulated in the criminal legislation of the Republic of Tajikistan.

According to this law, the legal sources for regulation of the suppression of the traffic in persons or, in other words, the normative framework of trafficking, are comprised in the Constitution as the primary source, the present law being analyzed and all international treaties recognized by Tajikistan.

According to the law on trafficking, legality, the responsibility of traffickers, non-discrimination against the victims of trafficking, the secure and just treatment of victims of trafficking, access to justice, and cooperation with NGOs and societies are the primary principles in the suppression of trafficking in persons.

Article 5 of the Law provides for the classification of the traffic of persons. The classification is based on two elements:

1. Means of coercion, and
2. Context of the exploitation of victims of traffic.

The law includes the following in the first category:

- physical coercion with the use of force and/or use of narcotic substances, alcohol, or medication;
- material coercion in the form of debt bondage or any other form of material dependence including slavery or conditions similar to slavery;
- psychological coercion by means of blackmail, deception, or threat of use of force;
- legal dependence due to adoption or guardianship, or due to marriage without the object of creating a family.

The second category – the context of exploitation of the victims of trafficking includes:

- exploitation of the physiological organs of a human being, namely, transplantation of organs and tissues, including the use of a woman as a surrogate mother;
- exploitation of labour in domestic and consumer service, in the field of production, in agricultural works, as well as in criminal business (participation in armed groups, in the domain of illicit goods production);
- exploitation for sexual purposes;
- exploitation of persons in armed conflicts.

Articles 6 through 10 develop provisions regarding the state agencies that represent the main actors in the suppression of traffic in persons; the provisions define

the scope of responsibility for each organ. The law specifically envisages that the state agencies participate in the suppression of the trafficking by means of the elaboration and realization of preventive, organizational, informational, and other measures to prevent, disclose, and suppress trafficking.

For the purpose of coordination, the law specifically sets the legal basis for the creation of the Interagency Commission on Suppression of Traffic in Persons. The Interagency Commission is in charge of framing the state policy regarding trafficking, conducting outreach campaigns on the suppression of traffic in persons, and is the focal point for gathering information regarding the scale and situation of trafficking. The Commission is also in charge of developing and participating in the development of international agreements concerning matters of trafficking.

The system of preventive measures provided under the law envisages among others the following activities:

- monitoring of problems of the traffic in persons;
- developing a programme encouraging employers to hire victims of traffic in persons;
- developing a programme directed towards the elimination of social problems that create conditions for traffickers to expand their activities;
- informing the population about dangerous situations that can bring about victimization, about the measures of protection provided by state agencies, and about measures taken by the state to suppress the traffic in persons.

In terms of addressing the needs of the victims of trafficking, the law has established the legal basis for the creation of specialized agencies and centres providing support for victims of trafficking. For this purpose the centres may provide accessible information on judicial and administrative procedures to defend victims' rights; provide qualified psychological and medical assistance; facilitate the reintegration of the victims into their families and society, and provide temporary shelter for the victims of trafficking.

Articles 16 and 17 of the Law on Suppression of Traffic in Persons regulate issues of the social rehabilitation of the victims of trafficking, and provide protection measures for victims. Protection measures include but are not limited to restriction of information available to the public about victims; prohibition of the dissemination of information about victims that may endanger their security; in cases where there is a threat to the life and the health of the victim, the victim may change his/her name and other personal data according to the procedure established by the law.

Article 19 of the law provides a number of guarantees to children who are victims of traffic in persons. Specifically, the provision provides that in the case of providing support and assistance to children, all necessary measures in the best interests of a child as provided by the Convention on the Rights of the Child should be taken. The legal provision, among other requirements, stipulates that children should be placed separately from the adults' premises and should be allowed to attend educational institutions.

Article 21 sets the framework for international cooperation in suppression of traffic in persons; in particular the provision provides that Tajikistan will cooperate with other countries and international organizations acting towards the suppression of trafficking in accordance with the principles set by international law.

Suspension of the Death Penalty

The Law "On the Suspension of the Death Penalty"[113]
Adopted 15 July 2004

This act was preceded by the law adopted on 1 August 2003 that has excluded the death penalty as a form of punishment from ten articles of the Tajik Criminal Code: Article 181 part 3 (hostage taking); Article 184 part 3 (hijacking); Article 186 parts 1 and 2 (gangsterism); Article 200 part 3 (the illicit distribution of drugs); Article 204 part 4 (the illicit cultivation of prohibited plants containing narcotic substances); Article 249 part 4 (robbery); Article 306 (the violent seizure of power or violent preservation of power); Article 310 (an attempt on the life of an official or public person); Article 395 part 2 (aggressive war), and Article 403 part 2 (a deliberate violation of the norms of international humanitarian law).

Subsequently, the death penalty as an exclusive form of punishment was still allowed under Article 104 part 2 (homicide); Article 138 part 3 (rape); Article 173 part 3 (terrorism); Article 398 (genocide), and Article 399 (biocide). However, the President of the country declared the suspension of the death penalty and this has resulted in the adoption of a relevant law in July of the same year. The death penalty has been replaced by 25 years of imprisonment.

[113] The Law "On the Suspension of the Death Penalty" provided by the Encyclopaedia of Tajik Law *Adliya.*

THAILAND[114]

JUDICIAL DECISIONS

Extradition of foreign nationals – political offence

THE PUBLIC PROSECUTOR v. TERM POMTAVEE AND OTHERS[115]

Court of Appeal, 18 November 2003 (BE 2546)
(Black Case No. 6872/2546, Red Case No. 9951/2546)
Chalermchai Jarupaiboon, Pornpet Vichitchornlachai and Surasak Kittipongpattana JJ

On 25 March 2002, the Ministry of Foreign Affairs of the Lao People's Democratic Republic (LPDR) sent a diplomatic note to the Ministry of Foreign Affairs of Thailand requesting the Thai Government provisionally to arrest and extradite seventeen Defendants, who were Laotian nationals, to the LPDR in accordance with Article 9 of the Treaty on Extradition between the Kingdom of Thailand and the Lao People's Democratic Republic of 1999.[116] A warrant of arrest had been issued by the LPDR's Champasak Office of Public Prosecutors against the seventeen Defendants, charging them with gang robbery pursuant to the LPDR's Penal Code,[117] punishable with imprisonment for more than a year. A brief chronology of events, as provided by the LPDR, is as follows.

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[114] Contributed by Mattanee Kaewpanya, Ministry of Foreign Affairs, Thailand.

[115] There were 17 defendants, one of whom died during the extradition trial. The remaining 16 defendants with Laotian nationality in this case were: Mr. Vichai Chaiyajak, Mr. Suriya Samart, Mr. Seng Champa, Mr. Lom Chalihorm, Mr. Napa Pobandith, Mr. Kaen Singkoomkrong, Mr. Kum Chaiyawong, Mr. Dorn Suriyachan, Mr. Som Chaiyawong, Mr. Pisan Linthang, Mr. Seng Chaiboonya, Mr. Boonrod Kensuwan, Mr. Tongdee Hormnol, Mr. Pairin Chaiboonya, Mr. Kaew Boatong, and Mr. Suage Sengsura.

[116] The Treaty came into effect on 1 March 2001. Article 9 of the 1999 Treaty is about requesting a provisional arrest by one Contracting Party. In doing so, a Contracting Party has to submit a request in writing through diplomatic channels or through the International Criminal Police Organization (INTERPOL), which shall contain a description of the person sought; the location of that person, if known; a brief statement of the facts of the case; a statement of the existence of a warrant of arrest or judgment against that person, and a statement that a request for extradition of the person sought will follow.

[117] This is similar to Section 340 of the Penal Code of Thailand, which reads:
"Whenever three or more persons participate in committing robbery, such persons are said to commit gang robbery and shall be punished with imprisonment of ten to fifteen years and a fine of twenty thousand to thirty thousand Baht.
If in the commission of the gang robbery any one of the offenders carries arms, the offenders shall be punished with imprisonment of twelve to twenty years and a fine of twenty-four thousand to forty thousand Baht…"

On 3 July 2000, at approximately 03.05 a.m., the seventeen Defendants and other accomplices[118] armed themselves with firearms and illegally entered the Wang Tao Border Checkpoint, Ponethong District, Champasak Province, LPDR. They stole public property and the belongings of the local people by using violent force. Moreover, they started firing their weapons to threaten the public, and caused damage to an exchange bureau of the National Bank, an immigration office, a customs office, and shops, as well as a private company. They took the government officials and staff of the private company hostage to negotiate their own safe passage, along with the stolen valuables in their possession.

The Lao Army arrived at the scene to take control of the situation. However, this led to further gunfights between the two sides which resulted in the deaths of six men on the Defendants' side. Some survivors managed to escape and flee into Thailand, leaving behind some firearms and cash which were seized by the Lao authority and exhibited before the Court.

The seventeen Defendants were subsequently arrested by Thai police officers in Ubon Ratchathani Province, Thailand, and were brought to trial before the Ubon Ratchathani Provincial Court[119] on the charges of 1) entering and leaving the Kingdom of Thailand without permission, and 2) staying in the Kingdom of Thailand without permission.[120] The Provincial Court rendered its judgment on 19 March 2002 in 'Criminal Case, Black Case No. 2482/2543 and Red Case No. 906/2545', sentencing the sixteen of the Defendants to one year and nine months of imprisonment, and the seventeenth defendant to three years and nine months of imprisonment.[121]

Acting upon the LPDR's extradition request, the Prosecutor petitioned the Criminal Court, requesting the arrest and extradition of the seventeen Defendants to stand trial before a court of competent jurisdiction in the LPDR. The Criminal Court rendered its decision on 11 June 2003 in 'Criminal Case, Black Case No. Phor 4/2545 and Red Case No. Phor 4/2546', denied the Prosecution's motion, and instead ordered the release of all of the seventeen Defendants after the completion of their aforesaid sentences in Thailand. Having examined witnesses and the evidence, the Criminal Court was of the opinion that the Defendants' acts were not for private purposes, but were intended forcibly to demand the Government of the LPDR to comply with their request to change the system of government from Communism to Democracy. Therefore, such acts were considered by the Criminal Court to be political in nature and thus were not extraditable under Section 13(3) of the Thailand's Extradition Act BE 2472 (see below). In addition, the witnesses' account and evidence presented

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[118] There were eleven accused accomplices with Thai nationality.

[119] In Thailand, provincial courts have jurisdiction in both criminal and civil matters, and are identified by the name of the provinces where they are located.

[120] Sections 11, 18 (para. 2), 41, 58, 62 and 81 of the Thai Immigration Act B.E. 2472 (1929 A.D.).

[121] This was due to the fact that the 17th defendant in that case had illegally brought unregistered weapons into the Kingdom of Thailand, which is an offence under Sections 7, 55, 72 para 1, and 78 para 1 of the Firearms Ammunitions Explosives Firecrackers and Artificial Firearms Act BE 2490 (1947).

by the Prosecutor were not enough to persuade the Criminal Court to decide otherwise. The Prosecutor lodged an appeal with the Court of Appeal within the requisite 15 days in accordance with Section 14 of the Extradition Act BE 2472.

The Court of Appeal considered factual submissions from both sides and started its opinion by mentioning that when the incident took place in the year 2000, the Extradition Treaty between the Kingdom of Thailand and the LPDR had not yet come into force. Therefore, the Court of Appeal had to examine the provisions of the Extradition Act BE 2472, which was the relevant law governing this matter.

Pursuant to Section 4 of the Act, in the absence of an extradition treaty, the Royal Thai Government may, at its discretion, surrender to foreign States persons accused or convicted of crimes committed within the jurisdiction of such States, provided that by Thai law such crimes are punishable with imprisonment of at least one year and other requirements are met.

The Court of Appeal found that the *prima facie* facts satisfied the conditions for extraditing these offenders to the LPRD. Firstly, there was at least one diplomatic note requesting the extradition of all seventeen Defendants. Secondly, these Laotian Defendants were clearly those wanted by the Government of the LPDR. Thirdly, they had already been charged with gang robbery by the Jumpasak Office of Prosecutor of the LPDR. Lastly, the offence was punishable by Thai law with imprisonment of more than a year.[122]

However, on the Defendants' argument that the crimes were of a political nature, the Court of Appeal had to bear in mind the provision in Section 13(2) and (3) of the same Act, which reads as follows:

> The court need not hear evidence for the accused in his defence except upon the following points:
> (1) That he is not the person wanted;
> (2) That the offence is not extraditable or is of a political character;
> (3) That his extradition is in fact being asked for with a view to punishing him for an offence of a political character;
> (4) His nationality.

On this point, from the accounts of the incident by witnesses, especially by three Thai military personnel working at the time of the incident at the Thai Border Checkpoint located not far from the scene of the incident, the Court of Appeal was convinced that the seventeen Defendants were members of a national liberation movement attempting to liberate the LPDR from Communism. Moreover, at the time of the incident, while some Defendants were wearing military uniforms and others were wearing normal civilian attire, each of them wore a red scarf around his neck as a sign of being on the same side. After taking control of the Wang Tao Border Checkpoint, some of them in the group replaced the LPDR's national flag with a red flag with a three-headed elephant in the middle. They also kept more than ten

[122] See note 3 above.

people hostage somewhere near the Thai-Lao border until the following morning, before the gunfight between them and the LRDP Army broke out.

The Court of Appeal concluded that all of these factors made the Defendants' acts political in character, taking also into account national and political unrest in the LDPR after the incident. In addition, the Court of Appeal suggested that by taking hostages and keeping them for some time after the armed robbery showed that such an incident was not intended to be a normal gang robbery but, in fact, indicated an intention to cause unrest in the local area in order to draw international attention, and to disturb the Communist regime in the LPDR. The Court of Appeal, therefore, decided that, by virtue of Section 13(2) and (3) of the Extradition Act BE 2472, the Defendants' offences were not extraditable ones. Thus, the judgment of the Criminal Court was affirmed and the appeal by the Prosecution was dismissed.

Extradition of foreign nationals – political offence

THE PUBLIC PROSECUTOR v. SOK YOUEN A.K.A. SOK YUEN

Court of Appeal, 30 September 2003 (BE 2546)
(Black Case No. 1668/2546, Red Case No. 8630/2546)
Suriya Dethdan, Thanith Keasawapitag and Tawat Sethtamonkhon JJ

The Defendant, who fled to and hid in Thailand around the year 1999, was accused by the Cambodian authorities of committing two offences, namely, (a) the attempted murder of Prime Minister Hun Sen of Cambodia on 24 September 1998, resulting in losses of life and property damage; and (b) the illegal possession of firearms. The first offence is punishable with imprisonment of ten to twenty years, whereas the second one is punishable with imprisonment of six months to three years. An arrest warrant was issued by the Cambodian military court.

The Criminal Court, after examining the facts of the case as well as contentions and arguments from both sides, reached the following conclusions. Firstly, the Defendant was the person named in the extradition request. Secondly, his offences were extraditable offences under the Extradition Act BE 2472 (there being no extradition treaty between Thailand and Cambodia in force at the time of the extradition request). Finally, the offences were not of a political character. The Criminal Court, therefore, ordered that the Defendant be detained with a view to his extradition.

The Defendant lodged an appeal against the decision of the Criminal Court[123] to extradite the Defendant to Cambodia, pursuant to Section 15 of the Extradition Act BE 2472 and authorizing his detention pending extradition.

The Defendant's appeal to the Court of Appeal contended, *inter alia*, that his offences were of a political nature and/or that his extradition was in fact being sought in order to punish him for his membership of an opposition political party in Cam-

[123] Facts and the decisions of the Criminal Court of this case (Black Case No. Phor. 6/2543; Red Case No. Phor. 7/2545 on 28 November 2002) were published in the *Asian YIL*, Vol. 10, 2001-2002, State Practice Section, pp 249-252.

bodia. Moreover, the Defendant argued that he was granted refugee status by the UNHCR under Article 33 of the 1951 UN Convention relating to the Status of Refugees. Therefore, Thailand would have an obligation not to extradite him to the Cambodian authority.

The Court of Appeal made the following factual findings. There had been regular armed conflicts in Cambodia up to the Paris Conference of 1991, resulting in general elections being held under UN supervision in 1993 and 1998. After the elections, despite the fact that there were some clashes among political parties, including the political party to which the Defendant belonged, the political situation, in general, was peaceful. Even if the attempted murder of Mr. Hun Sen had been successful, this would have led to a change of the person in charge of the government, but not of the political regime as a whole. Thus, the Defendant's offences were not political in nature. Rather, they were criminal offences with the ultimate aim to cause unrest in the nation, or acts of terrorism. In addition, it was doubtful that, once being extradited, the Defendant would be put on trial for any political offence, other than possibly being forced to confess that Mr. Sam Rainsy, the leader of the political party to which the Defendant belonged, was the mastermind behind the Defendant's acts, and this possibility was not within the jurisdiction of Thai Courts.

The Court of Appeal rejected the Defendant's contention on his refugee status granted by the UNHCR pursuant to Article 33 (1) of the 1951 UN Convention relating to the Status of Refugees, as the Defendant himself acknowledged in his appeal that Thailand was not party to the 1951 UN Convention.

The other arguments put forwarded by the Defendant were also rejected by the Court of Appeal as unfounded and the appeal was dismissed.

OTHER RELEVANT STATE PRACTICE

Registration of partnership between same-sex partners at a foreign embassy

Private International Law: Registration of partnership between same-sex partners at a foreign embassy in Thailand

In March 2003, the Embassy of Sweden in Bangkok sent a diplomatic note to the Ministry of Foreign Affairs, Thailand, requesting a legal opinion on the following issues, namely, 1) whether it was permissible for the Embassy to perform the registration of partnership between same-sex partners at the Embassy premises in Bangkok, and 2) whether such registration was permissible under Thai laws and regulations and, if it was, whether there were any conditions thereof.

According to Swedish family law, which has been in force since 1 January 1995,[124] such registration of partnership is allowed for two persons of the same

[124] The Swedish Registered Partnership Act 1995; Section 1 (under Chapter 1: Registration of partnership) provides that two persons of the same sex may request the registration of their partnership.

sex. Furthermore, in practice, the Embassy of Sweden now registers regular marriages between two persons of opposite sexes insofar as one partner is a Swedish citizen and the other partner is a Swedish citizen or a foreign citizen (but not a Thai citizen); and as one of the persons in question has been living in this country for at least one year. The marriage ceremonies at the Embassy of Sweden in Bangkok are performed by the Ambassador or his Deputy Chief of Mission. As such, the Embassy, thus, suggested that similar rules be applied to same-sex registrations of partnership at the Embassy in Bangkok.

The Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand, issued a legal opinion on this matter[125] in its Memorandum No. 0802/190/2547 dated 5 February 2004 in reply to the request for a legal opinion from the Department of European Affairs of the same Ministry as follows:

> a. Relevant International Law
>
> Article 5 (f) of the Vienna Convention on Consular Relations 1963 clearly stipulates that a consular representative has a function in 'acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State'.
>
> b. Relevant Thai Laws and Regulations
>
> 1. Part 5 of the Conflict of Laws Act BE 2481 (1938 AD) deals with situations where a couple of more than one nationality desires to have registration of partnership in Thailand. Section 19 provides that the conditions of marriage shall be governed by the law of nationality of each party to the marriage. By virtue of Section 20, a marriage in accordance with the form prescribed by the law of the country where such marriage takes place shall be valid. Pursuant to Section 15 of the same Act, whenever the law of a foreign country is to govern, it shall be applied insofar as it is not contrary to the public order or good morals of the Kingdom of Thailand.
>
> 2. Sections 1448-1460 of the Thai Civil and Commercial Code on Family Law clearly state that a marriage can take place only between a man and a woman.[126]

Having examined the applicable law relating on this matter, the Department of Treaties and Legal Affairs was of the opinion that although the Swedish Government has approved the registration of partnership between same-sex partners, such registration will be lawful and applicable only within Sweden or in other States whose legal systems recognize such registration of partnership for same-sex partners, but not in accordance with the Thai laws and regulations.

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[125] Based on an opinion given by a Foreign Affairs Division of the Ministry of Interior of Thailand in its Note to the Ministry of Foreign Affairs No. MI 0204.1/10599 dated 15 September 2003.

[126] Chapter II: Conditions of Marriage, The Thai Civil and Commercial Code, Book V.

Furthermore, despite the fact that there are no clear laws or regulations governing such registration in Thailand, such partnership registration is not compatible with the fundamental norms of established laws and regulations; namely, the Civil and Commercial Code, particularly the public order or good morals of Thailand. Therefore, such registration of partnership between same-sex partners, even inside the Swedish Embassy's premises in Thailand, does not conform to Thai laws and thus, is not permissible under the Thai legal system.

Counter-terrorism laws

Domestic Laws to Counter International Terrorism: the Amendment to Section 135 of the Thai Penal code

With the increasing threat of international terrorism and as a Member State of the United Nations having an obligation to implement the UN Security Council's resolutions adopted under Chapter VII of the UN Charter, particularly UN Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), Thailand has promulgated a Royal Decree to amend provisions relating to criminal offences and commission of terrorist acts in Section 135 of the Penal Code BE 2546 (2003) as follows.[127]

- Section 135/1 includes definitions of terrorist offences, based largely on definitions of criminal acts under Article 2 of the Draft Comprehensive Convention on International Terrorism then pending before the Sixth Committee of the UN General Assembly. In this Section, whoever commits any of the following criminal offences:
  1. an act of violence or any act to cause death or serious injury to the life and freedom of an individual;
  2. an act causing serious damage to a public transportation system, a telecommunication system, or an infrastructure facility of public use;
  3. an act causing damage to property belonging to a State or an individual, or the environment, resulting or likely to result in major economic loss…

  and if the commission of the offence is intended to threaten or coerce the Royal Thai Government, or any foreign government, or an international organization, to do or abstain from doing any act, thus, causing serious damage, or is intended to create unrest so as to intimidate a population, that person is said to commit a terrorist act and shall be punished with death, imprisonment for life, or imprisonment of three to twenty years and fine of sixty thousand to one million Baht.

  Nevertheless, any demonstration, gathering, protest, objection or movement that calls for the government's assistance or for fair treatment, as an exercise of the freedom under the Thai Constitution, shall not be regarded as a terrorist offence.

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[127] Royal Decree on the Amendment of the Penal Code B.E. 2546 (2003)

- Section 135/2 lays down principles for acts of preparation leading to commission of terrorist offences, mainly that whoever:
  1. threatens to commit a terrorist act by demonstrating behavior which leads to a reasonable belief that the person will do as he/she has threatened;
  2. collects forces or firearms, provides or compiles any assets, gives or receives training relating to terrorism, makes preparations for or conspires to commit a terrorist act, or commits any offence which is part of the plot to commit a terrorist act, or instigate people to partake in committing a terrorist act, or does any act to conceal the knowledge of the commission of a terrorist act…

  shall be punished with imprisonment of two to ten years and fine of forty thousand to two hundred thousand Baht.

- Section 135/3 further provides that whoever is an accomplice to any offence mentioned in Section 135/1 or 135/2 shall be liable to the same punishment as a principal in such offence.

- Section 135/4 was adopted in order to assert jurisdiction over persons and groups of persons listed by UN as having connection with al Qaida and Taliban Groups (around 400 or more persons have been so identified). It provides that 'a person who is a member of a group designated by a United Nations Security Council resolution or declaration as a group committing an act of terrorism, which resolution or declaration has been endorsed by the Royal Thai Government, shall be liable to imprisonment not exceeding seven years and to fine not exceeding one hundred forty thousand Baht'.

PARTICIPATION IN MULTILATERAL TREATIES*

Introduction

This section records the participation of Asian states in open, multilateral law-making treaties which aim mostly at world-wide adherence. It updates the treaty sections of earlier Volumes until 31 December 2004. New data are preceded by a reference to the most recent previous entry. In the event that no new data are available, the title of the treaty will be listed with a reference to the latest Volume containing such data. On this occasion, no updates could be provided for treaties on maritime issues, due to the non-availability of the relevant IMO document/data. This will be redressed in the next Volume for which, according to the International Maritime Organization, the required data will be available.

For the purpose of this section, States broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered. The Editors wish to express their gratitude to all international organizations that have so kindly provided information on the status of various categories of treaties.

Note:

- Where no other reference to specific sources is made, data are derived from Multilateral Treaties Deposited with the Secretary General, http://www.untreaty.un.org.
- No indication is given of reservations and declarations made.
- Sig. = signature; Cons. = consent to be bound; Eff. date = effective date; E.i.f. = entry into force; Ratif. registered = ratification registered; Min. age spec. = minimum age specified.

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* Compiled by Karin Arts, Associate Editor, Associate Professor in International Law and Development, Institute of Social Studies, The Hague.

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State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	14 Aug 1980	5 Mar 2003	Timor-Leste	16 Apr 2003	

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
(Continued from Vol. 10 p. 274)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Maldives		20 Apr 2004	Timor-Leste		16 Apr 2003

Convention on the Rights of the Child, 1989
(Continued from Vol. 7 p. 329)

State	*Sig.*	*Cons.*
Timor-Leste		16 Apr 2003

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
(Continued from Vol. 10 p. 274)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia	27 Sep 2004		Kyrgyzstan		29 Sep 2003
Indonesia	22 Sep 2004		Timor Leste		30 Jan 2004

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999
(Continued from Vol. 10 p. 275)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Philippines	21 Mar 2000	12 Nov 2003	Timor Leste		16 Apr 2003

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000
(Continued from Vol. 10 p. 275)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		24 Sep 2003	Kyrgyzstan		13 Aug 2003
Cambodia	27 Jun 2000	16 Jul 2004	Maldives	10 May 2002	29 Dec 2004
India	15 Nov 2004		Mongolia	12 Nov 2001	6 Oct 2004
Japan	10 May 2002	2 Aug 2004	Philippines	8 Sep 2000	26 Aug 2003
Kazakhstan	6 Sep 2000	10 Apr 2003	Timor-Leste		2 Aug 2004
Korea (Rep.)	6 Sep 2000	24 Sep 2004			

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000
(Continued from Vol. 10 p. 275)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India	15 Nov 2004		Kyrgyzstan		12 Feb 2003
Japan	10 May 2002		Mongolia	12 Nov 2001	27 Jun 2003
Korea (Rep.)	6 Sep 2000	24 Sep 2004	Timor-Leste		16 Apr 2003

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949
(Continued from Vol. 6 p. 249)

State	*Cons.*
Timor-Leste	8 May 2003

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977
(Continued from Vol. 7 p. 330)

State	*Cons.*
Japan	31 Aug 2004

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977
(Continued from Vol. 7 p. 329)

State	*Cons.*
Japan	31 Aug 2004

INTELLECTUAL PROPERTY

Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 10 p. 276.
Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979
(Continued from Vol. 9 p. 289)
(Status as included in WIPO doc. 423(E) of 15 Jan 2005)

State	*Party*	*Latest Act to which State is party*	*State*	*Party*	*Latest Act to which State is party*
Bhutan	25 Nov 2004	Paris	Vietnam	26 Oct 2004	Paris
Korea (DPR)	28 Apr 2003	Paris			

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961

(Continued from Vol. 6 p. 252)

(Status as included in WIPO doc. 423(E) of 15 Jan 2005)

State	*Cons. (deposit)*
Kyrgyzstan	13 Aug 2003

Convention for the Protection of Industrial Property, 1883 as amended 1979

(Continued from Vol. 10 p. 276)

(Status as included in WIPO doc. 423(E) of 15 Jan 2005)

State	*Party*	*Latest Act to which State is party*
Pakistan	22 Jul 2004	Stockholm

Convention Establishing the World Intellectual Property Organization, 1967

(Continued from Vol. 10 p. 276)

(Status as included in WIPO doc. 423(E) of 15 Jan 2005)

State	*Membership*
Maldives	12 May 2004

INTERNATIONAL CRIMES

Convention on the Prevention and Punishment of the Crime of Genocide, 1948: *see* Vol. 8 p. 182.
Slavery Convention, 1926 as amended in 1953: *see* Vol. 7 p. 331.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956: *see* Vol. 7 p. 331.
Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: *see* Vol. 9 p. 289.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 6 p. 254.
Convention for the Suppression of Unlawful Seizure of Aircraft, 1970: *see* Vol. 8 p. 289.
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: *see* Vol. 8 p. 290.
International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: *see* Vol. 7 p. 331.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol. 10 p. 277.
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988: *see* Vol. 10 p. 277.

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973

(Continued from Vol. 10 p. 277)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		24 Sep 2003	Myanmar		4 Jun 2004
Kyrgyzstan		2 Oct 2003	Papua New Guinea		30 Sep 2003
Malaysia		24 Sep 2003			

International Convention Against the Taking of Hostages, 1979

(Continued from Vol. 10 p. 277)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		24 Sep 2003	Myanmar		4 Jun 2004
Kyrgyzstan		2 Oct 2003	Papua New Guinea		30 Sep 2003

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988

(Continued from Vol. 10 p. 278)

(Status as at 31 December 2004 provided by the ICAO Secretariat)

State	*Cons.*	*Eff. date.*
Philippines	17 Dec 2003	16 Jan 2004

International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989

(Continued from Vol. 8 p. 184)

State	*Sig.*	*Cons.*
Korea (Rep.)		24 Sep 2004

Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991

(Continued from Vol. 10 p. 278)

(Status as at 31 December 2004 provided by the ICAO Secretariat)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	1 Mar 1991	30 Nov 2003	Philippines	17 Dec 2003	15 Feb 2004
Myanmar	1 Sep 2004	31 Oct 2004	Singapore	20 Jan 2003	21 Mar 2003

Convention on the Safety of United Nations and Associated Personnel, 1994
(Continued from Vol. 10 p. 278)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		22 Sep 2004	Mongolia		25 Feb 2004
Korea (DPR)		8 Oct 2003	Sri Lanka		23 Sep 2003

International Convention for the Suppression of Terrorist Bombings, 1997
(Continued from Vol. 10 p. 278)

State	*Sig.*	*Rat.*	*State*	*Sig.*	*Rat.*
Afghanistan		24 Sep 2003	Papua N.Guinea		30 Sep 2003
Korea (rep.)	3 Dec 1999	17 Feb 2004	Philippines	23 Sep 1998	7 Jan 2004
Malaysia		24 Sep 2003			

Statute of the International Criminal Court, 1998
(Continued from Vol. 10 p. 279)

State	*Sig.*	*Rat.*
Afghanistan		10 Feb 2003

International Convention for the Suppression of the Financing of Terrorism, 1999
(Continued from Vol. 10 p. 279)

State	*Sig.*	*Rat.*	*State*	*Sig.*	*Rat.*
Afghanistan		24 Sep 2003	Mongolia	12 Nov 2001	25 Feb 2004
Bhutan	14 Nov 2001	22 Mar 2004	Myanmar	12 Nov 2001	
India	8 Sep 2000	22 Apr 2003	Papua N.Guinea		30 Sep 2003
Kazakhstan		24 Feb 2003	Philippines	16 Nov 2001	7 Jan 2004
Kyrgyzstan		2 Oct 2003	Tajikistan	6 Nov 2001	16 Jul 2004
Maldives		20 Apr 2004	Thailand	18 Dec 2001	29 Sep 2004
Korea (Rep.)	9 Oct 2001	17 Feb 2004			

INTERNATIONAL REPRESENTATION
(*see also*: Privileges and Immunities)

Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character, 1975: *see* Vol. 6 p. 257.

INTERNATIONAL TRADE

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 6 p. 257.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 6 p. 257.

UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.

UN Convention on Contracts for the International Sale of Goods, 1980
(Continued from Vol. 8 p. 184)

State	*Sig.*	*Rat.*
Korea (Rep.)		17 Feb 2004

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure, 1954: *see* Vol. 6 p. 258.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: *see* Vol. 9 p. 291.
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 9 p. 292.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961
(Corrected from Vol. 10 p. 280)
(Status as provided by The Hague Conference on Private International Law)

State	*Sig.*	*Cons.*
India		26 Oct 2004

LABOUR

Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 10 p. 280.
Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): *see* Vol. 9 p. 292.
Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 10 p. 280.
Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 10 p. 281.
Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111): *see* Vol. 8 p. 185.
Employment Policy Convention, 1964 (ILO Conv. 122): see Vol. 8 p. 186.

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105)
(Continued from Vol. 10 p. 281)
(Status as at 31 December 2004 as provided by the ILO)

State	*Ratif. registered*
Sri Lanka	7 Jan 2003

Minimum Age Convention, 1973 (ILO Conv. 138)
(Continued from Vol. 10 p. 281)
(Status as at 31 December 2004 as provided by the ILO)

State	*Ratif. Registered*	*Min. age spec.*	*State*	*Ratif. Registered*	*Min. age spec.*
Thailand	11 May 2004	15	Vietnam	24 Jun 2003	15

Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182)
(Continued from Vol. 10 p. 281)
(Status as at 31 December 2004 as provided by the ILO)

State	*Ratif. registered*	*State*	*Ratif. registered*
Kazakhstan	26 Feb 2003	Kyrgyzstan	11 May 2004

NARCOTIC DRUGS

Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: *see* Vol. 6 p. 261.
Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.
Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: *see* Vol. 6 p. 261.
Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the protocol of 1946: *see* Vol. 6 p. 262.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 6 p. 262.
Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: *see* Vol. 6 p. 262.
International Opium Convention, 1925, amended by Protocol 1946: *see* Vol. 7 p. 334.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.
Single Convention on Narcotic Drugs, 1961: *see* Vol. 7 p. 334.
Convention on Psychotropic Substances, 1971: *see* Vol. 9 p. 294.
Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972: *see* Vol. 9 p. 294.

Protocol amending the Single Convention on Narcotic Drugs, 1972
(Continued from Vol. 8 p. 186)

State	*Sig.*	*Cons.*
Myanmar		22 Aug 2003

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988
(Continued from Vol. 9 p. 294)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Laos		1 Oct 2004	Mongolia		25 Jun 2003

NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 6 p. 264.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: *see* Vol. 6 p. 265.
Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: *see* Vol. 8 p. 187.

NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 6 p. 265.
Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1980: *see* Vol. 6 p. 265.
Convention on Early Notification of a Nuclear Accident, 1986: *see* Vol. 9 p. 295.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 9 p. 295.
Convention on Nuclear Safety, 1994: s*ee* Vol. 10 p. 283.
Protocol to amend the Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 8 p. 188.
Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 8 p. 189.

Convention on the Physical Protection of Nuclear Material, 1980
(Continued from Vol. 10 p. 283)
(Status as at 31 December 2004, provided by IAEA)

State	*Sig.*	*Cons. (deposit)*
Afghanistan		12 Sep 2003

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997
(Continued from Vol. 10 p. 283)
(Status as at 31 December 2004, provided by IAEA)

State	*Sig.*	*Cons. (deposit)*
Japan		26 Aug 2003

OUTER SPACE

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967: *see* Vol. 6 p. 266.
Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: *see* Vol. 10 p. 284.
Convention on Registration of Objects launched into Outer Space, 1974: *see* Vol. 10 p. 284.

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations, 1946: *see* Vol. 10 p. 284.
Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol. 6 p. 269.
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963: *see* Vol. 6 p. 269.
Convention on Special Missions, 1969: *see* Vol. 6 p. 269.
Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, 1969: *see* Vol. 6 p. 269.

Vienna Convention on Diplomatic Relations, 1961

(Continued from Vol. 6 p. 268)

State	*Sig.*	*Cons.*
Timor-Leste		30 Jan 2004

Vienna Convention on Consular Relations, 1963

(Continued from Vol. 8 p. 189)

State	*Sig.*	*Cons.*
Timor-Leste		30 Jan 2004

REFUGEES

Convention relating to the Status of Refugees, 1951

(Continued from Vol. 8 p. 190)

State	*Sig.*	*Cons.*
Timor-Leste		7 May 2003

Protocol relating to the Status of Refugees, 1967
(Continued from Vol. 8 p. 190)

State	*Sig.*	*Cons.*
Timor-Leste		7 May 2003

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968: *see* Vol. 7 p. 338.
Convention on Road Signs and Signals, 1968: *see* Vol. 7 p. 338.

SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.
Convention on the High Seas, 1958: *see* Vol. 7 p. 339.
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.
Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.
United Nations Convention on the Law of the Sea, 1982: *see* Vol. 10 p. 285.
Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 10 p. 285.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (…) relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995
(Continued from Vol. 10 p. 285)

State	*Sig.*	*Cons.*
India		19 Aug 2003

SEA TRAFFIC AND TRANSPORT

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 6 p. 273.
International Convention for the Safety of Life at Sea, 1960: *see* Vol. 6 p. 273.
Convention on Facilitation of International Maritime Traffic, 1965 (as amended): *see* Vol. 10 p. 286
International Convention on Load Lines, 1966: *see* Vol. 10 p. 286
International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 6 p. 274.
Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.
Convention on the International Regulations for Preventing Collisions at Sea, 1972 as amended: *see* Vol. 10 p. 286.
International Convention for Safe Containers, as amended 1972: *see* Vol. 10 p. 286.

Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.
International Convention for the Safety of Life at Sea, 1974, as amended: *see* Vol. 6 p. 286.
Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.
UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 6 p. 276.
Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 (as amended) 1978: *see* Vol. 6 p. 276.
Protocol Relating to the International Convention on Load Lines, 1988: *see* Vol. 10 p. 286.

SOCIAL MATTERS

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women and Children, 1921: *see* Vol. 6 p. 277.
Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, 1923, amended by Protocol in 1947: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women of Full Age, 1933: *see* Vol. 6 p. 277.
Convention for the Suppression of the Traffic in Women and Children, 1921, amended by Protocol in 1947, *see* Vol. 6 p. 277.
Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended by Protocol, 1947: *see* Vol. 6 p. 277.
International Agreement for the Suppression of the White Slave Traffic, 1904, amended by Protocol 1949: *see* Vol. 6 p. 278.
International Convention for the Suppression of the White Slave Traffic, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.
Agreement for the Suppression of the Circulation of Obscene Publications, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950

(Continued from Vol. 10 p. 287)

State	*Sig.*	*Cons*	*State*	*Sig.*	*Cons*
Cambodia	27 Sep 2004		Kazakhstan	17 Nov 2004	
Indonesia	25 Sep 2003				

Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950

(Continued from Vol. 6 p. 278)

State	*Sig.*	*Cons*	*State*	*Sig.*	*Cons*
Indonesia		25 Sep 2003	Kazakhstan		17 Nov 2004

TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 8 p. 192.
Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended): *see* Vol. 8 p. 193.
Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 8 p. 193.
Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: *see* Vol. 9 p. 298.
Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.
Amendments to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1999: *see* Vol. 10 p. 288.

TREATIES

Vienna Convention on the Law of Treaties, 1969: *see* Vol. 10 p. 288.
Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 6 p. 280.

WEAPONS

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: *see* Vol. 6 p. 281.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: *see* Vol. 6 p. 281.
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: *see* Vol. 6 p. 282.
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 8 p. 194.

Treaty on the Non-Proliferation of Nuclear Weapons, 1968
(Continued from Vol. 10 p. 289)

State	*Sig.*	*Cons.*
Timor-Leste		5 May 2003

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972
(Continued from Vol. 6 p. 282)

State	*Sig.*	*Cons.*
Timor-Leste		7 May 2003

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980

(Continued from Vol. 10 p. 289)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Sri Lanka		24 Sep 2004	Turkmenistan		19 Mar 2004

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993

(Continued from Vol. 10 p. 289)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	14 Jan 1993	24 Sep 2003	Kyrgyzstan	22 Feb 1993	29 Sep 2003
Timor-Leste		7 May 2003			

Comprehensive Nuclear Test Ban Treaty, 1996

(Continued from Vol. 10 p. 289)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	24 Sep 2003	24 Sep 2003	Kyrgyzstan	8 Oct 1996	2 Oct 2003

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997

(Continued from Vol. 10 p. 290)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Timor-Leste		7 May 2003	Papua New Guinea		28 Jun 2004

Amendment of Article 1 of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects
Geneva, 21 December 2001

Entry into force: 1 March 1999

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		11 Aug 2003	Korea (Rep.)		13 Feb 2003
Japan		10 Jul 2003	Sri Lanka		24 Sep 2004

ASIAN AND INTERNATIONAL ORGANIZATIONS

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

A survey of activities 2001-2002, including The work of its Forty-first (Abuja) Session

M.C.W. Pinto*

Note: The Asian-African Legal Consultative Committee was established on 15 November 1956 to facilitate exchange of views and information on legal matters of common concern to its Members. Its regular Sessions are convened annually, alternately in Asia and Africa. A Session generally takes place in the first half of a calendar year, and is known by the name of the city in which it is held. Consideration of a topic commenced at one Session may continue at subsequent Sessions, as well as inter-sessionally through seminars or expert group meetings; these retain their association with the originating Session. Reports on inter-sessional activities may be discussed at the following Session.

By a resolution adopted at its Special Session in New Delhi on 14 October 1992 (Res. SS 1997/1), the Committee's permanent headquarters was established in New Delhi.

By a resolution adopted at its Fortieth (New Delhi) Session (RES/40/ORG.3 dated 24 June 2001) the Committee decided to change its name to *Asian-African Legal Consultative Organization* (AALCO).

Member States are represented at Sessions by high level delegations, which may include Chief Justices, Judges, Cabinet Ministers, Attorneys-General, and senior public officials. Sessions are routinely attended by observers from non-Member States, and inter-governmental and non-governmental organizations. The Organization maintains working relationships with the United Nations and its Specialized Agencies and Commissions, as well as with other international organizations, including the International Atomic Energy Agency, UNIDROIT, The Hague Conference on Private International Law, the Commonwealth Secretariat, the Organization of African Unity and the League of Arab States.

The present survey covers the focus of the work of the Organization's Forty-first Session, held at Abuja, Nigeria, 15-19 July 2002, while containing references also

* Of the Editorial Board.

Asian Yearbook of International Law, Volume 11 (B.S. Chimni *et al.,* eds.)

to activities associated with Sessions which were covered in earlier volumes of this *Yearbook*. The information contained in this survey is taken from *Report and Selected Documents of the Forty-first Session* published by the Organization.

Information on the activities of AALCO may be obtained from:

The AALCO Secretariat, E-66, Vasant Marg., Vasant Vihar, New Delhi 110057, India
E-mail: aalco@del3.vsnl.net.in

1. *MEMBERSHIP AND ORGANIZATION*

There were forty-four Members of the Organization at the time of its Forty-first Session, held at Abuja, Nigeria, from 15-19 July 2002: Bahrain, Bangladesh, China, Cyprus, Egypt, Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Lebanon, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, and Yemen. Botswana is an Associate Member.

2. *INTER-SESSIONAL MEETINGS AND OTHER ACTIVITIES*

A Meeting of Legal Advisers of AALCO Member States convened at New York on 20 November 2001, presided over by Dr. P. Sreenivasa Rao (India). The meeting focused on the work of the Preparatory Commission for the International Criminal Court, and on the topics of terrorism and corruption (*Report*, p. 7).

A Seminar on *Human Rights and Combating Terrorism* was held at Abuja on 15 July 2002 in conjunction with the Forty-first Session, in collaboration with the Office of the High Commission to Human Rights, the UN High Commission for Refugees and the International Organization for Migration (*Report*, pp. 623-643).

The Organization is to strengthen its *Centre for Research and Training*, and to establish a new *Centre for Energy and Environmental Law* (*Report*, pp. 9, 14-15).

3. *OFFICERS OF THE FORTY-FIRST (ABUJA) SESSION*

The Forty-first Session of the Organization elected as President Senator the Hon. Kanu G. Agabi, SAN, the Attorney-General and Minister of Justice of Nigeria, and H.E. Professor Dr. Yusril Ihza Mahendra, Minister of Justice and Human Rights of Indonesia, as Vice-President. Mrs. Ernestine Kamuhabwa, Minister Plenipotentiary at the High Commission for Tanzania in New Delhi, was elected Rapporteur of the *Special Meeting on Human Rights and Combating Terrorism*.

4. *ORGANIZATION OF THE SESSION*

Ambassador Dr. Wafik Zaher Kamil (Egypt), the Secretary-General of the Organization, was responsible for the organization of the Session. He was assisted by Dr. Ahmed Jassim Al-Gaatri (Qatar), Dr. Ali Reza Deihim (Iran), and Mrs. Toshiko Shimizu (Japan), Deputy Secretaries-General, by Dr. Li Zhenhua (China), Assistant Secretary-General, and by the AALCO Staff.

5. *SUBJECTS DEALT WITH BY THE ORGANIZATION*

The Organization considered and adopted resolutions on the subjects listed below, the order of their discussion having been determined at the commencement of the Session. The references next to each subject are to the pages of the *Report of the Forty-first Session* issued by the Secretariat** The *Report* on each Session will, from 2003, be contained in a volume entitled *Yearbook of the Asian-African Legal Consultative Organization*..

I. Questions under consideration by the International Law Commission (*Report*, pp. 17-109)

The Secretariat's report on the work of the Commission at its Fifty-third Session (2001) (*Report*, p. 17-109) focussed on the Commission's work on six topics: State responsibility; International liability for injurious consequences arising out of acts not prohibited by international law; Reservations to treaties; Diplomatic protection; Unilateral acts of States, and Jurisdictional immunities of States and their property. Of particular interest from an Asian perspective are (1) *Jurisdictional immunities of States and their property*, a topic of the International Law Commission which, on the initiative of Japan at the Cairo Session (2000), was placed on AALCO's own agenda (*Report*, pages 101-149); and (2) *International liability for injurious consequences arising out of acts not prohibited by international law*, a topic for which the Commission's Special Rapporteur is Dr. P. Sreenivasa Rao of India (*Report*, pp. 63-80).

A list of the Members of the International Law Commission elected by the General Assembly on 7 November 2001, who will hold office 2002-2006, is at pages 108-9 of the *Report*. Of the 34 Members of the Commission, eight are from Asia: Husain Al-Baharna (Bahrain), Ali Mohsen Fetais Al-Marri (Qatar), Choung Il Chee (Rep. of Korea), Riad Daoudi (Syrian Arab Republic), Djamchid Momtaz (Islamic Republic of Iran), Pemmaraju Sreenivasa Rao (India), Xue Hanqin (China), and Chusei Yamada (Japan). This election itself was noteworthy in that, for the first time since the establishment of the Commission on 21 November 1947, the General Assembly elected two women to membership: Xue Hanqin (China), and Paula Escarameia (Portugal).

II. Matters referred to the Committee by Member States

1. Law of the Sea (*Report*, pp. 179-216)

The Session reviewed the work of the institutions created for giving effect to the provisions of the 1982 UN Convention on the Law of the Sea, and heard a wide-ranging statement by the President of the *International Tribunal for the Law of the Sea* (ITLOS), Judge P.C. Rao, on dispute settlement mechanisms provided for under the Convention (pp. 180-185). The *Report* contains a Secretariat study of the work of the institutions established by the Convention, and brief notices of the cases that had, until then, been decided by ITLOS: *MV Saiga* No. 1, *MV Saiga* No. 2, *Southern Bluefin Tuna* cases, *Camouco* case, *Monte Confurco* case, *Swordfish stocks* case, *Grand Prince* case, *Chaisiri Reefer 2* case, and the *MOX Plant* case (*Report*, pp. 204-9).

2. Status and treatment of Refugees (*Report*, pages 348-360)

The Organization completed its work on a consolidated text of the Revised Bangkok Principles (for the original text see Asian YIL, Vol 7 (1997), pp. 381-7) taking into account Member States' comments. The Revised Consolidated text of the *Bangkok Principles on the Status and Treatment of Refugees* adopted by the Organization at its Fortieth (New Delhi) Session on 24 June 2001 was reproduced in this *Yearbook*, Vol. 10 (2002).

The *Revised Bangkok Principles* are regarded as "declaratory and non-binding", but should "guide and inform" Members of AALCO (*Report*, p. 360). This *Report* reproduces written comments by the Government of Malaysia (*Report*, pp. 357-9), and a Secretariat study on (1) recent initiatives by the UN High Commissioner for Refugees, and (2) suggestions for AALCO's future work programme on the topic (*Report*, pp. 361-8).

3. Human Rights in Islam (*Report*, pp. 217-223)

Proposed by Saudi Arabia for inclusion in the Organization's agenda at its Fortieth Session, the topic was taken up for consideration at its Forty-first Session. A Secretariat summary of the customary background note, furnished by Saudi Arabia, lists the following as having been elaborated therein: Right to Respect, Man's Right to Life, Man's Right to Security, Right to Property, Man's Right to Safeguard His Dignity, Man's Right to Education, Woman's Rights and her Status in Islam, and Child's Rights in Islam.

As to the main issue for discussion in connection with the topic, the Secretariat summary quotes from the paper presented by the Saudi Ministry of Justice:

> "[H]uman rights in Islam are based on divinity of the source and necessary commitment to abiding by the religious rules of which they form a part, and no ruler or authority is allowed to play with them or try to amend or abolish them, and that is also our conviction ..."

The following additional excerpts from the paper are quoted:

> "Let me cite a single example which is being raised by those who don't believe in our undisputed and unquestionable matters. These opponents of Shari'ah rules think that in establishing punishment for theft, like cutting off body parts, there is cruelty and insult to the dignity of a human being. We inform them that these rules are not laid down by a person or a ruler, but they are revealed by Allah the Almighty in the Holy Qur'an. He said, 'As for the male thief and the female thief, cut off their hands as a recompense for that which they committed'. Muslims are unanimous since the beginning of Islam till the present time on the truth and implementation of this rule ... So if, as a deterrent to crime, the Islamic Shari'ah pronounces the punishment of cutting off hands, it is not cruelty. This Shari'ah is famous for its compassion ... [but] mercy will not be shown to one who does not show mercy to others." (*Report*, pp. 217-8)

Several delegations welcomed Saudi Arabia's initiative in placing the topic before AALCO. However, discussion of the topic was postponed.

4. Deportation of Palestinians and other Israeli practices, among them the massive immigration and settlement of Jews in occupied territories in violation of international law, particularly the Fourth Geneva Convention of 1949 (*Report*, pp. 369-412)

A Secretariat summary of international action on the subject (*Report*, pp. 390-412) covers developments since the Fortieth Session of AALCO including the Jordanian-Egyptian Peace Proposal (April 2001) and the proposal of Saudi Arabia's Crown Prince Abdullah (March 2002), as well as action by the Security Council and General Assembly of the United Nations, the Organisation of the Islamic Conference, the Arab League and the Non-aligned Movement.

5. Legal protection of Migrant Workers (*Report,* pp. 413-452)

The extensive discussion of this topic which took place at a Special Meeting on *Some Legal Aspects of Migration*, held on 22 June 2001 during the Fortieth Session of the Committee, was summarized in the *Report* on that Session at pp. 598-645. Subsequent developments are summarised in the *Report* on the Forty-first Session at pp. 415-420; 449-452. A *Draft Model Agreement between States of Origin and States of Destination* prepared by the Secretariat has been circulated to the Members of AALCO for comment.

6. Extra-territorial application of national legislation: sanctions imposed against third parties (*Report*, pp. 150-178)

Members re-affirmed views expressed at the Organization's Thirty-sixth, Thirty-seventh, Thirty-eighth, Thirty-ninth, and Fortieth Sessions that the extra-territorial imposition of national laws violated State sovereignty and interfered with the legitimate economic interests of States. A Secretariat study on the subject and the Secretariat's report on discussion of related issues at the Fifty-sixth (2001) Session of the United Nations General Assembly, are at pp. 155-178.

7. Jurisdictional immunities of States and their property (*Report*, pp. 110-149)

Referred to the Organization at its Cairo Session (2000) by the Delegation of Japan, consideration of this topic takes account of the work of the International Law Commission, and discussion of it at meetings of the Sixth Committee of the UN General Assembly. With a view to collating the views of AALCC's Members States, the Secretary-General by his letter dated 3 July 2000, invited them to transmit to it national legislation, court decisions, and other relevant materials on the topic. The *Report* reproduces responses from Japan (pp. 134-7) and Myanmar (pp. 138-149).

8. International terrorism (*Report*, pp. 273-301)

Referred to the Organization by the Government of India, the topic was placed on the agenda of its Fortieth Session for the first time, and taken up for discussion at its Forty-first Session. Summing up the views expressed at that Session, the

President emphasized that military means of fighting terrorism were not the only ones. Other means of resolving the problem, such as the diplomatic and political, should also be used, he said. It was also essential to investigate and determine the root causes of terrorism. The struggle for liberation from foreign occupation should, in his opinion, be distinguished from terrorism.

A Secretariat study of the topic (*Report*, pp. 287-301) summarizes deliberations at the UN *Ad hoc* Committee charged with elaborating draft Conventions on the suppression of terrorist bombings (established at the Fifty-second Session (1997) of the General Assembly), the suppression of acts of nuclear terrorism, and suppression of financing terrorism (adopted at the Fifty-fourth Session (1999) of the General Assembly); and covers extension of the Committee's mandate at the Assembly's Fifty-fourth Session, to the drafting of a comprehensive Convention on international terrorism, based on the draft by India circulated during the Assembly's Fifty-first Session in 1996.

A report by Ms. Ernestine Kamuhabwa (Tanzania) on the *Special Meeting on Human Rights and Combating Terrorism*, held in conjunction with the Organization's Forty-first Session (17 July 2002), is at pp. 623-646. The report includes summaries of statements on the topic by representatives of the *High Commissioner for Human Rights*, of the *International Organization for Migration*, and other members of a Panel of Experts.

9. Establishing co-operation against trafficking in women and children (*Report*, pp. 453-508)

Referred to the Organization by the Government of Indonesia, the topic was placed on the agenda of its Fortieth Session for the first time and taken up for discussion at the Forty-first Session. A Secretariat study of the topic covers the *UN Convention against Transnational Organized Crime* adopted at the Fifty-fifth Session of the UN General Assembly on 15 November 2000, and its Protocols (Protocol to Prevent, Suppress and Punish Trafficking in Persons, and Protocol against Smuggling of Migrants by Land, Air and Sea), as well as the work of the *International Organization for Migration* and the *Office of the High Commissioner for Human Rights*.

III. Matters of common concern having legal implications

1. United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (Rome, 15 June-17 July 1998) (*Report*, pp. 302-347)

The Secretariat's study (*Report*, pp. 320-347) covers the work of the Preparatory Commission at its Eighth, Ninth, and Tenth Sessions, and the entry into force of the Convention on 1 July 2002, noting that, among the 139 States that had signed the Rome Statute of the ICC by that date, were the following Members of AALCO: Bahrain, Bangladesh, Botswana, Cyprus, Egypt, Gambia, Iran, Jordan, Kenya, Kuwait, Mauritius, Mongolia, Nigeria, Oman, Philippines, Rep. of Korea, Senegal, Sierra Leone, Sudan, Syria, Thailand, Uganda, United Arab Emirates, and Tanzania.

2. United Nations Conference on Environment and Development (*Report*, pp. 225-272)

The Report contains the Secretariat's review of the work of the Conference of the Parties to the *UN Convention on Climate Change* at its Seventh Session (Marrakech, 29 October-10 November 2001), which focuses on implementation of States' responsibilities regarding (1) capacity building, (2) technology transfer, and (3) funding, as well as the need to bring the Kyoto Protocol into force as soon as possible and implement its procedures and mechanisms aimed at securing compliance with its provisions. The Report also covers the work of subsidiary bodies established under the *UN Convention on Biological Diversity*, in anticipation of the sixth meeting of the Conference of the Parties, scheduled to take place at The Hague, 8-19 April 2002; and of the Fifth Session of the Conference of the Parties, to the *Convention to Combat Desertification*, 1-13 October 2001. Preparations for the ten-year review of action taken since the *1992 UN Conference on Environment and Development*, at a meeting designated by the UN as the "World Summit on Sustainable Development", are reported at pp. 263-272.

3. An Effective International Legal Instrument against Corruption (*Report*, pp. 509-533)

Placed on the Organization's agenda in response to a proposal by its Secretary-General, the item reflects concerns similar to those of the UN General Assembly in establishing, on 4 December 2001 by resolution 55/61, an *Ad hoc Committee* to commence negotiations for the conclusion of an effective legal instrument against corruption. A study by the Secretariat summarizes the work of the First Session of the UN's *Ad hoc* Committee held in Vienna 21 January-1 February 2002, attended by several AALCO Members, including China, India, Indonesia, Iran, Iraq, Japan, Jordan, Kuwait, Lebanon, Malaysia, Oman, Pakistan, Philippines, Qatar, Rep. of Korea, Saudi Arabia, Syria, Thailand, United Arab Emirates, and Yemen. Also covered are discussions taking place in a parallel inter-governmental group, the *Global Forum*, the first meeting of which convened in Washington, DC, 24-26 February 1999, and adopted "Guiding Principles for fighting corruption and safeguarding integrity among Justice and Security Officials" (*Report*, pp. 522-533).

IV International Trade Law Matters (*Report*, pp. 534-622)

The Secretariat continued its regular review of the work of international organizations in the field of international trade law. The review covers the work of the *United Nations Commission on International Trade Law (UNCITRAL)*, the *United Nations Conference on Trade and Development (UNCTAD) and its Commissions*, and the United Nations *Industrial Development Organization (UNIDO)*; as well as of the *International Institute for the Unification of Private Law UNIDROIT)*, the *Hague Conference on Private International Law*, and the *World Trade Organization*. A Secretariat study entitled "WTO as a Framework Agreement and Code of Conduct for World Trade" is at pp. 597-622.

CHRONICLE

CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW

July 2002 – June 2004

Ko Swan Sik*

TABLE OF HEADINGS

* Member of the Editorial Board. For the considerations underlying the Chronicle, *see* the Editorial Introduction 1 *Asian YIL* (1991) p. 265.

Asian Yearbook of International Law, Volume 11 (B.S. Chimni *et al.,* eds.)

AFGHANISTAN
See also: Central Asia

The International Security Assistance Force (ISAF)

A shift occurred in the US attitude on the size of the ISAF and the scope of its task (*cf.* 10 Asian YIL 335-336). After a long period of opposition the US agreed, in accordance with the wishes of the new Afghan government, to an enlargement of the force and its deployment outside Kabul. Other countries had been reluctant to consider such expansion until the US agreed to help with logistics, command and control, and intelligence. The US reluctance in the past (and its preference for improving the Afghan forces) was caused by the fear that an expansion as considered would tie down US forces and extend their stay in Afghanistan. (IHT 31-08/01-09-02)

ALIENS

Legalization of prolonged illegal stay

The Tokyo District Court granted an Iranian who had entered Japan in 1990 on a 90-day visa and who, together with his family, overstayed his visa for more than thirteen years permission to stay in Japan, overruling a decision of the Justice Ministry's Tokyo Regional Immigration Bureau for deportation.

The presiding judge held, *inter alia*: "They have already set up a basis for living (in Japan) as good citizens, and forcibly expelling them would go against humanity and would correspond to an abuse of discretionary power." It was the first time for a Japanese court to overrule a decision for deportation by immigration authorities on grounds of prolonged illegal stay, apart from those concerning applicants of refugee status.

The family had applied for a special residence permit, but the application was rejected. In 2000 the Immigration Bureau decided to deport them. The number of cases of extraordinary grant of residence permits had grown, but there were complaints of arbitrariness in the ministry's decisions. (JT 20-09-03)

ARMS SALES AND PROCUREMENT
See: Inter-state relations: India-Israel

ASIA-AFRICA

Asia-Africa Sub-Regional Organization Conference (AASROC)

An AASROC was held in July 2003 in Bandung, Indonesia, the town where the 1955 Asia-Africa Conference had been held. The conference aimed at reviving the spirit of cooperation between the two continents and was considered a preparatory meeting for the fiftieth celebration of the Bandung Conference in 2005. (JP 28-07-03).

ASIA-EUROPE MEETING (ASEM)

NOTE: ASEM (see 6 Asian YIL 401) was set up as a new and comprehensive partnership between Asia and Europe, providing for bi-annual informal meetings of heads of state and government of, initially, ten Asian countries (Brunei, China, Indonesia, Japan, Republic of Korea, Malaysia, the Philippines, Singapore, Thailand, and Vietnam), the (then) fifteen EU member states, and the president of the European Commission. Besides, there were regular ministerial meetings and senior officials' meetings.

The inaugural ASEM summit meeting took place at Bangkok in March 1996; the second meeting at London in April 1998; the third (which adopted the Asia-Europe Cooperation Framework 2000 and the Seoul Declaration on Inter-Korean Peace) at Seoul in October 2000; the fourth at Copenhagen in September 2002, and the fifth at Hanoi in October 2004.
(*See* overview at the EU website http://europa.eu.int/comm/external_relations/asem/intro)

Participation of Myanmar

The European Union had demanded that the military government of Myanmar make political concessions, such as lifting the house arrest of the dissident Aung San Suu Kyi (*see infra*), before it could be allowed to join a forum for Asia-Europe talks. These demands were rejected by the ten Asian members (seven ASEAN members plus China, Japan, and South Korea) of ASEM. They took the position that Myanmar and the two other new ASEAN member states, Cambodia and Laos, should be admitted into the ASEM when the EU brings its ten new member states into the Meeting after 1 May 2004. (IHT 19-04-04)

Asia-Europe Ministers' Meetings

The fifth ASEM Finance Ministers' Meeting took place on Bali Island, Indonesia, on 5-6 July 2003 (the previous meetings took place at Bangkok in September 1997; at Frankfurt in January 1999; at Kobe in January 2001, and at Copenhagen in July 2002). The meeting endorsed the so-called "Bali Initiative", aiming at better cooperation among the fiscal and financial authorities of both regions as a way to prevent a repeat of the financial crisis of 1997-1998.

The fifth ASEM Economic Ministers' Meeting took place on 15-17 July 2003 at Dalian, China (The previous four meetings were held at Makuhari, Japan in September 1997; at Berlin in October 1999; at Hanoi in September 2001, and at Copenhagen in September 2002).

There have also been Foreign Ministers' Meetings (at Singapore in February 1997; at Berlin in March 1999; at Beijing in May 2001; at Madrid in June 2002, and at Beijing in July 2003) and an Environment Ministers' Meeting at Beijing in January.

ASIA-PACIFIC ECONOMIC COOPERATION FORUM (APEC)

Summit Conferences

The tenth summit meeting took place in Mexico on 27 October 2002. The "2002 Leaders' Declaration", influenced by the attack of 11 September 2001 in the US, read *inter alia* that "We agreed on the importance of fighting terrorism, which poses a profound threat to our vision."

At the eleventh meeting, held at Bangkok on 20-21 October 2003 the leaders agreed at US insistence "to dedicate APEC not only to advancing the prosperity of our economies, but also to the complementary mission of ensuring the security of our people", and accordingly adopted a series of commitments to fight terrorism and the proliferation of weapons of mass destruction. (IHT 22-10-03; www.apecsec.org.sg)

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)

See also: East Asian Community

Counter-terrorism cooperation

ASEAN responded positively to a US request for a strong commitment to fight terrorism and strengthened the US efforts to build a counter-terrorism intelligence network by agreeing to sign, with the US Secretary of State on 1 August 2002 at a meeting in Brunei of the ASEAN Regional Forum (Asian YIL Vol.3: 440-441, Vol.4: 505), a declaration pledging to deepen anti-terrorism cooperation.

Since the 11 September 2001 attacks in the US dozens of suspected Al Qaeda activists had been arrested in Malaysia, Singapore, and the Philippines. (IHT 31-07-02).

Sino-ASEAN commitments

The ASEAN states and China reached agreement on a non-legally binding political *Declaration on the Conduct of Parties in the South China Sea* during the ASEAN Summit at Phnom Penh in early November 2002. The Declaration is intended to reduce the chances of military confrontation over the Spratly Islands and other disputed areas. In the Declaration the parties agreed to exercise self-restraint and to give advance notice of military exercises. (*see also*: Territorial claims and disputes)

Besides, the states concerned adopted a *Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues*. This latter notion was described as including crimes such as drug trafficking, trafficking and smuggling of human beings, sea piracy, terrorism, arms-smuggling, money-laundering, international economic crimes, and cyber crimes. (IHT 05-11-02, ATol 06-11-02, www.aseansec.org)

The Sino-ASEAN Summit on 8 October 2003 on Bali Island issued a *Joint Declaration on Strategic Partnership for Peace and Prosperity*, outlining a partnership by enhancing mutually beneficial relations and cooperation, and upholding the principles of good neighbourliness. The Declaration characterized the partnership as "non-aligned, non-military, and non-exclusive", not precluding the participants from developing their "all-directional ties of friendship and cooperation with others". The Declaration listed various kinds of political, economic, social, security, and regional and international cooperation as falling under the partnership. (Antara 09-10-03, www.aseansec.org)

Third-party adherence to 1976 Treaty of Amity and Cooperation

China and India formally expressed their adherence to the Treaty during the Bali Summit in October 2003. South Korea was considering adherence, as was Russia. Japan initially expressed reluctance, saying that Japan-ASEAN ties were already solid. Bowing to strong pressure, however, Japan in November 2003 decided to sign its adherence. [Papua New Guinea was the first non-member state to adhere to the Treaty back in 1989. The UN General Assembly endorsed the treaty in 1992.] (Kompas 21-09-03; Antara 08-10-03; JT 19-11-03)

Ninth Summit Meeting; Declaration of ASEAN Concord II

The ninth summit meeting was held at Bali Island in October 2003. Among other items the meeting resulted in a *Declaration of ASEAN Concord II* (later usually referred to as the Bali Concord II), signed on 7 October and containing ten points.

The Declaration comprised agreement on a framework to achieve a Security Community, an Economic Community, and a Socio-Cultural Community, together to constitute an "ASEAN Community". (Antara 07-10-03, www.aseansec.org)

The discussion of an ASEAN Security Community (ASC) Action Plan started in 2004 (Antara 24-02-04) and the Economic Community was planned for completion in 2020. (IHT 08-10-03)

Free trade zones and other facilitation of economic relations with non-member states

China, Japan, and India each agreed to create some form of free-trade arrangement with the ASEAN member countries.

China concluded a *Framework Agreement on Comprehensive Economic Cooperation* on 4 November 2002 during the eighth ASEAN Summit at Phnom Penh, in which the parties committed themselves to negotiate the establishment of an ASEAN-China free trade agreement within ten years.

Japan and the ASEAN countries signed a *Joint Declaration on Comprehensive Economic Partnership* during the same ASEAN Summit on 5 November 2002, followed by a Framework during the ninth ASEAN Summit at Bali in October 2003. Its implementation, including elements of a possible free trade area, was to be completed not later than 2012.

Meanwhile, during a Japan-ASEAN summit meeting in December 2003, Japan reached agreement separately with Thailand, Malaysia, and the Philippines to enter negotiations on bilateral free trade agreements. At the time, its only existing free trade agreement was with Singapore (*see* 10 Asian YIL 359). (JT 12-12-03)

An agreement (on a "Regional Integration Area") with India was delayed as Vietnam raised objections to the number of Indian non-tariff obstacles. (IHT 05-11-02; Tempo 05-09-03; Antara 07-10-03; JT 09-10-03)

The non-intervention principle

The Thirty-sixth Ministerial Meeting in Phnom Penh, 2003, considered a wide range of issues, such as the detention of Aung San Suu Kyi (on 30 May 2003, see Dissidents), though "without prejudice to the cardinal principle of non-interference". (www.aseansec.org)

BORDERS, BORDER DISPUTES AND BORDER INCIDENTS

See also: Divided states: Korea; Inter-state relations: Cambodia-Thailand, China-India

East Timor – Australia

See: Oil and Gas

Indonesia – Vietnam

The two countries signed an agreement on the delimitation of the continental shelf boundary on 26 June 2003. (Kompas 27-06-03)

CENTRAL ASIA

See also: Military cooperation; Shanghai Cooperation Organization

Kabul Declaration on Good Neighbourly Relations

Foreign ministers and delegates of Afghanistan, Pakistan, China, Iran, Tajikistan, Uzbekistan, and Turkmenistan met at Kabul on 22 December 2002 and signed a

declaration in which their countries committed themselves to the principles of "territorial integrity, mutual respect and non-interference in each other's internal affairs". They also pledged a shared determination to defeat terrorism, extremism and narcotics trafficking. (IHT 23-12-02)

By resolution 1453 (2002) adopted on 24 December 2002, the UN Security Council "welcome[d] and endorse[d]" the Declaration.

CIVIL WAR
See: Insurgents

DIPLOMATIC IMMUNITIES
See also: Jurisdiction

Local employee of foreign embassy

A Japanese woman employee of the Sri Lankan embassy in Japan caused a traffic accident when driving a car. She claimed before the Tokyo court diplomatic immunity on the grounds of performing official duties at the relevant time. The prosecution argued that the person was driving on personal business, being on her way home after having deposited a Sri Lankan minister on an unofficial visit to Japan at his hotel after a shopping trip. (JT 20-02-04)

DIPLOMATIC RELATIONS
See: Recognition

DISSIDENTS
See also: Association of South East Asian Nations

Mujahidin Khalq bombed by US

During their campaign in Iraq the US bombed the principal bases in Iraq of the main armed Iranian opposition group, which had maintained several thousand fighters on Iraqi territory along its border with Iran for more than a decade. The Mujahidin Khalq (MEK) had by the US been labelled since 1997 a terrorist organization [its political arm was the so-called "National Council on Resistance in Iran"], allegedly as a goodwill gesture to the Iranian government.

The MEK was formed in the 1960s and expelled from Iran after the Islamic Revolution in 1979. Its primary financial support in recent years came from the Iraqi government and also, it was reported, from European and US sources. (IHT 17-04-03)

Aung San Suu Kyi
See also infra

Despite her having been freed from nineteen months of house arrest in early May 2002 the assurances of the lifting of all restrictions on her movement had not been fulfilled, and the promised political dialogue had not materialized. Her freedom to travel out of Yangon was being obstructed; public meetings were being harrassed and disrupted.

On 30 May 2003 Aung San Su Kyi together with nineteen supporters were again taken into "protective custody" after violence erupted at a clash between her supporters and those of the government during a political tour in northern Myanmar. She was accused by government officials of having caused the violence by making inflammatory speeches criticizing the government. (IHT 31-05/01-06, 02-06-03)

DIVIDED STATES: CHINA
See also: Inter-state relations: China-US, Japan-China

Taiwanese direct investments in mainland China

It was announced in Taiwan that new rules allowing local enterprises to invest directly in mainland China, ending a half-century ban, would take effect on 2 August 2002. (IHT 01-08-02)

Taiwanese legislation on national referenda

A bill in the Taiwanese legislature enabling referenda on constitutional matters had created concerns with the Chinese government in connection with the possibility of pronouncements on Taiwanese independence. The Taiwanese legislature eventually retreated from confrontation and on 27 November 2003 passed a bill that would allow national referenda on constitutional and sovereignty issues only under very narrow circumstances. (IHT 29/30-11-03)

The US president said the US opposed a move in Taiwan to stage a referendum, and opposed "any unilateral decision by either China or Taiwan to change the *status quo*". (IHT 10-12-03)

DIVIDED STATES: KOREA

Naval incident

A naval gun battle occurred in disputed waters west of the peninsula on 29 June 2002, resulting in the sinking of a South Korean ship and deaths of four of its crewmen. The explanation from the North Korean side was that its firing on the South Korean ship was by way of self-defence and in retaliation to a surprise attack by the South Koreans, who provoked a response while the North Korean vessels were on "routine coastal guard duty". South Korea said that two North Korean gunboats opened fire when challenged by South Korean patrol craft for crossing waters claimed

as being under South Korean jurisdiction (*see* Asian YIL Vol.8:265, Vol.9:392). These waters are determined by a line extending from the mouth of the Imjin River, which forms the western end of the land demarcation line. After several weeks, North Korea on 25 July 2002 issued an expression of regret accompanied by an expression of hope that both sides would make joint efforts to prevent the recurrence of similar incidents.

A resumption of US-North Korean talks (*see infra* at) was announced just hours before the battle broke out. (IHT 01-07, 02-07, 26-07-02)

Meetings

The two parties agreed to high-level negotiations in August 2002, the first in nearly a year. The agenda included issues such as the building of railroads and roads and the construction of an industrial zone in Gaesong, North Korea. (IHT 05-08-02) While reports about the progress of the talks sounded positive, the parties could not agree on a date for key military talks that would enable the construction of road and rail links across the militarized border. (IHT 13-08, 15-08-02) On 30 August 2002 agreement was reached on a timetable for an economic programme including the completion of a railroad linking the two Koreas, closed since the early days of the Korean War. (IHT 31-08/01-09, 19-09-02)

Meetings between the two parties started again in early January 2003. There were in fact three separate rounds of talks in January 2003: as well as a ministerial meeting at Seoul there were Red Cross talks in Kumgang (North Korea), resulting in an agreement on a new round of family reunions. (IHT 22-01, 23-01-03)

On 26 May 2004 a series of meetings began between senior North Korean and South Korean military officers (*see infra*), the first such meetings since the end of the Korean War in 1953. (IHT 25-05-04)

New South Korean presidency and policy

In his first interview since his election in December 2002 the South Korean president-elect determinedly defended a policy of engagement with North Korea and was not prepared to contemplate a military strike. He vowed to usher North Korea out of isolation and into the international fold. (IHT 17-01-03)

First regular DMZ-crossing

The first regular land crossing of the demilitarized zone (DMZ) since the Peninsula was split by war in the 1950s was inaugurated on 14 February 2003.

Cooperative measures

According to the South Korean Ministry of Reunification interactions between North and South Korea had increased significantly since regular contacts began in 1989 and became quite intensive in 2002. In the first quarter of 2003 there were, among others, activities for the removal of landmines in the demilitarized military zone and another (sixth) reunion of divided families. (ATol 14-05-03)

On 4 June 2004 high North and South Korean military commanders reached agreement on various confidence building measures such as the removal of propa-

ganda speakers and signs along the Demilitarized Zone and measures to prevent naval clashes (*see supra*), although they failed to resolve the disagreement over the disputed North-South maritime border in the Yellow Sea (*see* 9 Asian YIL 388). (IHT 5/6-06-04)

To avoid naval clashes over rich crab fishing grounds, it was agreed to set up a telephone hot line, share an emergency radio frequency, and institute a mutually understood naval flag signalling system. In the economic field there would be a joint agency to administer an industrial park financed by South Korea and situated in Gaesong (*see supra*), just north of the Demilitarized Zone. (IHT 07-06-04)

EAST ASIAN COMMUNITY

Prospective creation

On the occasion of the ASEAN-Japan meeting held at Tokyo (*see also supra*), ASEAN member states and Japan agreed on 13 December 2003 to work together toward the creation of an East Asian Community also to include China and South Korea, though refrained from setting a clear target. The participants of the meeting signed a declaration on "special relationship" featuring the creation of the proposed Community, and called for the expansion of the existing economic ties to include political and security issues.

The idea of an East Asian Community was first proposed by the Japanese prime minister in 2002. (*Cf.* East Asian Economic Grouping/Caucus in Asian YIL Vol.1:289; Vol.2:305; Vol.4:432; Vol.5:407-408; Vol.6:368) (JP 12-12, 13-12-03)

ECONOMIC DEVELOPMENT COOPERATION

Japanese assistance to China

The annual Japanese white paper on official development assistance for 2004 said that bilateral ties as well as China's economic development would be considered in Japan's policy on future economic aid to China. As a result the official development aid in fiscal year 2004 would be less than half of that provided in fiscal year 2000. (JT 31-03-04)

EMBARGO

The So San incident

On 8 December 2002 the US joined Spanish warships in seizing a North Korean vessel, the *So San*, in international waters in the Gulf of Aden, about 600 miles from the coast of Yemen, on suspicion of carrying missiles to a terror-linked Middle Eastern state. The action was part of an expansive US policy on fighting terrorism that includes its questionable right to interdict ships at sea, but according to the US officials the ship flew no flag and its "official markings" had been painted over. The

action was classified by some as an early test of the new US doctrine of pre-emptive military action.

The cargo was destined for Yemen and the ship was finally released since Yemen was not among the states to be targeted (it was in fact "a partner of the US in the war against terrorism") and since the transport did not violate international law. However, several countries, among them Yemen, Syria, Pakistan, and Iran, had been pressed by the US not to buy North Korean arms.

The White House spokesman was reported to have said: "We don't have to like everything North Korea does, but that doesn't mean we have the right to change international law out of convenience", while others classified the incident as the sacrifice of the principle of interdiction of terror weaponry entering a war zone on the altar of practicality. (IHT 12-12, 20-12-02)

Export controls against North Korea

At Japan's initiative eight Pacific Rim economies (Australia, China, Hongkong, Singapore, South Korea, Thailand, and the US) agreed on 27 October 2003 to take effective measures to prevent the illegal export of products with military potential. Agreement was reached to establish a system on informing each other about suspicious trade practices. It was the first-ever meeting on export controls in Asia. (JT 28-10-03)

EU embargo against China on arms sales

China on 13 October 2003 asked the EU to end its embargo imposed after the crackdown on opposition protests in Beijing in June 1989. The EU responded that persistent human rights violations prevented it from changing its policy on arms sales, but agreed in December 2003 to consider lifting the embargo. (IHT 14-10, 13/14-12-03)

Relaxation of import ban on Japanese cultural products

South Korea announced in September 2003 it would further relax its ban on imports of Japanese cultural products as of January 2004. This was in line with the joint statement adopted after a summit meeting in Tokyo of the South Korean president and the Japanese prime minister. In 1998 the then South Korean president in a major policy shift had begun a staged lifting of a decades-old ban on imports of Japanese cultural products. This ban had been imposed due to strong anti-Japanese sentiment stemming from Japanese colonial rule in the period 1910-1945. (JT 17-09-03)

ENVIRONMENTAL POLLUTION AND PROTECTION

Whaling

As in the previous year (see 10 Asian YIL 352) Japanese efforts to obtain international permission to resume commercial whaling failed. The International Whaling Commission voted 27 to 17 against the Japanese proposal to permit the

annual catch of 150 Bryde's whales from the Pacific Ocean from 2004 to 2008. (IHT 19-06-03)

ESPIONAGE

US bugging of Chinese plane

According to reports in January 2002 Chinese officials had discovered in October 2001 that an aircraft, bought by China in the US in 2000 for the purpose of serving as a presidential plane and delivered in August 2001, had been bugged while being refurbished in the US.

US involvement was initially denied, but acknowledged in April 2003 in connection with a US spy (Katrina Leung) case, although the government persisted in declining any comment. US counter-intelligence officials suspected that the Chinese authorities were tipped off by the spy in question. (NYT.com 15-04-03)

EXCLUSIVE ECONOMIC ZONE

See also: Borders; Oil and gas

China – Japan

China conducted oceanographic surveying in an area claimed by Japan as part of its EEZ around Okinotori Island ("Douglas Reef"), Japan's southernmost point. Japan urged China to halt its activities, but China claimed on its part that the waters concerned could not be regarded an EEZ on account of the fact that Okinotori Island was not (for EEZ purposes) an island: just a rock formation. According to Japanese sources, however, two rocks on the island remain above sea level during full tide. [The UNCLOS, Art.246, stipulates that coastal states are obliged to grant consent to other states for the conduct of marine scientific research for peaceful purposes, as far as specific criteria are fulfilled, in the former's EEZ.] (JT 10-05-04)

A Chinese consortium was constructing a new drilling facility for the exploration of natural gas resources in the East China Sea, near the intermediate line that separates the Chinese and Japanese exclusive economic zone (EEZ). Japan raised objections, complaining that the project could infringe on Japan's rights because it could draw gas from the Japanese EEZ. It was reported in late June 2004 that Japan would counter the Chinese efforts by starting its own initial exploration.

Meanwhile, China proposed on 21 June 2004 that the two countries should put their differences aside and engage in a joint development project in the area. (JT 22-06, 30-06-04)

EXTRADITION

The Fujimori case

While on an official visit to Japan in November 2000 (after having attended the APEC summit meeting at Brunei Darussalam) Alberto Fujimori, the Peruvian presi-

dent of Japanese descent (born in Peru to Japanese immigrants), submitted his resignation and decided to remain in Japan, opting for Japanese nationality. Under the Japanese Nationality Law he was eligible for acquisition of Japanese nationality on the grounds of registration in a family register by his parents when they emigrated to Peru in 1934. [It was later argued that under the law he should when he reached the age of 20 have expressed his wish to retain this right, which he had allegedly not done.]

Peru rejected the resignation. Instead, Peru deposed Fujimori from office and charged him with dereliction of duty, later added to by a parliament-approved accusation of participation in killings committed by military commandos. It issued an international arrest warrant for Fujimori via Interpol in 2003; on 31 July 2003 it formally asked Japan to turn him over. Japan refused to comply on the grounds of Fujimori's Japanese nationality and the absence of an extradition treaty between the two countries (Japan had concluded only two extradition treaties: with the US, and with South Korea). Peru argued that it had, on its part, in 1996 handed over to Japan a person who was on the international wanted list, despite the absence of an extradition treaty, and that Peru would continue upon request to hand over persons accused of crimes in Japan.

Peru based its demand additionally on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, but Japan rejected the request on the basis of Fujimori's Japanese nationality (it was reported that the Peruvian Under-Secretary for Foreign Affairs urged that Japan not use domestic law to override international law in considering the extradition). (JT 01-08, 27-09-03, 21-02-04, and other sources)

HIGH SEAS

See: Embargo; Exclusive economic zone; Inter-state relations: Japan-North Korea, Jurisdiction; Regional security

HOT PURSUIT

US troops at Afghanistan-Pakistan border

According to hazy media reports an incident occurred in late December 2002, in which US troops and Pakistan border scouts were involved and that resulted in a US air strike at a place of which it was uncertain whether it was located in Afghan or Pakistan territory.

In any case the incident gave rise to contradictory claims on whether the US were permitted to engage in hot pursuit across the border. The Pakistani information minister publicly denied that any permission had been given, but reportedly Pakistani intelligence officials privately conceded that the US had been given tacit approval to pursue across the border. Moreover, according to a (*Dawn*) newspaper report of 6 January 2003 Pakistan's military ruler and the US Secretary of State "have agreed that hot pursuit of the Taliban and Al Qaeda fighters across the Pakistan-Afghan border will continue but quietly".

[After the 11 September 2001 attacks in the US, Pakistan withdrew support for the Taleban regime, backed the US invasion of Afghanistan, allowed US military use of several Pakistan military bases, gave authorization for overflights, and permitted the FBI to hunt down Al Qaeda suspects in Pakistan.] (WSWS 22-01-03)

IMMIGRATION
See: Aliens

INSURGENTS

Aceh, Indonesia

The territory had known a secessionist movement since 1976. Since January 2000 the Indonesian government and Acehnese rebels, organized in the *Gerakan Aceh Merdeka* (GAM, Free Aceh Movement, or: Aceh Sumatra National Liberation Front), had been engaged in a dialogue process mediated by the (Swiss) *Henri Dunant Centre for Humanitarian Dialogue* and assisted by some states, including the US and Japan. A "Preparatory Conference on Peace and Reconstruction in Aceh", held at Tokyo on 3 December 2002, finally led to the signing at Geneva, on 9 December, of a Cessation of Hostilities Agreement (COHA). The agreement referred to regional autonomy, control over the province's natural resources, and elections for an Acehnese legislature. A joint security committee would design and implement a mutually agreed process of demilitarization including the creation of "peace zones". The agreement also provided for an international monitoring team from Thailand and the Philippines. (IHT 10-12-02, 23-05-03)

However, subsequent talks held at Tokyo in May 2003 by the joint committee overseeing the agreement collapsed as a result of a difference in interpretation of the Agreement: the Indonesian government accused the rebels of having failed to act in accordance with the letter and spirit of the 2002 agreement through the rebels' failure to fulfil three conditions. These were: laying down their arms, accepting the Indonesian special Aceh Autonomy Law, and negotiating within the context of the unitary Indonesian state. When the insurgents did not respond to a government ultimatum on the acceptance of the Autonomy Law and the premise of the unitary state, the territory was placed under martial law on 19 May 2003, and a military campaign was started by the government. From that time foreigners were banned from the territory.

In May 2003 the Indonesian government for the fourth time requested the Swedish government to restrain GAM supreme leader Hasan Tiro and also other GAM leaders, who lived in exile in Sweden and who held Swedish and other nationalities, from organizing the separatist movement in Aceh. In order to strengthen its case and to put pressure on Sweden Indonesia later tried to have the Aceh rebel group included in the UN list of terrorist groups. It accordingly based its case on UNGA resolution No. 49/60 of 9 December 1994 which read *inter alia* that "the state members of the United Nations … reaffirm their unequivocal condemnation of all acts, methods and

practices of terrorism as criminal and unjustifiable … including those which jeopardize the friendly relations among states and peoples and threaten the territorial integrity and security of states".

Sweden had rejected previous requests, saying that it would follow its laws and would not expel its citizens; nevertheless, it was reported in February 2004 that the Swedish government had started legal investigations into the alleged involvement of the Swedish GAM leaders in criminal acts in the Indonesian province of Aceh. A Swedish team also questioned GAM detainees in Indonesia in March 2004; specifically, concerning several crimes that had occurred in Indonesia between September 2000 and February 2004, and which were allegedly committed by GAM members. (IHT 21-05, 23-05-03; Kompas 07-05, 09-05, 02-06, 03-06-03; Antara 02-06, 18-06-03, 18-02, 19-03-04; JP 13-09-03, 17-06-04)

Sri Lanka

The Sri Lankan government and the Tamil Tigers separatists began Norwegian-sponsored peace talks on 16 September 2002, aiming at ending the 19-year civil war. The LTTE (Liberation Tigers of Tamil Eelam) had been fighting for an ethnic Tamil homeland in the north and east of the island. The talks were the first in seven years and were held in Thailand. Previously, the government and the rebels had signed a Norwegian-brokered cease-fire in February 2002. (*see* 10 Asian YIL 355-356) (IHT 17-09-02)

At the end of the talks the LTTE announced that they would settle for autonomy rather than a separate state although it was added that they would still fight for a separate state "as a last resort" if their demands for self-determination and autonomy were not met.

A fourth round of talks started on 6 January 2003. The LTTE temporarily pulled out of the peace talks because of the sinking of LTTE vessels some time before and a US refusal to allow the LTTE to participate in an aid conference in Washington DC since the LTTE was classified by the US as a terrorist organization (*see infra*). The talks were resumed in September 2003 on the basis of government proposals of July 2003 for the establishment of an interim administration ("Advisory Council") for the northern and eastern part of the country, to which the LTTE in October 2003 responded with counter-proposals. On 5 November 2003 the government imposed a state of emergency. (IHT 19-09-02, 07-01-03, and other sources)

The Philippines

The government launched an offensive against the Moro Islamic Liberation Front (MILF, *see* 5 Asian YIL 426) in early 2003 which, however, bogged down. Contrary to allegations of MILF links to Islamic terrorist group the MILF in June 2003 denounced terrorism, after which their leaders were granted safe conduct for travel to Malaysia for new peace talks. Meanwhile, speculations emerged of cooperation between the MILF and the New People's Army (NPA, *see* 5 Asian YIL 425). (JT 22-07-03) The government announced a cease-fire agreement with the MILF on 18 July 2003. (IHT 19/20-07-03)

INTERNATIONAL COMPANIES

Rubber Consortium

Indonesia, Malaysia, and Thailand concluded an agreement on the setting up of a rubber consortium for the processing and marketing of their rubber production. A "Shareholders Agreement of the International Rubber Consortium Limited" was signed for that purpose by ministers from the three states on 6 October 2003. (Kompas 08-10-03)

INTERNATIONAL CRIMINAL LAW

Immunity of International Criminal Court (ICC) jurisdiction for US military

East Timor and Tajikistan were the first two Asian states to conclude an agreement with the US giving US troops in those countries immunity from prosecution by the ICC. (IHT 28-08-02) (*Cf.* Art.98 of the ICC Statute)

East Timorese arrest warrant for Indonesian general

An East Timor tribunal issued an arrest warrant on 10 May 2004 for the former commander of the Indonesian Armed Forces, citing crimes against humanity committed in 1999 when East Timor broke from Indonesian rule. The tribunal had been set up with UN backing and advice, and included international staff, the judge who issued the warrant being American. The warrant came at a time when the retired general was standing as a candidate in the Indonesian presidential elections and more than a year after he had been indicted by prosecutors for the (UN-sponsored) East Timor Serious Crimes Unit in February 2003. The indictment charged him with "command responsibility for murder, deportation and persecution committed in the context of a widespread and systematic attack on the civilian population in East Timor". An Indonesian judicial panel had earlier found him innocent of such accusations.

Indonesia made it clear that it denied the Timorese court's jurisdiction over Indonesian nationals. (Reuters 10-05-04)

INTERNATIONAL ECONOMIC AND TRADE RELATIONS

See also: Association of South East Asian Nations

Japan-South Korea free trade agreement

The two countries agreed on 20 October 2003 to launch negotiations on a bilateral free trade agreement. (JT 21-10-03)

[Japan had one earlier free trade agreement, with Singapore, dating from January 2002, and was involved in negotiations on similar agreements with Mexico and Thailand.]

Singapore-Australia free trade agreement

The two countries reached agreement on a free-trade pact on 3 November 2002, after two years of negotiations. Singapore already had similar agreements with Japan and New Zealand. (IHT 04-11-02)

INTERNATIONAL INVOLVEMENT FOR HUMANITARIAN PURPOSES

Access to territories of civil strife

Some weeks after the declaration of martial law in the province of Aceh on 19 May 2003 (*see supra*) Indonesia closed the territory for foreigners in connection with the military operations against the insurgents. The measure rendered virtually impossible independent scrutiny of the territory. It was reported that the government eased the restrictions in December 2003 by allowing five international organizations to resume their humanitarian activities. These were the ICRC, UNDP, WFP, UNESCO, and UNICEF. The responsible minister said that the new policy was part of the government's intention "to boost transparency and accountability". (JP 12-12-03)

INTERNATIONAL AND MUNICIPAL LAW

See: Extradition; Insurgents

INTER-STATE RELATIONS: GENERAL ASPECTS

Asia – Australia

It was reported in early December 2002 that the *Philippines*, while in favour of counter-terrorism agreements, was concerned about assertions made on 8 December 2002 by the Australian prime minister, of a right to make pre-emptive military strikes against terrorists in other countries who are plotting against Australians. The Philippines accordingly planned to review an Australian-Philippine memorandum of understanding and draft agreement on cooperation against terrorism.

Earlier Indonesia, Malaysia, and Thailand had concluded various counter-terrorism agreements with Australia. The *Indonesian* agreement laid the groundwork for the joint Australian-Indonesian investigation into the Bali bombing of October 2002. In response to the Australian statement *Malaysia* threatened to abrogate its agreement of August 2002 providing for increased sharing of intelligence, as it considered the concept of pursuing terrorists in another country "an act of war". (ST 09-12-02)

Responding to the Australian prime minister's statement, the *Japanese* ambassador in charge of counter-terrorism said in an interview that he was "comfortable" with the Australian position and that, when he had read a full transcript of the remarks, he considered Australia to be "in favour of responsible international law". (ST 10-12-02)

Asia – US: military presence

In late July 2002 the US Secretary of State, during his round of visits to several Asian countries, said in a statement on 29 July 2002 that the US is committed to keeping troops stationed in Asia to guard against nations that might have "aggressive intent". The US in fact maintained about 100,000 troops in the region and this fact, he said, ensured stability in the region. By way of example he mentioned North Korea which, he said, had been following an "incorrect path". (IHT 30-07-02)

Afghanistan – Pakistan

A mob rampaged through the Pakistan embassy compound in Kabul on 8 July 2003, the fourth time in fifteen years that Afghans had ransacked the Pakistan embassy. The Afghan president offered his apologies for the incident.

The relations between the two states became strained after troops of the US-backed "Northern Alliance", long hostile to Pakistan, had moved into Kabul after the defeat of the Taleban by the US-led coalition. Pakistan had been a staunch supporter of the Taleban before abruptly switching sides and allying itself with the US in the war on terror. The Afghan government said Pakistan was not doing enough to hunt down Taleban rebels at Pakistani territory. (IHT 09-07, 10-07-03)

Cambodia -Thailand: incident, tensions and territorial issues

A remark allegedly made (but denied) by a Thai actress, implying that Cambodia had stolen the historic Angkor Wat from Thailand, resulted in January 2003 in anti-Thai riots in Cambodia. The Thai response consisted of a suspension of economic deals and flights, the sealing of the common borders, the withdrawal of Thai embassy staff members, and the evacuation of more than one thousand Thai nationals. After a few days, quiet returned with a Cambodian apology, a Thai acceptance of a Cambodian offer of compensation, and the arrest of nearly one hundred and fifty people involved in the riots. Yet Thailand barred its nationals from crossing the border into Cambodia, to which Cambodia retaliated in a similar manner in early March, resulting in a practical cessation of trade between the two countries. It was said that the riots underscored the resentment against Thai economic and cultural domination in its smaller and poorer neighbour states.

In the past France and Thailand have traded the province of Siem Reap, where the temples are located, for territorial gains. A series of accords were drawn up in 1900-1904 to delimit the boundaries between Thailand, Cambodia and Laos; in 1907 a protocol was concluded under which Siam, as it then was, ceded the territories of Battambang, Siem Reap and Sisophon to Cambodia in exchange for Dan Sai and Krat. These agreements were consolidated into a single treaty in 1937. Subsequently, a Thai-Japanese treaty of May 1941 transferred tracts of Cambodian and Laotian territory to Thailand in return for transit rights for Japanese forces. This treaty was annulled by the post-war Franco-Thai Washington Accord of 1946, restoring the 1937 boundaries. New hostilities occurred in 1958 regarding Thai-Cambodian disagreements which, as far as the temple at Preah Vihear is concerned, resulted in a 1962 ruling by the International Court of Justice. (ATol 04-02, 11-03-03)

Central Asia – US
See: Military cooperation

China – Europe
See: Embargo

China – India

On the occasion of the visit by the Indian prime minister to China the two parties issued a *Declaration on Principles for Relations and Comprehensive Cooperation* on 23 June 2003, and signed several agreements.

The two countries fought a border war on three fronts in 1962. In the Declaration the two parties charged senior officials from each side with resolving the existing boundary disputes. China had been claiming 90,000 square kilometres in Arunachal Pradesh, while India claimed that China was occupying 38,000 square kilometres of the Ladakh region in Kashmir. In the past there was also some Chinese offer of an exchange of disputed territories.

Furthermore, India explicitly re-affirmed its recognition of Tibet as the Tibetan Autonomous Region of China and its commitment not to permit anti-China activities by Tibetans who lived in India. The Indian position on Tibet's status was in fact unchanged, and agreements of 1988 and 1991 were cited to confirm this. In turn China agreed to re-open ancient trade routes to India through the Indian states of Arunachal Pradesh and also Sikkim, merged with India in 1975. This acceptance of a trade route was seen as an affirmation of India's sovereignty, although the Chinese foreign ministry maintained that "the question of Sikkim is a question left over from history and is an enduring one".

The joint declaration also contained the decision to set up a joint study group to recommend ways of strengthening economic cooperation. (Xinhuanet 24-06-03; IHT 25-06, 5/6-07-03; ATol 25-06-03)

China – Japan
See: Economic development cooperation; Exclusive economic zone; Oil and gas; World War II

China – North Korea

The North Korean leader visited China in April 2004 for talks with the Chinese president. It was his first visit to China since January 2001. (IHT 19-04-04)

China – US
See also: Divided states: China; Espionage; Refugees; Terrorism

The US-China Security Review Commission of the US Congress warned in a 200-page report that China was making dramatic economic and strategic advances against the US, requiring a much tougher response to ensure China's compliance with trade laws and to prevent the spread of weapons of mass destruction. The

Congress had created the commission at the end of 2000, when US-China relations were at a low point.

The report urged an "immediate review and overhaul" of US sanction policies, including giving the president authorization to invoke economic sanctions against countries that proliferate weapons of mass destruction or related technologies. It also recommended the use of financial sanctions, such as the denial of access to US capital markets to companies involved in proliferation. (IHT 13/14-07-02)

It was reported in December 2002 that the Chinese president had suggested to his US counterpart during their meeting in October that China link its deployment of short-range missiles facing Taiwan to US arms sales to Taiwan. The proposal was reported to have been raised again in informal talks in November 2002. (IHT 11-12-02)

It was reported that the US Department of Defense planned selling long-range "early warning" equipment to Taiwan, explaining that the proposed sale "will contribute to the foreign policy and national security of the United States by helping to improve the security and defensive capability of the recipient, which has been and continues to be an important force for economic progress in the Far East". (IHT 01-04-04)

India – Israel

The US gave its approval to Israel for the sale of its advanced Phalcon airborne reconnaissance system to India. It was said that the US was also on the verge of approving the Israeli sale to India of its Arrow anti-missile system.
[Israel ranked fifth in the world among arms exporters, after the US, EU, Russia, and Japan.] (ATol 27-05-03)

The Israeli prime minister paid a visit to India in Sep.2003, the first ever since the establishment of diplomatic relations in 1992.

Besides the signature of several agreements, such as on environmental protection, the illicit trafficking and abuse of narcotic drugs, health and medicine, and culture, a joint declaration was issued on 10 September on the occasion of the event, the *Delhi Statement on friendship and cooperation between India and Israel*. In it the two sides stated that, "[a]s democratic countries since their inception", they "share faith in the values of freedom and democracy". The Declaration stated that the "shared ideals" were drawing them "into a natural amity in pursuit of common goals". The two sides expressed their satisfaction with the growth in bilateral economic relations; Israel expressed its interest in participating in key national Indian projects, and invited Indian companies to expand their activities, including investment, in Israel; the two sides expressed willingness to enhance participation in the joint fund for scientific research established in 1994 and to explore the possibility of the establishment of a bi-national research and development fund in the industrial fields. They stated that there "cannot be any compromise in the war against terrorism … in all its forms and manifestations", and consider themselves to be "victims of terrorism" and "partners in the battle against" it. They recalled their adherence to UN Security Council resolution 1373 and "condemn[ed] states and individuals who aid and abet terrorism across borders, harbour and provide sanctuary to terrorists and provide them

with financial means, training and patronage". With regard to the Middle East the Statement read: "India and Israel called for the establishment of a just and durable peace in the Middle East. The two sides expressed their views, and called for complete cessation of violence, so that a conducive environment is created for continuation of the dialogue." (*inter alia*, Indian Min.Ext.Aff., <http://meaindia.nic.in>.)

India – Pakistan
See also: Special territories within a state: Kashmir

After having been broken off after the December 2001 attack on the Indian Parliament (*see* 10 Asian YIL 394) diplomatic relations were restored on 2 May 2003. (IHT 08-05-03)

On 22 October 2003 India unveiled a number of proposals to normalize relations, including the expansion of travel facilities and family re-unifications. Nevertheless, India still rejected Pakistan's offer of dialogue to resolve all outstanding issues, and emphasized that the "war against terrorism" would continue against Islamic militants who were fighting against Indian control in Kashmir. (IHT 23-10-03)

On 23 November 2003 Pakistan announced a unilateral cease-fire with India along the 740-kilometre-long Kashmir Line of Control in spite of an earlier rejection by India of a Pakistani offer on the matter. The Pakistani measure was accepted and agreed to by India, and it was extended to the disputed Siachen glacier. It was the first formal, and most comprehensive, cease-fire since the insurgency in Indian-controlled part of Kashmir began fourteen years ago. (IHT 24-11, 26-11-03)

The Indian prime minister and the president of Pakistan met in January 2004 on the sidelines of the SAARC Summit. This was the third time they had met; first in 1999 in Lahore and then in 2001 in Agra. They agreed that the two countries would resume talks on the issues that were keeping them apart, beginning in February 2004. (IHT 06-01, 07-01-04) The discussions on the specific issue of Kashmir started on 27 June 2004. (IHT 28-06-04)

India – US
See: India-Israel; Iraq war

Indonesia – Russia

During a visit by the Indonesian president to Russia in April 2003 the two countries signed several instruments. In a joint declaration the parties pledged "to strengthen the central role of the UN and to prioritize principles of international law, such as respect for national sovereignty, territorial integrity and non-interference in internal affairs". Besides, the parties signed an agreement on military cooperation and a Memorandum of Understanding on space-research cooperation. (ATol 21-04-03)

Iran – Egypt

The Iranian vice-president said in an interview that the two countries would shortly restore ties and diplomatic relations, but this was denied by the Egyptian foreign minister.

Ties were broken in 1980 after Egypt signed a peace treaty with Israel and gave refuge to the ousted Shah of Iran. Relations worsened even more when Egypt supported Iraq during the 1980-1988 Iran-Iraq War. (IHT 07-01-04)

Iran – European Union

Despite US disapproval the EU started a landmark meeting with Iran on 12 December 2002 in an attempt to link talks on improving trade relations to existing political issues, such as human rights, the Middle East crisis, nuclear proliferation, and the financing of terrorist movements. It was reported that the EU was at pains to assert that progress on trade would only be possible if Iran were to make concessions in the "areas of political concern". (IHT 13-12, 24/25-12-02)

Iran – Israel

It was reported that Israel had suggested it would not allow the nuclear power plant at Bushehr, Iran (see 5 Asian YIL 477), to be completed, and during the first half of 2002 it had publicly warned Iran that it considered the plant a threat to its national security. (IHT 30-07-02)

[Neither the technology nor the spent fuel from the Bushehr plant could, by itself, be used to make a nuclear bomb. However, the technology as used in the plant is necessary to manufacture enriched fuel for nuclear weapons, and weapons-grade plutonium could be extracted from the spent fuel.]

[On 7 June 1981 Israeli warplanes destroyed the French-built Osirak lightwater nuclear reactor near Baghdad.]

Iran – UK

Jewish Centre bombing at Buenos Aires

An Argentine judge ordered arrest warrants against four Iranian government officials in early 2003 for alleged help in organizing and carrying out a bombing of a Jewish community centre in Buenos Aires on 18 June 1994, thereby essentially accusing Iran of involvement. However, the judge declined to follow a recommendation by the prosecution also to indict a number of more senior Iranian officials, including the highest Iranian religious leader. All the indicted persons were outside Argentina. The accusations coincided to a large extent with secret testimony offered by a former Iranian intelligence official who had defected to Germany.

In August 2003 there was another Argentinian arrest warrant against eight Iranians, among whom a former Iranian ambassador to Argentina. The person, who had been living in England since early 2003 for study purposes, was arrested on an extradition request from Argentina.

Iran recalled its ambassador from London for consultations, warning that relations would worsen unless the former diplomat were released. The foreign office spokesman was reported to have said: "The arrest of an ex-ambassador is unacceptable for the Islamic Republic of Iran." (IHT 11-03, 08-09-03)

Iran seized three small British Navy boats on 21 June 2004 and detained eight armed sailors on board after they entered Iranian national waters. The boats were

about to be delivered to the Iraqi Riverine Patrol Service. The British side, however, also said that the sailors were on a training run and that they could have strayed into Iranian waters on a windy day. The arrest took place on the Shatt-al-Arab marking the southern boundary between Iran and Iraq. Assault rifles, pistols, cameras, maps of the border, and global navigation devices were found on the boats. The Iranian government on 23 June 2004 declared that the sailors would be released. (IHT 22-06, 23-06, 24-06-04)

Iran – US
See also: World Trade Organization

Responding to US remarks on the US desire to improve relations with Iran while waiting for Iran to take a first step, the Iranian foreign minister accused the US of not recognizing Iran's counter-terrorism efforts (*see infra*); of itself using terrorist tactics; of supporting Afghan terrorist groups against Iran, and of using the 11 September attacks as a pretext to settle accounts with countries that disagreed with US politics. (IHT 09-09-02)

In the context of its policy in Iraq the US warned Iran on 23 April 2003 not to interfere with the development of a government in Iraq, amid allegedly growing signs of Iranian attempts to influence Iraqis to push for a government similar to that in Iran. (IHT 24-04-03) The Iranian foreign minister denied the accusations and said: "It is very interesting that the Americans have occupied Iraq but they accuse Iraq's neighbour of interfering into its affairs." (IHT 25-04-03)

Japan – neighbouring countries
See also: Embargo

On New Year's Day, 1 January 2004, the Japanese prime minister visited and paid his respects at the Yasukuni Shrine in Tokyo for the fourth time since taking office in April 2001. As on all previous occasions, the visit drew fire from Japan's neighbouring countries where the shrine is considered a monument to Japanese militarism. The shrine honours the nation's war dead, including convicted war criminals from World War II.

The Japanese vice foreign minister said that the visit was to pledge that Japan would never again wage war. (JT 04-01, 06-01-04)

Japan – Myanmar
See also: Dissidents

Japan took a new hard line against Myanmar, suspending official development assistance (except for projects already under way) and increasing pressure over the continued detention of the opposition leader Aung San Suu Kyi. It thus joined the US and EU in taking economic steps, and reversed a policy of careful engagement.

Japan earlier suspended aid in 1990 after the military government refused to honour the results of parliamentary elections. (IHT 26-06-03)

Japan – North Korea
See also: Embargo

Various aspects of the relationship

The on/off talks (see Asian YIL Vol.9:401, Vol.10:374) were renewed with a two-day meeting at Pyongyang on 18-19 August 2002, as a prelude to subsequent talks set for later in the month. (IHT 19-08-02) Instead, however, the Japanese prime minister came to North Korea on 17 September for a one-day summit meeting with the North Korean leader. The meeting turned out to be the result of a year-long series of negotiations behind the scenes. (IHT 31-08/01-09-02)

The meeting resulted in a joint declaration ("Pyongyang Declaration"), a North Korean admission that its agents had played a part in the disappearance of twelve or thirteen Japanese since the late 1970s (*see* Asian YIL Vol.2:330, Vol.3:399, Vol.5:441, Vol.6:408, Vol.8:280); a Japanese apology for its colonial rule of Korea; Japanese commitments for grants, loans and humanitarian assistance, and the permission for five abducted Japanese to visit Japan. According to North Korea the eight other persons had already died. The apology said that "Japan humbly recognize[s] the historical fact that it caused tremendous damage and suffering to the people of Korea through its past colonial rule and expresse[s] feelings of deep remorse and heartfelt apology".

The meeting also resulted in a North Korean pledge to extend indefinitely its moratorium on ballistic missile tests (*see infra*), and in broad agreement on the normalizing of relations. (IHT 18-09-02) Talks on this latter issue started at Kuala Lumpur, Malaysia, in late October 2002, but were heavily influenced by the new developments in the field of North Korean nuclear programmes (*see infra*) and the issue of the past abductions of Japanese nationals. Consequently, they ended in a stalemate. (IHT 30-10-02). In early November the North Korean foreign ministry issued a statement (not, however, part of a government-to-government communication) with the warning that unless relations with Japan were quickly normalized, North Korea would resume its testing of ballistic missiles. (IHT 06-11-02)

The Japanese defence minister said in January/February 2003 that Japan would launch a military strike against North Korea if it had firm evidence that North Korea were ready to attack Japan with ballistic missiles. He classified such a strike as defensive and thus permitted by the Japanese constitution (*see infra*). (IHT 04-03-03)

With regard to the abduction issue North Korea in August 2003 initially accused Japan of having broken its promise by not having sent back the five persons who had returned to Japan in September 2002 (*see supra*). However, it later offered to let the children of the five persons go to Japan if Japan would provide food aid and agree to close the abduction issue. Initially, it was unlikely that Japan would accept the Korean conditions and, on the contrary, it insisted on there being an investigation into other suspected cases of abduction by North Korea. (IHT 21-08-03, JT 30-08-03)

In May 2004, however, the Japanese prime minister visited North Korea again and did promise food and medical aid, in exchange for permission for the five North Korean-born children to leave the country and go to Japan. (JT 23-05-04, IHT 24-05-04) [Although the departure for Japan was referred to as "coming home" (*kikoku*), the persons concerned were in fact born and brought up in North Korea as Koreans.] (IHT 17-06-04)

The above reunion was preceded by the arrival in Japan of six offspring of Japanese radicals belonging to the "Red Army Faction" who had hijacked a Japan Airlines aircraft in March 1970 and who had been granted asylum in North Korea. In this case, too, the "returnees" were born in North Korea. (JT 15-01-04)

On the occasion of his visit in May 2004 to North Korea, the Japanese prime minister said that Japan had no intention of evoking economic sanctions against North Korea as long as the latter respected the "Pyongyang Declaration" (*see supra*). Economic sanctions were made possible under the revised Foreign Exchange and Foreign Trade Law since a restriction that such sanctions be based on a UN Security Council resolution had been removed. (JT 23-05, 15-06-04)

On 7 June 2004 the Japanese prime minister repeated that if North Korea wanted Japanese aid and diplomatic relations, it would first have to dismantle its nuclear weapons programme and account for Japanese persons abducted by North Korea. (IHT 08-06-04)

The Mangyongbong-92 *incident*

Amid strained ties between Japan and North Korea the North Korean ferry *Mangyongbong-92*, which sailed irregularly between Wonsan in North Korea and Niigata in Japan, arrived at Niigata port on 25 August 2003 for the first time in seven months. Upon its arrival it was subjected to a very thorough inspection by Japanese authorities in the light of espionage and smuggling allegations. While no irregularities were found in a joint inspection by coast guard, customs, and immigration officials, some problems with the ship's safety equipment were found in the context of a (separate) "port state control" (the port state control checks were the first in ten years). These had to be rectified before the ship was allowed to leave port, resulting in a delay of nine hours. Nevertheless, the Japanese government said they did not plan to ban ships from entering Japanese ports. There was no Japanese law on banning specific ships from docking at Japanese ports, as this would be not in conformity with the international freedom of navigation. (JT 26-08, 27-08-03)

On its following visit to Niigata in early September 2003 the *Mangyongbong-92* was again subjected to "port state control" to check that the previously found minor safety infractions had been rectified, and was again searched by coast guard, customs, and immigration officials.

During the next port call on 16 September, the Japanese authorities again found a safety violation and referred the case to the Public Prosecutor who, however, decided to shelve the case.

In order to create a legal basis for barring the vessel from further entry into Japan a law was enacted on 14 June 2004 enabling the government to ban, for a certain period of time, port calls by ships from a designated country, for the purposes of

maintaining peace and security. The Japanese parliament also enacted a Law on Ship Pollution Damage on 14 April 2004, requiring owners of ships of 100 tons or more in Japanese territory to have insurance for oil spill damage, presuming that most North Korean ships would have no such coverage. (JT 03-09, 05-09, 17-09, 17-10-03, 02-04, 15-04, 15-06-04)

Compensation for wartime human right abuses

North Korea on 11 November 2003 proposed holding talks to discuss compensation for human rights abuses committed during the 1910-1945 Japanese colonial rule. It was said by the Japanese side that the proposal was aimed at countering calls to resolve the abduction issue. (JT 12-11-03)

Japan – South Korea
See: Embargo; International economic and trade relations

Japan – Russia

On the occasion of the Japanese prime minister's visit to Moscow, the two countries on 10 January 2003 agreed on a number of matters, such as the solution of their territorial dispute over some of the Kuril Islands (the "Northern Territories", *see* 1 Asian YIL 346-347), while Japan reiterated its support of Russia's efforts to join the WTO and Russia pledged to support Japan's efforts to become a permanent member of the UN Security Council.

The Russian president hailed the agreement as an "action plan", not as a formal treaty. (IHT 11/12-01-03)

Japan – Peru
See: Extradition

Malaysia – Singapore
See: Neighbourly relations

North Korea – Pakistan
See: Nuclear energy matters: Pakistan

North Korea – US
See also: Embargo; Nuclear energy matters

The positive signs in April 2002 of a possible meeting between representatives of the two parties failed to materialize when the US cancelled its offer to send an envoy to North Korea as a consequence of the North-South Korea naval incident in late June (*see supra*) (IHT 03-07-02) Nevertheless, after expressing regret over the naval incident (*see supra*) North Korea stated it was open to a visit by a senior US official (IHT 30-07-02); at the ASEAN Regional Security Forum meeting on 31 July 2002 the North Korean foreign minister announced, after having met the US Secretary of State, that it had been agreed to resume the dialogue. This would

be the first high-level contact since the visit by the US Secretary of State to North Korea in October 2000. (10 Asian YIL 376) Yet commentaries issued by the official North Korean news agency referred to the US, in apparent response to the US president's designation of North Korea, as "the kingpin of evil". (IHT 01-08-02)

Marking a significant change of strategy the US announced on 25 September 2002 that it would send an assistant Secretary of State to North Korea in early October. (IHT 27-09-02)

Comparing its own situation with that of Iraq after more than two weeks after the US attack on the latter country, North Korea said it could guarantee its own security only by arming itself with a "tremendous military strength". The foreign ministry issued a statement in which it was said, *inter alia*: "The Iraqi war shows that to allow disarming through inspection does not help avert a war but rather sparks it ... This suggests that even the signing of a non-aggression treaty with the US would not help avert a war." (IHT 07-04-03)

The US strategy of not engaging in bilateral talks was widely criticized in Asia. It was based on the argument that the North Korean nuclear programme was a major problem for the whole North-east Asian region, and on the fear that bilateral negotiations would enable North Korea to split the US from its Asian allies. (*inter alia*, NYTimes.com 16-04-03)

Pakistan – US

The US announced on 18 March 2004 that it would classify Pakistan as a "major non-NATO ally" for purposes of their military relations, thus making it easier for it to acquire US arms. The classification also applied to Australia, Bahrein, Israel, and South Korea. [The US failed to deliver 28 F-16 fighter planes ordered and paid for by Pakistan, taking eight years for the money to be refunded. (*See* Asian YIL Vol.1:271, Vol.3:442, Vol.4:508, Vol.5:486, Vol.6:449)] (IHT 19-03-04)

South Korea – US

See also: Iraq war; Military alliances

Relations between the two countries, particularly with regard to North Korea, had shown unchallenged leadership by the US for decades. A visible change in policy was introduced by President Kim Dae Jung (*see supra*) and was affirmed by various statements made during the transition to his successor, Roh Moo Hyun, in early 2003. (IHT 8/9-02-03)

The US Defense Secretary said on 6 March 2003 that the US was studying ways of either withdrawing its 37,000 troops from the Korean Peninsula or moving them south of Seoul and the Han River, about 120 kilometres from the Demilitarized Zone. On the other hand, alarmed South Korean officials demanded that the US troops stay where they were at least until the resolution of the North Korean nuclear issue. It was reported that South Korean officials suspected a US plan under which a withdrawal would put the US troops outside the range of North Korean artillery, thus

allowing the US to stage a pre-emptive strike on North Korean nuclear facilities without fear of the North Korean artillery (*see also infra*). (IHT 8/9-03, 09-06-03)

Thailand – US
See also: Iraq war

It was reported that in spite of Thailand's low-profile approach to terrorism, it was in fact allowing the US both to bring Al Qaeda suspects into the country for interrogation and to use air bases in the country for US warplanes to fly into Iraq, as it had done in the past for bombing raids over North Vietnam and for the Afghanistan War. Nevertheless, Thailand was said to have insisted that it not be included in the list of countries which were part of the US-led coalition in Iraq. (IHT 09-05-03)

Vietnam-US

It was announced that a US warship was to make a port call in Vietnam in November 2003, the first such visit since the end of the Vietnam War in 1975. Besides, the Vietnamese defence minister would visit the US the same month. (IHT 31-10-03)

(NON-)INTERVENTION
See: Afghanistan, Association of South East Asian Nations

IRAQ WAR
See also: Military alliances

Asian attitudes towards the US attack on Iraq

China

During his visit to China in late August 2002, the US Deputy Secretary of State informed the Chinese that the US was considering all options in the matter of the toppling on security grounds of the Iraqi president. *China* strongly opposed military action in Iraq lacking specific approval from the UN Security Council. (IHT 27-08-02) In late January 2003 the *Chinese foreign ministry* urged that more time be given to the UN weapons inspectors and that one should not jump to any conclusion. (IHT 29-01-03) On 6 March 2003 China "endorse[d] and support[ed]" efforts by Russia, France and Germany, who had asserted in a joint declaration that they would "not allow" a draft Anglo-US-Spanish resolution authorizing an attack on Iraq to pass. (IHT 07-03-03).

The Chinese foreign ministry spokesman, responding to the start of the war on 20 March 2003, said that the war violated both the UN Charter and international law, and urged an immediate halt to the military action (IHT 21-03-03); however, apparently vacillating between opposing the war and not angering the US, the Chinese president in a telephone conversation with the US president indicated that China

would not turn the war into a stumbling block in Sino-US bilateral relations. (IHT 25-03-03)

Pakistan

On his part the *Pakistani president* reacted to the US efforts towards "regime change": "It is not a question of removing Saddam Hussein … It's the question of attacking a country, attacking another Muslim country." (IHT 03-09-02) In late January 2003 the *prime minister* said: "In the 21st century, you don't go for wars. War is the last resort one goes to." (IHT 29-01-03) When the war finally started, *Pakistan* officially deplored the attack, yet avoided condemning the US by name. (IHT 21-03-03)

When the US asked for military support from various countries after the first phase of the war in the second part of 2003, the *Pakistan president* said Pakistan needed more political support from Iraqis and the Islamic world before it could send troops to help to stabilize Iraq. (IHT 23-09-03)

Iran

In an interview in which he expressed Iran's disappointment of the US attitude towards the constructive role of Iran in respect of terrorism and Afghanistan, the *Iranian foreign minister* said that Iran would accept the use of force in Iraq as a reality only if a new UN resolution authorized military action. (IHT 19-09-02) On a later occasion the Iranian president said: "We have said several times that we are against any military attack on Iraq and any unilateral action in resolving international issues." (IHT 31-10-02)

In connection with the Anglo-US attack on Iraq, the Iranian government spokesman condemned the war as "illegitimate" and "unjustified", and reiterated Iran's neutrality. (ATol 25-03-03)

Japan

During a visit to the US the *Japanese prime minister* said on 12 September 2002 that the US should "make further efforts for international cooperation toward a settlement" of the Iraq problem. (IHT 24-09-02) In late January 2003 the *foreign minister* said Iraq had used chemical weapons in the past and must convince the world that it was no longer a threat; it must carry the burden of proof. (IHT 29-01-03) In early March 2003, however, Japan stated that it would support a UN resolution as sought by the US (*see supra*). The Japanese foreign minister said: "Japan supports the proposed resolution as something that will mark the final step of the global community's effort to pressure Iraq to disarm on its own." (IHT 11-03-03) The Japanese prime minister also voiced strong support for the US action when the war started on 20 March 2003: "I support the start of the use of force by the US ... If I have to choose between peace and war there is no doubt I go for peace ... But I have made a decision because supporting the US position supports Japan's national interests."

Reiterating his support for the war in early April 2003, the Japanese prime minister said that people would come to understand the dangers "when weapons of

mass destruction, chemical and biological weapons fall in the hands of a dangerous despot". As to the underlying reasons for this attitude he said: "The public knows the importance of the Japan-US alliance. The Japanese defence capability is not adequate, and with the security pact with the US, Japan is defending itself."

Calling for UN support and an "international framework" for post-war reconstruction, Japan committed itself to $100 million in financial aid, while the prime minister offered to attach Japanese personnel to the US Office of Reconstruction and Humanitarian Assistance (ORHA).

In July 2003 the Parliament passed legislation allowing the dispatch of troops, and on 9 December 2003 Japan decided to deploy ground forces to join the US-led war in Iraq. It was its most ambitious military operation since the end of World War II, thus was regarded as a turning point for post-war Japan. Past Japanese troop contributions had consisted of participation in UN peacekeeping operations. The Iraq mission would last for between six months and a year, and would consist of non-combat troops who would engage in humanitarian activities. In June 2004 the Japanese government approved a plan for the Japanese forces to join UN-authorized troops when an Iraqi government took formal authority. (IHT 10-12-03, 16-01, 19/20-06-04, WSWS 17-04-03)

On 9 April 2004 the Japanese prime minister declared not to withdraw the Japanese forces to satisfy the demands of an Iraqi resistance group who had threatened to kill three Japanese hostages. The three were an aid worker, a freelance photojournalist, and a high school graduate who studied the possible effects of depleted uranium ammunition. (JT 09-04, 10-04,11-04,13-04, 14-04, 15-04, 16-04-04; IHT 10/11-04-04)

South Korea

The *South Korean* president responded to the start of hostilities: "We decided it is in our best interest to support the US". (IHT 21-03-03) As to the later US request for additional South Korean troops in Iraq, the South Korean Parliament on 2 April 2003 approved the sending of seven hundred soldiers to Iraq "to help in the country's reconstruction effort", after the president said that "realism" required the country to support the US. He clarified this by saying that: "[i]n order to resolve the North Korea nuclear issue peacefully, it is important to maintain strong cooperation with the US" and "[i]t would be imprudent to make a decision that threatens the survival of our people in the name of an equal relationship with the United States". (IHT 03-04-03) The South Korean president on 1 October 2003 offered to consider the request in exchange for "positive" movement by the US to resolve the stand-off over North Korea's nuclear weapons program. (IHT 02-10-03) In June 2004 it was announced that South Korea would send 3,000 soldiers in early August to assist the US-led coalition, the largest contribution after the US and Britain. (IHT 19/20-06-04)

In June 2004 a South Korean hostage was killed by an Iraqi militant group after the latter's failure in its demand that South Korea withdraw its troops and drop its plans to send additional forces. The South Korean government rejected the demand since its troops were to help to rebuild Iraq, not for offensive operations. (IHT 23-06-04)

North Korea

North Korea condemned the invasion, which it described as the first stage of an attack that would also target North Korea. (IHT 21-03-03)

Indonesia

The *Indonesian foreign minister* said in early January 2003 that "regime change" through military intervention "would be difficult to accept". Instead, Indonesia supported "every effort on the disarmament of weapons of mass destruction through the UN Security Council". It was feared that an America-led war against Iraq would spark anti-American demonstrations and could embolden Islamic militants who had been on the defensive in the aftermath of the terrorist Bali bombing. (IHT 09-01-03)

India

In late January 2003 the *Indian prime minister* referred to the US and said that "the superpower should exercise super restraint". In early April 2003, when the US troops were approaching Baghdad, the Indian Parliament passed a resolution condemning the war as unjust and calling on the US to withdraw.

After the first phase of the war the US asked India to contribute an army division for "peacekeeping"; India rejected the request on 14 July 2003. The decision was explained in the statement from the foreign minister, as follows: "Our longer-term national interest, our concern for the people of Iraq, our long-standing ties with the Gulf region as a whole, as well as our growing dialogue and strengthened ties with the US, have been key elements in this consideration." (IHT 15-07-03)

In September 2003 the US repeated its request, supported by the Israeli prime minister when the latter paid a visit to India shortly later, at a time when India was pursuing the purchase of the "Arrow" anti-missile system from Israel. This time India did not exclude a military contribution in the event that there was an "explicit UN mandate".

Singapore

During the discussion on the legitimacy of an attack on Iraq the *Singapore foreign ministry* maintained in January 2003: "It is up to the Security Council to assess and consider what further actions it needs to take." (IHT 29-01-03)

Thailand

See also: Inter-state relations: Thailand-US

It was reported in early October 2003 that *Thailand* had sent 447 military personnel to join the "coalition forces" in Iraq. The decision was first announced in July 2003 when the number of 886 men was mentioned. In early April of the same year the defence minister still declared that under no circumstances would Thailand commit combat troops in Iraq. The Thai prime minister visited the US in June 2003.

The troops sent consisted mainly of engineers and medical specialists. (WSWS 01-10-03)

Sino-Russian statement

The Chinese and Russian presidents in a joint declaration at Beijing in early December 2002 repeated calls for a peaceful resolution to the US-Iraqi stand-off "on the basis of rigorous observance of the resolutions of the UN Security Council". (IHT 03-12-02)

JAPAN'S MILITARY ROLE

Right to pre-emptive action

The Japanese defence minister, following the so-called Bush-doctrine, argued in February 2003 that Japan's constitution does not prevent the country from taking pre-emptive action against a North Korean threat of a missile attack. In March 2003 he told a parliamentary committee that if North Korea started fuelling its missiles, "then it is time to strike".

On 14 June 2004 seven laws were enacted, supplementing three previous laws enacted in June 2003 and effectively completing Japan's post-war legislation on its response to a military attack. Two of the seven laws were intended to facilitate US military operations in the event of an attack or imminent attack on Japan, and enable the Japanese Self-Defense Forces to supply provisions to the US forces. The other five laws dealt with, *inter alia*, the protection and evacuation of people, procedures for ship inspections in and around Japanese waters, the use of public facilities, and ensuring proper treatment of prisoners of war. The laws also empowered the prime minister to allow the US military to use privately owned land or buildings if Japan came under or anticipated an attack. The new legislation essentially provided a domestic legal framework for the bilateral mutual support. (WSWS 17-04-03, IHT 23-07-03, JT 15-06-04)

Participation in "Coalition Forces" in Iraq

On 26 July 2003 the Japanese parliament passed legislation allowing the dispatch of up to 1,000 troops to Iraq to "help with reconstruction" (*see supra*). (IHT 26/27-07-03, JT 24-09-03) It was the first time for Japanese military forces to be stationed in a combat zone since the Second World War, and it took place without a UN mandate. [Earlier Japanese troops did participate in several UN peace-keeping missions, such as in Mozambique, Cambodia, and East Timor. In the first Gulf War (1991) the Japanese role consisted of a financial contribution, and Japan supported the US action in Afghanistan by dispatching naval vessels providing logistical support.]

Re-interpretation of the Constitution

In its report an advisory panel to the Japanese foreign minister said that the government should alter its interpretation of the Constitution and allow Japan to exercise the right of collective defence. (JT 19-09-03)

JOINT DEVELOPMENT
See: Exclusive economic zone

JUDICIAL ASSISTANCE
See also: Association of South East Asian Nations; Extradition; Inter-state relations: Thailand-US

Pakistani attitude toward judicial assistance to the US

In mid-September 2002 Pakistan handed over a man thought to be an Al Qaeda activist to US officials in Pakistan who believed he was intimately involved in planning the attacks in the US of 11 September 2001. The Pakistani interior minister said Pakistan was obliged under international law to hand over the suspect to the country where he was wanted, although emphasizing that the legal extradition procedure would be followed. According to news reports, however, Pakistan had previously handed over suspected Al Qaeda members to the US without going through a formal extradition process. (IHT 17-09-02)

A Kuwaiti national suspected of being a prominent Al Qaeda activist was arrested on 1 March 2003 in Rawalpindi by Pakistani and US agents who handed him over to locally-based US intelligence authorities. He was immediately flown out of Pakistan, yet within twenty-four hours the Pakistani authorities denied the hand-over and said that the person was being interrogated in Pakistan by Pakistani officials. (AsT 05-03-03)

It was reported that the Pakistani foreign minister said on 23 February 2004 that any top Al Qaeda fugitives wanted in the US would be handed over. However, the president assured tribal elders that suspects who turn over their weapons and surrender would not be extradited. (IHT 25-02-04)

Iranian cooperation in handing over Al Qaeda fugitives

According to the Saudi foreign minister Iran had, at the request of Saudi Arabia, quietly detained and expelled to Saudi Arabia Al Qaeda fighters who were Saudis and who had sought refuge in Iran after fleeing from Afghanistan. Iran knew that all information obtained during Saudi interrogation would be passed on to the US. This was contrary to the allegations about Iranian assistance to Al Qaeda fugitives. (IHT 12-08-02)

Japan – US

Japan and the US signed a treaty on 5 August 2003 allowing their law-enforcement authorities to by-pass diplomatic channels in exchanging information on criminal cases. (JT 02-08, 07-08-03)

JURISDICTION
See also: Hot pursuit; Insurgents; International criminal law; Inter-state relations: Thailand-US

Japan-US Status of Forces Agreement

The current SOFA did not require the US to hand over US military personnel alleged to have committed crimes until charged by the Japanese prosecutor, but after a rape incident in 1995 (see 6 Asian YIL 421) the US was willing to give "sympathetic consideration" to handing over in the event of suspected serious crimes, although demanding Japanese guarantee of proper protection of the suspect's rights. In response to US insistence Japan indicated that under certain conditions it would, by way of exception to the applicable rules, allow US law-enforcing officers to be present during the pre-trial police interrogations of the suspect. However, no agreement had been reached on a general rule to that effect.

The two parties had been discussing the details of the conditions for some time, and it was reported in March 2004 that the US withdrew its demand for its presence during the questioning of all arrested US military personnel. Finally, the parties agreed to allow US officials, but not a defence lawyer, to be present "as part of the investigators' side" when Japanese police question US military personnel suspected of a serious crime. This opened the door for an exception, exclusively in the case of US soldiers, to the general rule of the Japanese law on criminal procedure. (JT 14-09, 24-11-03, 21-03, 29-03, 03-04-04)

MILITARY ALLIANCES

See also: Iraq war

US security guarantee for Japan

At an unofficial meeting in late September 2003 the US made the promise that it would keep Japan under its "nuclear umbrella" even after it was to give security assurances to North Korea in exchange for the latter's abandoning its nuclear arms programme.

While maintaining a national policy of not processing, producing or allowing nuclear weapons in its territory, Japan remained dependent on US nuclear deterrence for security against its assumed hostile neighbours. (JT 31-10-03)

Thailand – US

See: Inter-state relations

MILITARY COOPERATION

Indonesia – US

In a move aimed at bolstering Indonesian efforts against terrorism the US announced on 2 August 2002 that US aid for direct military training was to be resumed. (IHT 3/4-08-02)

The US Senate approved in February 2003 the re-establishment of Indonesia-US military cooperation. This cooperation in the form of an "International Military

Education Training (IMET) was suspended in 1999 because of the conflict on the self-determination of East Timor (see 9 Asian YIL 407). (Tempo 19-02-030)

Pakistan – US

See: Inter-state relations

Philippines – US

The US participation in a six-month operation against Muslim guerrillas in the Philippines (see 10 Asian YIL 381) was winding down in late July 2002. (IHT 23-07-02) This "training mission" failed to quell the guerrilla movement and in December 2002 there were proposals for a new programme aimed at combating the Muslim insurgents. This reflected the US concern that militant Islamic networks posed an increasing threat to US interests in Southeast Asia. (IHT 02-12-02) In February 2003 it was indeed reported from the US that another 1,700 US troops would be sent to the Philippines and that, contrary to the 2002 mission, the new mission would be a combat operation, backed by attack helicopters and planes. The operation would last as long as necessary "to disrupt and destroy" the Abu Sayyaf group at the Sulu Archipelago. Philippine officials, however, insisted that any US request for a combat role would be denied as being against the (Philippine) constitution. The Philippine Supreme Court had ruled that US troops could shoot only in self-defence and that the constitution forbade the presence of foreign troops unless covered by a specific treaty. (IHT 22/23-02, 24-02-03) The rejection of a combat role for the US troops was repeated after a bombing at the airport of Davao City in early March 2003. (IHT 06-03-03)

South Korea – US

South Korea and the US agreed to hold talks on the withdrawal of a third of the 37,000 US troops stationed in South Korea. It would constitute the first major troop reduction on the Korean Peninsula since 1992 (*see* Asian YIL Vol.2: 303, Vol.3: 369). The initial US idea dated from 2003 (*see supra*), when it was agreed to move US troops stationed near the border to a location south of Seoul, putting them out of North Korean artillery range. (IHT 29/30-05, 08-06-04)

US bases in Central Asia

Since the war in Afghanistan some dozen bases in Central Asia were made available to US forces. In *Uzbekistan* US forces gained permission to be stationed at a former Soviet base in Khanabad. *Turkmenistan* gave permission for fly-over and refuelling of US military planes. This might be important in allowing US aircraft based in Uzbekistan to reach Iran. In November 2001 *Tajikistan* agreed to allow the US to use three former Soviet air bases, to support its operations in Afghanistan. Regarding *Kazakhstan*, it was said that the government was allowing military over-flights and refuelling, and had given landing rights in emergencies. In *Kyrgyzstan* the former Soviet base at Manas airport was to accommodate US troops and aircraft. (ATol 10-06-03)

MISSILE TECHNOLOGY

Limitation of export of Chinese missile technology

In accordance with its pledge of 21 November 2000 (see 10 Asian YIL: 383) China on 25 August 2002 issued regulations on the export of missiles and missile-related technology, in order to restrict missile proliferation. The regulations prescribed that exports that might affect national security and state interests must be submitted to the cabinet and the Central Military Commission for approval.

In November 2000 China promised to tighten export controls, but pending specific regulations the US imposed sanctions, accusing China of having supplied missile and nuclear arms technology to Pakistan.

In return for cooperation on proliferation China wanted an end to the US ban on launches of US commercial satellites on Chinese rockets. (IHT 26-08-02)

North Korea

See also: Sanctions

On the occasion of the North Korean-Japanese summit meeting on 17 September 2002 (*see supra*) the North Korean leader said that his country would continue indefinitely to observe a self-imposed moratorium on the testing of ballistic weapons despite its formal termination in 2003. (IHT 18-09-02) It was reported, however, that later revelations on North Korean missile and nuclear weapons programmes (*see supra*, *infra*) pushed Japan towards joining the US in trying to develop a missile defence programme. (IHT 12-11-02)

Iran

Iran confirmed on 7 July 2003 that it had successfully conducted the final test of its mid-range *Shahab-3* missile several weeks earlier.

NATIONALITY

See also: Extradition

Turkmenistan – Russia

An estimated 300,000 ethnic Russians were living in Turkmenistan, of whom about 100,000 had registered for Russian as well as Turkmen nationality under a 1993 treaty allowing dual nationality.

In April 2003 the presidents of the two countries agreed to cancel the treaty. This was followed by a Turkmen decree of the same month, requiring residents in possession of the two nationalities to choose between them. Non-performance of the option would result in automatic retention of Turkmen nationality and loss of the Russian one. (ATol 11-07-03)

NEIGHBOURLY RELATIONS

Malaysia – Singapore

In recent years the issue of the water agreements between the two countries, especially the question whether Malaysia or Singapore profited most from them, continued to be heatedly discussed. The dispute concerned the price to be paid by a party for the water supplied by the other party.

Bilateral talks on the issue had taken place since 1998. The water agreements dated from 1961 (Tebrau and Seudai Rivers Water Agreement) and 1962 (Johor River Water Agreement) between the Johor state government (Johor being the southernmost state of the Malaysian Federation) and Singapore (then an autonomous self-governing state within the Commonwealth). The continued application of the agreements, which are to expire in 2011 and 2061 respectively, were guaranteed by Malaysia in the Separation of Singapore Agreement (1965).

Under the current agreements Malaysia supplies 350 million gallons of raw water to Singapore at the price of $0.007 per 1,000 gallons, fixed by the Colonial government in 1927. After delivery the water undergoes treatment (in Singaporean water treatment plants located in Johor) costing $0.63 per thousand gallons. Singapore in its turn is under obligation to provide the Malaysian state of Johor with at least 17 million gallons of treated water per day at a price of $0.13 for every thousand gallons. Johor thus paid more than it received. It considered this unfair (although it was selling the water to consumers in Malaysia for $1.04 per thousand gallons) and intended to stop buying treated water from Singapore once the construction of its own water treatment plant was completed in mid-2003. According to the Johor Chief Minister, three Singaporean water treatment plants in Johor would be taken over by Johor after the expiration of the first water supply agreement in 2011.

The two water supply agreements of 1961 and 1962 provide for price revisions after twenty-five years, in 1986 and 1987 respectively. Singapore maintained that the 25-year marks passed without any review and that, consequently, Malaysia had no more legal basis on which to raise the water price, but Malaysia takes the position that it has that right at any time after the 25-year period.

On 7 October 2002 the Malaysian prime minister announced that in seeking a solution Malaysia had decided to discontinue the "package approach" agreed in September 2001. This approach intended to deal with several key bilateral contentious issues in the Malaysian-Singaporean relationship together, *viz*. the water issue and those concerning the Malaysian railway land in Singapore (*see* Asian YIL Vol.7:483, Vol.8:288); the Malaysian customs, immigration and quarantine facilities on Singapore territory (*id*.); the use of Malaysian air space by Singaporean aircraft, and the pension fund assets belonging to Malaysians working in Singapore. (UPI 28-01-02; ATol 31-08-02; ST 01-11-02, 06-01-03)

NON-ALIGNED MOVEMENT

Summit Conference, Kuala Lumpur, February 2003

The NAM tri-annual summit conference was held at Kuala Lumpur on 20-25 February 2003. The meeting was originally due to be held in October 2001 in Bangladesh after the previous, 1998, conference at Durban, South Africa, but Bangladesh decided to cancel. In its place Jordan would organize the conference in July 2002 yet it withdrew because of the prevailing Middle East situation. In April 2002 the Coordination Bureau then decided unanimously for Malaysia.

The Movement comprised 116 members including the two newest ones: Timor-Leste, and St. Vincent and the Grenadines. (Kompas 24-02-03)

NUCLEAR ENERGY MATTERS

Iran

See also: Inter-state relations: Iran-Israel

It was reported that according to a Russian announcement in late July 2002 Russia planned to increase its cooperation with Iran by building four reactors at Bushehr, including the plant already in progress and two other plants at Akhvaz. On 25 December 2002 Russia and Iran agreed to speed up the completion of the Bushehr plant and to set up a joint commission to carry out feasibility studies for the construction of another energy plant in Iran. While re-affirming its commitments to supply the necessary nuclear fuel, Russia, under US pressure, changed its laws in 2001, thus allowing for the return and storage on Russian territory of the spent radioactive material from Iran and made an agreement under which Iran would return the spent fuel. (IHT 30-07, 3/4-08, 26-12-02, 05-06-03).

[The Bushehr project had its origin in the 1970s when the Shah of Iran, with US blessing, awarded a contract to a subsidiary of the German Siemens company to construct two 1,200 megawatt reactors. IHT 14-10-03.]

In August 2002 an Iranian opposition group disclosed the existence of two nuclear facilities at Natanz (a fuel-enrichment facility) and Arak (a heavy-water production plant) in Iran, apparently designed to play a role in the production of enriched uranium or plutonium which could be used for the fabrication of nuclear weapons. The US published satellite pictures and urged the IAEA to inspect the facilities regarding compatibility with the regime of the Non-Proliferation Treaty. Iran insisted that the sites were designed solely to produce low-enriched uranium for the nuclear power plant being built at Bushehr. (IHT 20-12-02) It gave assurances that the Natanz facility would fall under international safeguards; upon an Iranian invitation, the IAEA in February 2003visited the facilities. It was reported that there was reluctance on the side of the IAEA to pronounce the site a nuclear-weapons facility; however, the US persisted that it in fact was such a facility and exerted pressure on other states members of the IAEA governing board to have Iran declared in violation of the Non-Proliferation Treaty, a declaration that could lead to punitive action by the UN. (IHT

10-02, 24-02, 09-05-03) Iran consistently denied the accusations that it was seeking to develop nuclear weapons, recalling that it was in fact the first country to have suggested that the whole region must be void of nuclear weapons. (IHT 10-02, 24-02, 09-05, 03-06-03)

Later in 2003 the IAEA reported that it had in fact found particles of highly enriched uranium at the Natanz facility. The Iranian side denied producing highly enriched uranium and suggested that the equipment used might have arrived already contaminated from the foreign supplier. It said it could not mention the country of origin because the equipment was bought through middlemen. (IHT 27-08, 24-10-03)

At a later stage of developments highly-enriched particles were discovered in indigenous centrifuge gear. The Iranian foreign ministry in February 2004 acknowledged publicly that Iran had secretly purchased components for its nuclear program from a network of international suppliers, "but we don't know what the source was or what country they came from". The spokesman also insisted that every purchase had been reported to the IAEA. The acknowledgement came after the disclosure of a nuclear trading network set up by the Pakistani scientist A.Q. Khan (*see infra*) (IHT 24-02, 01-03-04)

Ahead of the IAEA meeting on 16 June 2003 the IAEA issued a report which read, *inter alia*: "Iran has failed to meet its obligations under its safeguard agreement with respect to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed", concluding that the "number of failures by Iran to report the material, facilities and activities in question in a timely manner as it is obliged" was a matter of concern. Iran disputed the allegation, and the IAEA report acknowledged that "these failures [referring to the allegations in its report] are in the process of being rectified by Iran". (IHT 7/8-06-03)

At the IAEA meeting Iran defended its failure to report the importation of a small amount of uranium by reciting the IAEA report that listed failures by many other countries. The US delegate, on the other hand, said that "the US expect[ed] the [IAEA] accumulation of further information [would] point to only one conclusion: that Iran [was] aggressively pursuing a nuclear weapons program".

The US and the EU tried to rally support for a resolution urging Iran to accept stricter supervision of its nuclear programme, by way of signing an additional protocol allowing such supervision (this refers to a protocol supplementing the existing safeguards agreement between the country concerned and the IAEA in accordance with the Model Protocol adopted by the IAEA Board of Governors on 15 May 1997). Meanwhile, the UK threatened Iran that the EU would cut off trade ties if Iran refused to allow inspections, and Japan delayed finalizing a $2 billion oil deal under US pressure aimed at forcing Iran to comply with the inspection demands. (*See*, however, *infra*)

There was, however, no majority necessary to pass the resolution, with a group of about fifteen states members of the IAEA board taking the position firstly, that Iran had been cooperative and transparent and secondly, that many other countries had equally failed to report. Finally, the result was that the meeting issued a statement

just calling on Iran to allow stricter inspection of nuclear reactor sites in order to defuse the existing suspicions. (IHT 17-06, 18-06, 19-06, 20-06, 08-07-03)

In August 2003 the head of the Iranian Atomic Energy Agency expressed his expectation that Iran and the IAEA might soon reach positive results on the signing of an additional protocol. This was later confirmed by the Iranian foreign minister, although Iran had always said that it would sign a protocol only if the other countries promised technical cooperation in the field of nuclear technology. It was said that this was precisely what Britain, Germany, and France had been offering Iran if it stopped its nuclear fuel enrichments programme, although they had reportedly not specifically pledged to give assistance in a civilian nuclear energy programme. (IHT 15-08, 29-08, 08-09, 20/21-09-03)

At its meeting in early September 2003 the IAEA board of governors adopted a Western draft resolution formally sponsored by Australia, Japan, and Canada, setting a deadline on 31 October 2003 for Iran to demonstrate full compliance with its international obligations, including providing a full declaration of imported material and components for its enrichment programme and giving IAEA inspectors full access to its facilities. The resolution called on Iran to "suspend all further uranium enrichment-related activities" and "promptly and unconditionally" to conclude and implement an additional protocol on unscheduled inspections. The US gave its support to the draft, as there was no support for its initial demand for a resolution finding Iran already in non-compliance, which would have brought the matter before the UN Security Council. (IHT 10-09, 11-09-03)

The Iranian foreign ministry said on 28 September 2003: "Relinquishing peaceful nuclear technology or enriching uranium is not a subject Iran can compromise on." (IHT 29-09-03). Accordingly, the foreign minister said in early October that his country would not suspend uranium enrichment. However, Iran was under threat of losing a planned trade deal with the EU; in a joint statement with the foreign ministers of the UK, Germany, and France of 21 October 2003, it agreed to conclude a so-called additional protocol to its existing agreement with the IAEA, allowing unexpected and intrusive inspections of its nuclear sites and to suspend temporarily its uranium-enrichment programmes, to show its good will and build confidence. (IHT 08-10, 22-10-03) [Even under such an additional protocol it might take the IAEA two years to complete its survey and begin its inspections.] Accordingly, Iran submitted the relevant documents on its past nuclear energy activities to the IAEA on 23 October 2003, ahead of the 31 October deadline. The protocol was signed by Iran and the IAEA on 18 December 2003. (IHT 24-10, 19-12-03)

On 21 November 2003 the IAEA Governing Board took up a draft resolution, submitted by France, Germany, and Britain, that sought to compel Iran to halt the enrichment and reprocessing of uranium while offering cooperation including the sharing of nuclear technology for civilian use. The US was not satisfied as the resolution failed to declare Iran in violation of the Nuclear Non-proliferation Treaty; furthermore, it lacked "trigger mechanisms" to punish Iran for non-compliance. However, the US abandoned its demand since among the thirty-five board members only Japan, Canada, and Australia (and possibly New Zealand) would support it. The resolution was adopted on 26 November. It warned that Iran would face un-

specified action if the IAEA inspectors uncovered "further serious failures", yet omitted the conclusion of the IAEA report (*see supra*) that there was "no evidence" of a weapons programme. (IHT 19-11, 24-11, 26-11, 27-11-03)

In preparing a next meeting of the IAEA Governing Board in June 2004, the Western powers in March 2004 agreed on a draft resolution, which was, however, rejected by Iran. The draft praised Iran for opening much of its nuclear activities to outside inspection, but "deplor[ed]" some omissions in Iran's declarations. It stopped short of declaring Iran in breach of the Nuclear Non-Proliferation Treaty. Iran's displeasure with the criticism was manifested in its postponement of a planned visit by IAEA inspectors. The resolution was passed unanimously on 18 June 2004. (IHT 10-03, 11-03, 13/14-03, 17-06, 19/20-06-04)

As regards the suspension of the Iranian uranium-enrichment programme: it was initially announced that the suspension would start on 9 April 2004, but on 27 June 2004 the Iranian foreign ministry declared that Iran would resume building centrifuges for its nuclear programme although it would not resume the actual uranium enrichment. This was reportedly a reaction to the IAEA resolution of June 2004 (*supra*) criticizing Iran for past cover-ups. (IHT 07-04, 28-06-04)

North Korea

Implementation and collapse of the 1994 Agreed Framework; withdrawal from Non-Proliferation Treaty

In July 2002 there were still reports of South Korean technicians involved in the building of light-water nuclear reactors at Kumho, North Korea, under the auspices of the Korean Peninsula Energy Development Organization (*see* 5 Asian YIL 473, 547). (IHT 22-07-02) The pouring of the foundation of the reactor began on 7 August 2002, attended by Western diplomats and a US special envoy.

Meanwhile, US and European officials recalled North Korea's failure to allow unhindered inspection by experts from the IAEA of its nuclear facilities, warning that any hesitation on the part of North Korea in this respect would result in a freeze in the construction activities. Under the 1994 accord, inspection was a condition for the delivery of key components for the reactor. The IAEA on its part affirmed the necessity for an instant inspection of activities for the consortium to deliver the crucial parts on time. By way of response the North Korean foreign ministry on 13 July 2002 denied any such deadline or requirement of inspection. It charged that the US was to blame for years of delays to the project and that according to the original plans, the first reactor should be finished in 2003. The deal should be saved by agreeing to simultaneous action rather than demanding early inspection. (IHT 08-08, 14-08-02)

After being confronted with the data on its uranium enrichment facility in October 2002 (*see infra*) North Korea announced its intentions on withdrawal from the Nuclear Non-Proliferation Treaty (NPT), the expulsion of the IAEA inspectors and the restarting of the plutonium reprocessing facility that was frozen under the 1994 Agreed Framework. (IHT 18-10, 19-10-02, 13-01-03)

In view of the development of the situation, the US decided on 13 November 2002 (also by way of retaliation against the existence of the North Korean uranium enrichment program, *see infra*) to stop financing the monthly shipments of fuel oil to North Korea by the KEDO organization as part of the 1994 arrangement (*see* 5 Asian YIL 471 *et seq*., 545 *et seq*.). (IHT 15-11-02) North Korea responded by declaring the 1994 agreement as having collapsed, accusing the US of destroying it. (IHT 22-11-02) More explicitly, it announced several weeks later, on 12 December 2002: "The prevailing situation compelled the DPRK government to lift its nuclear freeze adopted on the premise that 500,000 tons of heavy oil would be annually supplied to the DPRK under the DPRK-US Agreed Framework, and immediately resume the operation and construction of its nuclear facilities [referring to the Yongbyon facility, *see* 1 Asian YIL 336] to generate electricity". Nevertheless, the announcement continued: "Whether the DPRK refreezes its nuclear facilities or not hinges upon the US. … It is the invariable stand of the DPRK government to find a peaceful solution to the nuclear issue on the Korean Peninsula". (IHT 13-12-02) Rather surprisingly, it was not until early November 2003 that the states members of KEDO (US, Japan, South Korea, and the EU) said they would formally announce the fate of the reactor project by some later date. It was said that there was no consensus in the US government whether or not to respond through abandoning the 1994 Accord, as this would imply lifting the North Korean obligation to freeze the spent fuel from its nuclear reactors. (IHT 06-11-03)

As a follow-up to its announcement of 12 December 2002 North Korea asked the IAEA to unseal the canisters containing the spent fuel rods, which were sealed and under IAEA supervision, and to remove the surveillance cameras. However, the IAEA showed no haste in either complying with the request or in withdrawing its inspectors, while the KEDO officials said that work on the construction of the two light-water reactors was going on as usual. (IHT 14/15-12-02) North Korea thereupon started itself to remove the UN monitoring equipment and seals. (IHT 23-12-02) On 27 December 2002 North Korea announced that it would expel the IAEA inspectors. (IHT 28/29-12-02)

The IAEA deplored the North Korean moves in a resolution of the IAEA governors in early January 2003, although granting it "a window of opportunity to reverse its decision". (IHT 07-01-03) However, North Korea rejected the IAEA's call to reconsider its withdrawal from the Non-Proliferation Treaty. The intention of withdrawal was, on the contrary, confirmed on 10 January 2003 (it was, however, later said by the North Korean side in mid-January 2003 that it could rejoin the treaty if its demands for changes in the IAEA's inspection regime were met). Both China and South Korea stated their concern about the withdrawal. (IHT 07-01, 08-01, 11/12-01, 14-01-03)

Uranium enrichment facility

In early October 2002 the US confronted North Korea with intelligence data about the building of a *uranium enrichment* facility in violation of the Nuclear Non-Proliferation Treaty. It was suspected that North Korea had begun the programme to produce weapons-grade material from highly enriched uranium, which does not require

nuclear reactors (*see infra*). North Korea admitted that it had been conducting a nuclear energy development programme for the past several years by way of response to the US threat to its sovereignty implied in the latter's classification of North Korea as part of an "axis of evil", but denied the use of the uranium-enrichment method. It persisted in its denial despite the later admissions by the Pakistani scientist A.Q. Khan. (*see infra*) (IHT 18-10-02, 25-02-04)

It was reported in May 2004 that international inspectors had discovered evidence of North Korean supply of uranium to Libya in 2001, which would be the first case of a North Korean sale to another country of a key ingredient for manufacturing atomic weapons. (IHT 24-05-04)

Restart of nuclear programme and the issue of weapon production

In accordance with an earlier North Korean announcement to that effect (*see supra*) it was reported in late February 2003 that North Korea had restarted (on 4 February 2003) a reactor at its primary nuclear complex at Yongbyon (*see* 1 Asian YIL 336). The critical step would be the operating near the reactor of a "re-processor", which is used to convert spent nuclear fuel rods into bomb-grade ("enriched") plutonium. The reactor would be able to produce annually more or less the amount of spent fuel rods necessary for the production of one bomb.

Much confusion arose as to what stage North Korea had reached in its reprocessing efforts and whether it had proceeded with weapons production. In any case there was clarity about the reprocessing aspect when North Korea reported in July 2003 that it had reprocessed all of its spent nuclear fuel rods. (IHT 06-02, 28-02, 05-03, 02-05, 02-07, 14-07, 21-07-03) At the three-party talks in April 2003 (*see infra*) the North Korean delegate asserted for the first time unequivocally that North Korea already had nuclear weapons. However, as late as in early May, it was reported that the US intelligence officials seemed not yet able to ascertain whether North Korea had in fact already reprocessed enough spent nuclear fuel for weapon production and that, consequently, the US instead began to emphasize the prevention of North Korean exports of nuclear material to other countries. (IHT 06-05-03)

On 9 June 2003 North Korea for the first time referred to its need for a "nuclear deterrence". In a commentary published by the official news agency it was said that North Korea had "no other option but to have a nuclear deterrence" to counter the "hostile policy" of the US, including "its nuclear threat". (IHT 10-06-03)

On 2 October 2003 North Korea said (again) that it had completed reprocessing the 8,000 spent fuel rods which had been sealed under the 1994 agreement, while emphasizing that it had no intention of transferring any means of its nuclear deterrence to other countries. (IHT 03-10-03)

On 6 January 2004 a non-governmental group from the US, with the permission of the North Korean government, left for North Korea to visit the Yongbyon nuclear plant. In this context North Korea declared it had shown a "nuclear deterrent" to the unofficial delegation, but from the other side it was reported that the visitors had seen only the facilities to produce bomb fuel, and not an actual weapon. (IHT 3/4-01, 07-01, 12-01-04)

[During the interrogations of the Pakistani scientist A.Q. Khan (*see infra*: Pakistan) the latter divulged that he (being a metallurgist, not a weapon expert, by training) was once shown what he described as three nuclear "devices". This would mark the first time that a foreigner reported seeing North Korean nuclear weapons. (IHT 14-04-04)]

North Korean and US positions; condition of non-aggression pact; the prospect of a peace treaty

In spite of the disclosure of the North Korean uranium enrichment facility and the North Korean reaction (*see supra*) the latter said on 25 October 2002 that it would be prepared to enter into negotiations about its nuclear programme, but only if the US signed a non-aggression pact. (IHT 28-10-02) With regard to this demand US officials said that a formal non-aggression treaty required ratification by the US Senate and this would be improbable to obtain. However, they did not rule out a less formal commitment, such as, for instance, a reaffirmation of the communiqué of October 2000 (10 Asian YIL 376) in which both sides vowed that they had no "hostile intent" towards the other. (IHT 08-01-03) [Some analysts noted that the US has historically avoided non-aggression pacts.]

The US on its part emphasized its not being prepared to engage in negotiations in the face of threats or broken commitments. Dissimilarly to the attitude of South Korea, the US favoured a policy of no bargaining and no new economic incentives until North Korea abandoned its nuclear programme. It was said that the US policy was one of increasing diplomatic pressure yet not squeezing North Korea further economically or militarily ("structured containment", "tailored containment").

Nevertheless, the US-Japanese-South Korean "Trilateral Coordination and Oversight Group" issued a joint statement expressing willingness to talk with North Korea about returning to compliance with nuclear safeguards, although without *quid pro quos*. This was rejected by North Korea. Meanwhile, unofficial talks took place on 9-10 January 2003 between North Korean diplomats and a former US ambassador to the UN. (IHT 04-11, 05-11-02, 02-01, 07-01, 08-01, 10-01, 11/12-01, 14-01-03)

Another shift in US policy was signalled on 14 January when the US president said that if North Korea disarmed, he would reconsider whether to restart a "bold initiative" that could include aid, energy assistance and security agreements, but this was again rejected by North Korea. (IHT 15-01, 16-01-03)

Among other developments, North Korea repeated its interest in a binding non-aggression treaty with the US in exchange for a willingness to prove that it did not make nuclear weapons. The description of North Korea by the US president in his State of the Union speech in late January 2003 as "an oppressive regime" ruling "a people living in fear and starvation" was classified by North Korea as an "undisguised declaration of aggression". In view of a possible US move to impose sanctions there was a threat from the North Korean People's Army that in such case it might abandon the 1953 armistice agreement (IHT 1/2-02, 19-02-03)

On the other hand the US president, while trying to involve China in resolving the stand-off, emphasized that "all options are on the table", apparently not ruling out the use of force. This alternative was later expressed explicitly, while there were

reports in early March 2003 that the US had started sending long-range bombers to the island of Guam, within easy striking distance of North Korea. (IHT 8/9-02, 06-03-03)

As a consequence of the uncertainty about the progress made by North Korea in reprocessing its spent nuclear fuel and against the backdrop of the shifts of emphasis in its policy (*see supra*) the US set up a programme together with other states, including the UK, Japan, and Australia, under the name of "*DPRK Illicit Activities Initiative*" aimed at squeezing North Korea by applying interdiction and seizure techniques. In this context there was an announcement in September 2003 according to which ten joint military exercises would be held shortly in various parts of the world to train for intercepting shipments to and from countries suspected of having "illegal" arms programmes (*cf. infra*). (IHT 18-08, 19-08, 11-09-03)

On 13 August 2003 North Korea once again re-affirmed its standpoint, through a major policy announcement by its foreign ministry, by insisting that it would not give up its "nuclear deterrent force" "as long as the US insist[ed] on its hostile policy towards the DPRK", and that it would consider giving up that policy only by a legally binding non-aggression treaty between North Korea and the US. It thereby rejected a collective security guarantee by whatever other participants in the six-party talks (*see infra*: Meetings). It further demanded the establishment of normal diplomatic relations with the US as an additional precondition. (JT 14-08-03) Furthermore, at the six-party talks in August 2003 (*see infra*) some statements by the North Korean delegate appeared to contain references to North Korea's actual possession of nuclear weapons and its preparedness to test or to deliver them, but denied that his country was developing a uranium-based nuclear weapon.

At the same meeting the US showed a remarkable shift in its attitude, emphasizing that it had "no intention to invade and attack North Korea" nor "to work for regime change". The US would be prepared to take a range of steps, from gradually easing sanctions to an eventual peace treaty, although phased in slowly as North Korea started surrendering its nuclear weapons, dismantling its facilities, and permitting inspectors. The principal change in approach was said to consist in the sequence of rewards, contrary to the previous absolute dismissal of any benefits for North Korea before the complete elimination of its entire nuclear infrastructure. (IHT 29-08, 05-09, 6/7-09-03)

The new US attitude was further elaborated when six weeks later, in October 2003, on the sidelines of the APEC summit meeting at Bangkok (*see supra*), the US and Chinese presidents discussed a new, if vague, US plan offering North Korea a five-nation commitment not to invade (but still ruling out the North Korean demand for a formal non-aggression treaty that would forbid the US to ever make a pre-emptive strike) if North Korea froze and dismantled its nuclear weapons programme. According to sources at the Japanese foreign ministry the US proposal included a kind of peace agreement to replace the 1953 truce accord between North Korea, the US, and China. (IHT 20-10-03; JT 06-11-03) In early December it was reported that the US had agreed with South Korea and Japan to a broadly worded set of principles, consisting of a "co-ordinated" set of steps in which five states would offer North Korea a security guarantee as it begins the verifiable disassembly of its nuclear

facilities. The statement of principles was submitted to China in order to be conveyed to North Korea. It was admitted that the offer was vague and would require inspections, although it was noteworthy that the plan avoided any reference either to the Non-Proliferation Treaty or to an IAEA role. It included no unilateral, explicit, renunciation of intent to punish North Korea economically or militarily, apparently in order to save the Proliferation Security Initiative (or: Illicit Activities Initiative, *see supra*). (IHT 09-12-03) North Korea rejected the US offer on 15 December 2003 on the grounds that it failed to allay fears of a US attack. (IHT 16-12-03)

North Korea on its part, during the August session of the six-party talks, unveiled a four-stage approach to end the stand-off, while again denying that it had a programme to enrich uranium for nuclear arms. Under the plan North Korea would declare an intent to abandon its nuclear weapons programme after the US had resumed oil supply shipments. In the second stage North Korea would accept inspection of its nuclear facilities after a non-aggression pact with the US was signed. In the third stage North Korea would settle issues relating to its missile development after the relations with the US and Japan would be normalized. In the final stage North Korea would abandon its nuclear weapons programme when the light-water reactors under the 1994 agreement were completed. (JT 29-08-03)

On 6 January 2004 North Korea offered to refrain from testing and producing nuclear weapons and to halt the operation of its nuclear power facilities. This would happen in exchange for its removal from the list of sponsors of terrorism; the lifting of political, economic, and military sanctions and blockades, and for the supply of heavy oil, power, and other energy resources. (IHT 3/4-01, 07-01-04)

Under pressure from the Asian participants in the six-party talks, the US presented a new proposal at the meeting in June 2004, essentially a revised edition of the earlier South Korean proposal, thus softening its hard-line stance. The US plan, resembling the earlier South Korean proposal (*see infra*: Attitudes of other countries), required full disclosure of the North Korean nuclear programme, submission to inspections, and the start of elimination of the programme after a preparatory period of three months. In exchange North Korea would receive heavy oil (contrary to the earlier US attitude), would be granted a provisional security guarantee by the US, and would see the lifting of some sanctions. The plan did not require the dismantling of the North Korean nuclear programme according to the precise formula of "complete, verifiable and irreversible dismantling" (CVID). From its side North Korea presented its demands with respect to the energy aid in exchange for the freezing of its nuclear programme. (IHT 24-06, 25-06-04)

Attitudes of other countries; non-nuclear status for the Korean Peninsula

A joint declaration by the *Chinese and Russian* presidents was issued in early December 2002 on the occasion of a visit by the Russian president to China. The declaration called on North Korea to abandon any programme to develop nuclear weapons. The parties "consider it important for the destiny of the world and security in Northeast Asia to preserve the non-nuclear status of the Korean Peninsula and the regime of non-proliferation of weapons of mass destruction." The presidents also

emphasized the "extreme importance" of new talks between the US and North Korea, calling for a return to the 1994 agreement. (IHT 03-12-02)

On 20 January 2003 *Russia* presented a three-part plan to resolve the crisis. The plan involved guarantees of a nuclear-free status for the Korean Peninsula, written security guarantees for North Korea from the US, and a package of humanitarian and economic aid. (IHT 22-01-03)

The position of *China* was later formulated by its vice-president on the occasion of the second session of the six-party talks in August 2003, as follows: "China holds that the Korean Peninsula should be nuclear-free and reasonable security concerns of the Democratic People's Republic of Korea should be addressed." (IHT 27-08, 28-08-03) Contrary to the dismissive US attitude not only China, but also South Korea and even Australia urged the US to enter into direct bilateral talks with North Korea. (IHT 25-02-03)

One day after the Iraq War started the *European Union* issued a declaration stating that the EU "[stood] ready to look into the possibilities of enhancing cooperation with North Korea if the present crisis can be resolved in a satisfactory manner." The European Council planned to convene a ministerial meeting on the matter and asked South Korea and Japan to participate. (IHT 22/23-03-03)

At the February 2003 session of the six-country talks (*see infra*) *South Korea* proposed a three-step plan to the six-party negotiations for North Korea to freeze and eventually dismantle the whole of its nuclear programme. Under the first phase North Korea would declare its willingness to give up its nuclear programmes, and the US and its allies would offer a verbal security guarantee. The second phase would involve North Korea initiating the freeze, followed by "corresponding measures" from the other five countries. In a third phase, North Korea would dismantle its nuclear programmes in a verifiable and irreversible manner, while the others would offer unelaborated further measures. The US consent represented a partial retreat from its initial stand of not rewarding North Korea for simply freezing its nuclear programme. However, it was reported that while China and Russia would join South Korea in providing energy aid to North Korea when the latter agreed to freeze its programme, the US (and possibly Japan) would not participate in such aid. (IHT 24-02, 25-02, 26-02, 27-02-04)

Meetings

While refusing bilateral talks with North Korea, the US on 15 April 2003 approved a plan of six-party talks including South Korea, China, Japan, and Russia (instead of the earlier four-party talks with North Korea, South Korea, China, and the US); the US was prepared even to begin negotiations with North Korea, with only China sitting in as a full participant. These meetings would thus be neither strictly bilateral nor multilateral (*cf.* Asian YIL Vol.6: 423, Vol.7: 417, Vol.8: 262, Vol.9: 392, Vol.10: 376, and *supra*). The meeting was scheduled for 23-25 April 2003 at Beijing. It was the first official meeting of North Korea and the US since the visit by a US envoy to North Korea in October 2002 (*see supra*) (IHT 17-04-03) and represented a shift from the earlier US complete rejection of talks before North Korea had started dismantling its facilities. The US entered the discussions with the

objective of not settling for another freeze of North Korea's nuclear programme, but insisting on the dismantling of both of its nuclear weapons projects as part of any larger agreement. (IHT 18-04-03)

The meeting ended a day early on 24 April, with all three parties having presented their point of view. (IHT 25-04-03) North Korea offered a plan that could lead to the dissolution of its nuclear weapons programme, in return for a number of demands. Among these were the normalization of relations with the US, and economic assistance. North Korea also offered to suspend ballistic missile tests and to stop missile exports if the US offered "credible security assurances". The offer was a step-by-step package with, at the end of the process, the dismantling of nuclear weapons. The Chinese side confirmed the North Korean offer. On 29 April the North Korean offer was rejected by the US on grounds that the US "[would] not reward North Korea for bad behaviour".

It seemed that the talks broke down after the North Korean delegate had asserted that North Korea already possessed nuclear weapons (IHT 26/27-04, 29-04, 30-04-03)

China in July 2003 proposed new multilateral negotiations in an effort to end the stand-off that had existed since the trilateral talks in April 2003. It was supposed that within the context of a multilateral meeting, bilateral talks could take place on the sidelines. (IHT 16-07-03) North Korea reacted favourably to the idea, yet even before the meeting started in late August there was disagreement. It arose when the US insisted on forming a new, multilateral inspection team to visit the North Korean nuclear facilities; North Korea rejected any early inspection. Yet the US on its part was reported to be considering some conciliatory steps, and South Korea promised economic assistance if North Korea ended its suspected nuclear weapons programme.

The six-party talks were resumed from 27 to 29 August, with US and North Korean delegates meeting on the sidelines of the formal discussions, thus breaking a freeze on direct dialogue. However, Chinese efforts to have the meeting issue a multi-party declaration that would provide a framework for future negotiations failed. (IHT 15-08, 16/17-08, 21-08, 27-08, 28-08-03; JT 02-08, 14-08-03)

While the Chinese announced that the six parties agreed to reconvene within two months, North Korea said that it saw no purpose in continuing the talks, and that it had no choice but to strengthen its nuclear deterrent. However, it said in late October that it was ready to enter a new round of negotiations "if they provide a process of putting into practice the proposal for a package solution based on the principle of simultaneous actions". (IHT 30/31-08, 01-09, 31-10-03)

The six-country talks were reconvened on 25 February 2004 (IHT 24-02, 25-02, 26-02, 27-02-04) and again in June 2004.

IAEA and UN involvement

The issue of the North Korean nuclear programme was discussed in an emergency meeting of the IAEA board of governors that on 12 February 2003 declared North Korea officially in "non-compliance" with the applicable safeguards agreement the matter was referred to the UN Security Council. The IAEA declared that it "remain[ed] unable to verify that there [had] been no diversion of nuclear material"

for weapons use. The US was said it would seek a UN resolution condemning North Korea, although it would not press for sanctions. (IHT 13-02-03)

The UN Security Council met on 8 April 2003 to discuss the North Korea issue; itt failed to agree on a statement condemning North Korea's nuclear programme, due to opposition from China. The latter said it did not want the Security Council to be involved in its efforts to bring the US and North Korea together (*see supra*). The Council met the following day to discuss the North Korean withdrawal from the Nuclear Non-Proliferation Treaty announced on 10 January and which would take effect on 10 April, but the Council failed to agree on a statement. (IHT 09-04, 10-04-03)

Pakistan

According to US Department of Energy and CIA reports dating from 1999 and 2001, Pakistan had since 1998 been supplying enrichment technology to North Korea in exchange for missiles and missile technology (which allegation was at the time denied by Pakistan). This cooperation was, however, reportedly halted after the coming to power in Pakistan of General Pervez Musharraf in 1999. (IHT 25-11-02, 21-04-03)

In 2003 evidence was found of a role played by the Pakistani *A.Q. Khan Research Laboratories* in the development of technology that enabled Iran, in around 1987, to pursue an uranium enrichment programme. Similar circumstances appeared to have been the case with the development of nuclear technology in Libya, which agreed on 19 December 2003, under Western pressure, to dismantle its nuclear programme.

The Pakistani assistance to the Iranian, North Korean and Libyan efforts over the past fifteen years in the form of designs and technology for the production of nuclear fuel was confirmed in the written confession of late January or early February 2004 by the founder of Pakistan's nuclear weapons programme, A.Q. Khan. (IHT 05-01, 07-01, 03-02-04)

[The IAEA director general contended in 2004 that the (Non-Proliferation Treaty) system put in place (in 1970) to contain nuclear weapons technology had ruptured and could no longer control the nuclear trade. He proposed revising the current system by placing under multilateral control any facility that can manufacture fissile material.

The biggest hurdle in making a nuclear weapon seems no longer to be the designing of the warhead, but obtaining the fuel to create an atomic explosion. One method is to extract plutonium from (spent fuel from) nuclear reactors and reprocess it to produce more fuel: the creation of a fuel cycle. The other method is to extract uranium then enrich it, such as by way of centrifugation. A gaseous form of natural uranium is thus separated into U-238, a heavy isotope, and U-235, a light one (highly enriched uranium) which can be split to release nuclear energy. (IHT 05-01-04)]

Japanese nuclear waste

A freighter carrying reprocessed Japanese waste left Cherbourg in France on 19 January 2004 for Japan. The waste, processed from spent nuclear fuel from Japanese nuclear reactors, would be put in a long-term (30-50 year) storage facility in Rokkes-

ho, Japan. The shipment was the ninth of its kind (cf. Asian YIL Vol.2: 357-358, Vol.3: 428, Vol.5: 476, Vol.7: 467). (JT 21-01-04)

OIL AND GAS

See also: Exclusive economic zone; Inter-state relations: East Timor – Australia

China – Australia

Agreement was reached in early August 2002 for the annual supply of 3.3 million metric tons of liquefied natural gas (worth $11 to 13 billion) over the next 25 years from Australian fields to China. The Chinese made this choice in preference to supply from Indonesia. In late October 2003 the two sides signed a letter of intent for a $21 billion deal, affirming both the gas supply concerned and a commitment for the China National Offshore Oil Corporation to take an equity stake in an Australian natural gas field. (IHT 09-08, 06-11-02, 25/26-10-03)

China – Indonesia

On 26 September 2002 the China National Offshore Oil Corporation (CNOOC) signed a long-term 25-year contract with Indonesia for the annual supply of up to 2.6 million metric tons of liquid natural gas from the Tangguh fields in the Indonesian province of Papua. The Chinese company also committed itself to investing in the development of the Tangguh gas fields by taking a 12.5 per cent stake in the existing group of mainly British and Japanese companies.

CNOOC also became the largest producer of oil from the seabed in Indonesia by buying the Indonesian assets of the Spanish oil company Repsol-YPF in January 2002.

Other investment pledges were made besides, such as in a preliminary accord between Petrochina Co. and the Indonesian state gas company for the construction of a gas pipeline linking Kalimantan (Borneo) and Java. (IHT 06-11-02)

China – Kazakhstan

Oil companies from China and Kazakhstan signed an agreement to build a pipeline to deliver Central Asian oil to the Xinjiang region in China. (IHT 19-05-04)

China / Japan – Russia

Russia and China agreed in September 2001 to study a project relating to a 1,400-mile pipeline that would carry Russian oil from Siberia to Daqing in north-eastern China. The project was, among other topics, a subject of discussion during a visit by the Russian president to China in early December 2002. (IHT 03-12-02)

Meanwhile, there were competing Japanese efforts to have the pipeline laid to Nakhodka on the coast of the Sea of Japan, at one-day's tanker cruise distance from Japan. (IHT 3/4-01-04) The two options were a 2,400-kilometre extension of an existing network, from Angarsk, near Irkutsk, to Daqing, or a 3,800-kilometre pipeline to Nakhodka, circumventing China.

It was reported in March 2004 that amid competing preferences among Russian circles the Russian ministry was considering a combined project, consisting of a pipeline from Angarsk to Daqing, but with a branch and extension to Nakhodka, running entirely through Russian territory. In late April 2004 the government announced its decision to back the (cheaper) plan of building a pipeline to Daqing. (AT 02-04, 03-05-04; IHT 22-04-04)

East Timor – Australia

Prior to East Timor's separation from Indonesia the seabed boundaries between Indonesia and Australia were regulated by a 1972 treaty, with the exception of a stretch of seabed on which the parties could not reach agreement and which was left undelimited; it was named the "Timor Gap". The apportionment of oil and gas reserves from this sea area was covered by a 1989 "Timor Gap Treaty" between Indonesia and Australia, providing for a three-area "Zone of Cooperation" (ZOC), with parts (Areas B and C) under Indonesian and Australian administration respectively, and a joint development zone (Area A).

East Timor had been insisting on a revision of the maritime borders as drawn by the 1972 treaty and replace it by a delineation treaty in accordance with principles (such as the equidistance rule) contained in the Third UN Convention on the Law of the Sea. This was refused by Australia, and in 2002 Australia withdrew its acceptance of the compulsory jurisdiction of the International Court of Justice in matters of maritime boundaries. Instead, the two countries concluded a Timor Sea Treaty (TST) in May 2002 (*see* 10 Asian YIL 387), which maintained the 1989 joint development zone under the name of "Joint Petroleum Development Area" (JPDA), with 90 per cent of its revenues (deriving from, *inter alia*, the Bayu Undan field) accruing to East Timor. The treaty is concluded for a 30-year period or until such time as final maritime boundaries are achieved.

The two countries, furthermore, concluded a so-called *International Unitisation Agreement* (IUA) relating to oil and gas fields outside the joint development zone (including, especially, the *Greater Sunrise* field, of which not more than twenty per cent is located within the JPDA and which straddles the eastern lateral boundary of the JPDA) which, under the Timor Gap Treaty (and also under the TST), accrued to Australia, but most of which would fall to East Timor under a revised boundary treaty according to the new law of the sea.

East Timor on 6 March 2003 approved the IUA under which it ceded 79.9 per cent of the *Greater Sunrise* oil and gas field to Australia. By way of response Australia ratified the TST. This ratification was necessary for the renewal of commercial contracts concerned and
for the actual extraction of gas from the *Bayu Undan* gas field to start, the royalties of which were vital for East Timor.

The disagreement on the continuation or the revision of the Timor Gap Treaty erupted again late 2003 in connection with the issue of the sharing of royalties from the exploitation of yet another field.

India – Iran

The two countries concluded long-term gas and oil agreements on 13 May 2003 under which Iran would supply India with, *inter alia*, liquid natural gas (LNG) for 25 years. The gas agreement provided for "cooperation, exchange of experience in the field of compressed natural gas (CNG) production and reconstruction of refineries". (ATol 22-05-03)

Iran – Japan agreement

It was reported that after years of negotiations between Iran and Japan on a two-billion-dollar agreement for the development of the Azadegan oil field, an agreement was finally concluded in February 2004. This was achieved when Iran granted a Japanese consortium rights to develop the oil field for twelve-and-a-half years with a 75 per cent stake, and despite US pressure on Japan to give up the deal, in view of alleged Iranian nuclear development programmes and the alleged Iranian "support for violent groups". (JT 20-02-04)

ORGANIZATION OF THE ISLAMIC CONFERENCE (OIC)

Tenth summit conference

The tenth session of the Islamic Summit Conference was held at Putera Jaya, Malaysia, from 16 to 18 October 2003. [Of the 57 member countries, 27 were African, 14 were West, Central and South-west Asian and Middle East countries, 13 were otherwise Asian, two were South American, and one was European.]

The Conference on 17 October 2003 adopted the "*Putrajaya Declaration on Knowledge and Morality for the Unity, Dignity and Progress of the Ummah*".

PEACEFUL SETTLEMENT OF DISPUTES
See: Territorial claims and disputes

PIRACY

According to IMO data 24 acts of piracy had occurred in 2002 in the Strait of Malacca, 112 in the South China Sea, and 46 in the Indian Ocean. Seventy-nine per cent occurred at seaports and only 21 per cent at sea.

RECOGNITION
See also: Inter-state relations: China-India

Status of Iraqi embassy

The Indonesian foreign ministry stated in early August 2003 that Indonesia still recognized the Iraqi embassy as such in spite of the fall of the administration of

president Saddam Hussein. The ministry's spokesman said, *inter alia*: "The status of a country's embassy depends on the situation in the country concerned. … If the new administration [in Iraq] is fully supported by the people, Indonesia and other countries will certainly recognize it." The ambassador had, however, already left Indonesia.

It was reported that a similar issue had arisen with regard to the Iraqi ambassador in China following a recall by the post-war provisional government in Iraq and a US request to China for the ambassador's deportation. (Antara 05-08-03)

REFUGEES

Afghan refugees in Iran

Iran announced that it would require tens of thousands of refugees to return to Afghanistan by 27 August 2002, namely, those who had not taken part in the census of immigrants that had begun a year before. The government contended that while nearly 2.6 million Afghans had taken part, there were at least 250,000 who had refused to do so. The flow of Afghan refugees had already started even before the US-led campaign to oust the Taleban. The displaced Afghans were considered by the Iranian government to be immigrants, not refugees. The Office of the UN High Commissioner of Refugees claimed a right to review of those whom Iran wanted to expel, based on an agreement between the High Commissioner and Iran. (IHT 16-08-02)

Tibetan refugees in Nepal

Nepal on 30 May 2003 handed over to the Chinese authorities eighteen Tibetan refugees who had entered Nepal illegally from the Tibetan region of China. The US reacted by filing a protest note "deploring" the incident.

Over the years since 1959, Tibetans who had sought asylum in Nepal had been handed over to the UNHCR as "persons of concern". They would then be relocated to India (in the Tibetan settlement at Dharamsala) by the UNHCR under a programme paid for by the US. The UNHCR, it was said, acted for all practical purposes on behalf of the US.

The new Nepalese policy meant that Nepal had accepted the Chinese claim that Tibetans are in fact Chinese nationals and that in the event of unlawful border crossing, they must be handed over to China. It was believed that this happened with Indian compliance. (ATol 17-06-03)

North Korean refugees in embassy premises; "persons of concern"

According to news reports in early September 2002, groups of North Korean refugees rushed the fence of a diplomatic compound in Beijing despite attempts by police officers on guard to prevent them from entering the buildings. (IHT 03-09, 04-09-02)

On 31 July 2003 ten North Korean nationals entered the Japanese embassy in Bangkok. They had entered the country illegally, but Thailand was unable to deport

them since the UNHCR had recognized them as "persons of concern". The position of the UNHCR is that "persons of concern" should not be forced or pressured into returning to their country of origin against their will. The Thai government had consequently granted permission to them to remain in Thailand for the time being.

Although the persons initially asked for entry into Japan, they were persuaded to go to South Korea instead, as the South Korean foreign ministry stated that they would be granted entry. They finally left Bangkok for South Korea on 23 August 2003. (JT 01-08, 02-08, 04-08-03; Kompas 01-08-03, JP 23-08-03)

REGIONAL SECURITY

See also: Asia-Pacific Economic Cooperation Forum

US role in preserving Southeast Asian security

At a three-day conference on Asian security held in early June 2004 in Singapore, the Malaysian defence minister refused US "troops or assets" to set foot in the Strait of Malacca, since their use would fuel Muslim fanaticism and would harm the ideological battle against extremism and militancy in the countries concerned.. Yet he advocated an expansion of anti-terrorism efforts with the US in areas such as the sharing of intelligence, and cooperation in destroying the financial and logistical networks of terrorist groups.

The US was pursuing a "Regional Maritime Security Initiative" for the region, including the interception of ships carrying suspicious cargo. Several US allies, including Japan, South Korea, and Australia, were prepared to step up military plans for improving regional security (*cf.supra*). (IHT 07-06-04, www.globalsecurity.org, www.pacom.mil)

RIVERS

Network of Asian River Basin Organization (NARBO)

The organization, having as its purpose the promotion of integrated, especially river, water resources management (IWRM) in monsoon areas of Asia, was founded by sixteen Asian countries in February 2004. It is particularly aimed at the exchange of information. (Antara 25-02-04, NARBO Charter at www.narbo.jp)

SANCTIONS

See also: Embargo; Inter-state relations: China-US, Japan-Myanmar, Japan-North Korea; Missile technology; Nuclear energy matters

US sanctions against China

The US decided to impose sanctions on nine Chinese companies for three cases of the sale to Iran between September 2000 and October 2001 of advanced conventional arms, and of chemical and biological weapon components. The subjects

of the sanctions would be barred from doing business with the US government or US companies. It was the fourth time since September 2001 that Chinese companies had been the subject of sanctions for such sales. (IHT 23-07-02)

US sanctions against North Korea

In spite of more positive signals concerning US relations with North Korea (*see supra*), the US imposed sanctions against North Korea after concluding that it had sold Scud missile components to Yemen before 2001. The sanctions were based on a Helms-amendment to the US Arms Export Control Act relating to non-market economies. (IHT 24/25-08-02)

Japanese sanctions against Myanmar

Japan cut all official development assistance immediately after the government of Myanmar had on 30 May 2003 arrested Aung San Suu Kyi.

Japanese sanctions against North Korea

The Japanese parliament passed a bill on 9 February 2004 allowing Japan unilaterally to impose economic sanctions on North Korea. The legislation consists of an amendment to the Foreign Exchange and Foreign Trade Control Law. The preceding law prevented Japan from, *inter alia*, halting cash remittances to North Korea without mandate from an international agreement or a UN resolution. The revised law enables Japan to do so and, besides, to restrict investments in North Korea, to freeze assets, and to introduce import and export restrictions on its own if the government deems it necessary so to do in order to maintain peace and security. (JT 24-01, 27-01, 30-01, 10-02-04)

SHANGHAI COOPERATION ORGANIZATION

Developments

The 1996 "Agreement on deepening military trust in border regions" between China, Russia, Kazakhstan, Tajikistan and Kyrgyzstan (see 6 Asian YIL 347, 406) and that of 1997 between the same states "on reduction of military forces in border regions" gave rise to annual summit meetings under the appellation of "*Shanghai Five*" or "*Shanghai Forum*". In 2001 Uzbekistan was included; the scope of the gathering (not exclusively summit meetings) was extended from strengthening trust in border regions to cooperation in the fields of politics, security ("three evils": terrorism, separatism, extremism), and economics.

At the fifth anniversary of the grouping in June 2001 it was decided to lift the mechanism to a higher level, for which purpose the parties adopted a "*Declaration on the establishment of a Shanghai Cooperation Organization*" (SCO, text in www.sinomania.com). The same meeting adopted the "*Shanghai Convention on fight against terrorism, separatism and extremism*" (three months before the attacks in the US on 11 September) (see 10 Asian YIL 362).

During their second meeting on 7 June 2002 the SCO heads of state adopted a Charter for the organization, of which the final version was formally approved at the third SCO Summit at Moscow on 29 May 2003. The first budget (2004) was approved at the next summit meeting on 19 September 2003, when the organization also established its headquarters in Beijing and set up a regional anti-terrorism centre ("Regional Anti-Terrorism Structure") at Bishkek. The first summit meeting of the official SCO Council of Heads of State took place in June 2004 at Tashkent. The meeting was attended by the president of the transitional government of Afghanistan and the envoy of the president of Mongolia. (ATol 24-05-03, IHT 24-09-03, www.sectsco.org)

SOUTH ASIA ASSOCIATION FOR REGIONAL COOPERATION (SAARC)

Summit meeting 2004

The organization held its twelfth Summit at Islamabad in early January 2004. The meeting saw the signing of a Social Charter for South Asia, a Framework Agreement establishing a South Asia Free Trade Area (SAFTA), and an Additional Protocol on the Suppression of Terrorism. (IHT 3/4-01-04, *SAARC News* Jan-Mar 2004, www.saarc-sec.org.)

SPECIAL TERRITORIES WITHIN A STATE: KASHMIR

See also: Inter-state relations: India-Pakistan

Lessening of tensions

India announced on 16 October 2002 that it would withdraw some of its troops deployed on its border with Pakistan in December 2001 because of the tensions resulting from the attack on the Indian Parliament of 13 December 2001 (*see* 10 Asian YIL 393). However, the Defence Minister ruled out any resumption of dialogue "until cross-border terrorism stops completely".

De-escalation of the tension had already started earlier with the withdrawal in May 2002 of Indian warships from forward locations in the Arabian Sea, and the lifting of a ban on Pakistani planes flying over Indian territory.

In response to the Indian move Pakistan announced the following day that it would similarly withdraw its forces from its border with India to peacetime locations. (IHT 17-10, 18-10-02)

TERRITORIAL CLAIMS AND DISPUTES

See also: Association of South East Asian Nations; Inter-state relations: Cambodia-Thailand, China-India, Japan-Russia

Malaysia – Singapore: Batu Puteh / Pedra Branca Island

The two countries were involved in a territorial dispute concerning the Island of *Batu Puteh* (or: *Pedra Branca*), fifteen kilometres off the coast of Johor (the most southern state of the West-Malaysian peninsula), and the waters around it. Singapore based its claim on occupation and the exercise of sovereignty by itself and its predecessors since the 1840s, including the administration of the "Horsburgh" Lighthouse on the island. This sovereignty was never challenged until 1979, when Malaysia put forward its claim on the premise that the Johor Sultanate had exercised complete jurisdiction and sovereignty over the island from 1513. Malaysia also claims support from the 1824 Anglo-Dutch treaty which drew a line dividing the respective spheres of influence on either side of the Straits of Malacca and south of Singapore, placing the island within the British sphere of influence and within the territory of Johor.

In late 2002 Malaysia accused Singapore of putting up structures, while the two parties had agreed in principle in 1998 to refer the dispute to the International Court of Justice. In early January 2003 Malaysia through its foreign minister claimed a right to conduct surveillance in the area around the island because it considered these waters part of its territory (ST 23-12-02, 06-01-03)

On 24 July 2003 the two countries jointly, by Special Agreement, submitted their dispute concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge to the International Court of Justice.

Japan – South Korea: Takeshima / Tokdo Islands

South Korea had issued postage stamps featuring the disputed islands of Tokdo (Korean) or Takeshima (Japan) (*see* Asian YIL Vol.6: 460, Vol.7: 482).

Japan protested over the issuance and its foreign minister said that the Japanese government would notify members of the Universal Postal Union that South Korea's move was against the spirit of the Organization. The notification was later followed by a statement of 26 February 2004 claiming that South Korea was guilty of reproachable behaviour by going ahead with production of the stamps and that this would harm friendly bilateral relations while having no impact on the Japanese view of the islands.

South Korea rejected the Japanese protest. It sent a statement to the hundred and ninety UPU member states, claiming that the Japanese protest violated the South Korean right to sovereignty.

North Korea later also issued similar postage stamps featuring the islands in question. (JT 17-01, 01-03, 19-04-04)

China – Japan: Diaoyu / Senkaku Islands

Chinese activists approached the islands by boat on 24 March 2004 and seven persons landed, despite warnings from the Japanese coast guard to leave. They were the first Chinese activists to land on the main island since October 1996 (see Asian YIL Vol.2: 377, Vol.4: 516, Vol.7: 479). They were arrested by the Okinawa Prefectural Police for violating Japanese immigration rules and deported on 26 March.

Not long afterwards Japanese activists in early April 2004 planned similarly to go to the islands, but the coast guard said it would prevent them from leaving their port of departure at Ishigaki. (JT 25-03, 26-03, 27-03, 08-04-04)

Spratly Islands
See: Association of South East Asian Nations

TERRORISM
See also: Asia-Pacific Economic Cooperation; Association of South East Asian Nations; Central Asia; Dissidents; Embargo; Insurgents; Inter-state relations: Asia-Australia, India-Israel, India-Pakistan, Iran-US, Thailand-US; Judicial assistance; Military cooperation: Indonesia-US; Regional security; Shanghai Cooperation Organization

Liberation Tigers of Tamil Eelam

The organization which had since the early 1980s led a Tamil insurgence in Sri Lanka (*see supra*) was listed as a terrorist organization by the US, the UK, and Malaysia. It was also banned by India; after the 11 September 2001 attack in the US, Canada and Australia curtailed the activities of groups linked to the Tigers in those countries. (IHT 23-07-02)

East Turkestan Islamic Movement

As a counter-gesture to the Chinese regulation on the restriction of missile exports (*see supra*) the US announced on 26 August 2002 that it had listed the East Turkestan Islamic Movement, a grouping of Uighur Muslims in China, as a terrorist organization. The group was seen by China as being linked to Al Qaeda, with members being trained in Afghanistan. (IHT 27-08-02)

Permissibility of use of force

In connection with a controversial CIA-led missile strike early November 2002 against suspected Al-Qaeda members in Yemen, the US State Department coordinator for counter-terrorism said that such strikes were "legal and necessary" and that the US would keep its options open in launching a similar strike against terror groups in Southeast Asia. In the Yemeni case a missile was launched from a remote-controlled CIA "Predator" aircraft as the suspected persons rode in a vehicle. Under US law assassination is banned by a presidential executive order. (Straits Times 11-11-02)

Mujahidin Khalq
See also: Iraq War

Mujahidin Khalq, the main armed Iranian opposition group, was formed in the 1960s and expelled from Iran after the Islamic Revolution in 1979. Its primary financial support came from the Iraqi government, but it was also supported by

political circles in Europe and the US. It had its principal base within Iraq and had been carrying out cross-border attacks in Iran, while Iranian forces occasionally carried out attacks against them on Iraqi territory. It was labelled a terrorist organization by the US in 1997. At the time, this was widely interpreted as a goodwill gesture to the Iranian government.

On 16 April 2003 US forces which were part of the so-called Coalition Forces in Iraq bombed Mujahidin Khalq bases. The underlying reasons of this specific case of military activity were unclear. Meanwhile, it was believed that US officials had met Iranian officials in the months before the Iraq War to urge Iran to maintain its neutrality. (IHT 17-04-03)

Thailand – US
See: Inter-state relations

TREATIES (LAW ON)
See also: Inter-state relations: Japan-Russia

Publicity of international treaties

Negotiations between Japan and Qatar for a Status of Forces Agreement (to cover Japanese military forces to be dispatched to Qatar to support the Japanese military contingent in Iraq) broke down in October 2003 as Qatar wished to keep the contents of the agreement confidential. The Japanese foreign ministry said there was no precedent for Japan to conclude with a foreign country an agreement the details of which could not be revealed. (JT 25-11-03)

UNITED NATIONS

Asian nomination for Security Council seat
See also: Inter-state relations: Japan-Russia

The 53-member Asian group in the UN on 24 October 2003 chose Japan as its candidate for a non-permanent seat on the UN Security Council for 2005-2006, succeeding Pakistan. There were no other countries intended to run for the annual one-seat quota for Asia. It would be Japan's ninth appointment as a non-permanent member on the Council.

The Asia Group holds two of the ten non-permanent seats; one of the two Asia seats is replaced every year. (The non-permanent seats are allocated to three countries in Africa, two in Asia, two in Latin America, two in "western Europe and others", and one in eastern Europe.) (JT 27-10-03)

Japanese contribution to UN budget

It was reported in early 2003 that Japan considered cutting the size of its contribution to the UN. Japan's gross domestic product accounted for 14.4 per cent of the global economy, yet Japan paid 19.5 per cent of the UN budget (past its peak of 20.5 per cent in 2000), or almost $1 billion a year, more than the combined payments of four out of five of the permanent members of the UN Security Council. [*See* 5 Asian YIL 502-503 for table on status of Asian contributions to the UN regular budget for 1995, when Japan was listed at 13.95 per cent.] (IHT 22-01-03)

UNIVERSAL POSTAL UNION
See: Territorial claims and disputes

USE OF FORCE, DOCTRINE OF PRE-EMPTIVE STRIKE
See: Embargo; Inter-state relations: Asia-Australia, Japan-North Korea, South Korea-US; Iraq war; Japan's military role; Terrorism

VIETNAM WAR

Explosives left over from the war

A group of American veterans, the "*Vietnam Veterans of America Foundation"*, organized the first survey of unexploded bombs and other explosives still littering Vietnam. An agreement with the Vietnamese authorities for the purpose was signed in February 2004. The US government endorsed the efforts and would underwrite much of the survey. (IHT 23-02-04)

WAR AND NEUTRALITY
See also: Iraq war; World War II

Iran affected by the Iraq War

On 22 March 2003 a US cruise missile, presumably aimed at the Iraqi port of Basra, missed its target and hit the nearby Iranian port of Abadan. Iran filed a protest against the incident, in which two Iranians were killed.

In order to prevent Iraqi military personnel seeking shelter across the border, Iran decided to close its borders although declaring its readiness to help Iraqi refugees fleeing war-affected areas. (ATol 25-03-03)

WEAPONS
See: Nuclear energy matters, World War II

WORLD TRADE ORGANIZATION

Iranian membership

Iran's application for accession dated from 1996; it was backed by the EU and many other countries, but had always been barred by Israel and the US who accused Iran of supporting terrorist groups and building nuclear weapons. (IHT 12-02-04)

Japanese complaint over anti-dumping

The WTO issued a final report of a dispute settlement panel on 14 August 2003 rejecting a Japanese claim that US anti-dumping duties on corrosion-resistant carbon steel flat products violated WTO rules. (JT 16-08-03)

WORLD WAR II

See also: Inter-state relations: Japan-North Korea

Germ warfare conducted by Japan

A Japanese District Court ruled on 27 August 2002 that Japan did conduct germ warfare during the Second World War, contrary to the applicable law on warfare and contradicting insistence by the government that there was no proof to support the claim. It was considered proven that, in particular, the Japanese army, "under the order of the Imperial Japanese Army's headquarters" had spread fleas infected with bubonic plague over the Chinese countryside and had infected food with cholera. Nevertheless, the court dismissed the claim of wartime victims for compensation from the Japanese state, thus following a familiar pattern of Japanese case law. The court held the opinion that "no international law that enables individuals to sue for war damages was established at the time or has been now".

It was revealed in 1981 that after the war the US made a secret deal with Japan to exclude the accusations of biological warfare from the Tokyo war crimes trials in return for the acquisition of the reports on the results of the experiments. The Soviet Union tried a number of captured members of the military unit ("Unit 731") in question, but their testimony was dismissed by the US as Cold War propaganda. (IHT 28-08-02)

Abandoned chemical weapons

A Japanese investigation in August 2003 in a city in north-eastern China revealed that the sickness of tens of people had been caused by chemical weapons abandoned there by Japanese troops at the end of World War II. The Japanese foreign ministry expressed its sympathy to the victims and offered apologies.

Japan had acknowledged that it had left (700,000 according to Japanese estimates, and two million according to Chinese estimates) chemical weapons behind in China, and under a Sino-Japanese Memorandum of Understanding of 1999 it has been looking for and disposing of such armaments in accordance with the 1997 Chemical Weapons Convention. (IHT 14-08-03; JT 14-08, 19-08, 04-09-03)

Claim for compensation for leakage of poisonous gas

The municipal government of a town in the Chinese province of Heilongjiang asked Japan in early August 2003 for compensation for expenses resulting from a leakage of poisonous gas from chemical weapons buried by the Japanese army during the war. The expenses related to the disinfecting of affected areas, medical treatment of and disability payments to victims, and damages resulting from the suspension of construction work in the area. Although China had given up claims to wartime reparations there was a possibility that Japan would consider the case differently as the damage had occurred just recently. (JT 19-08-03)

When one of the victims later died, the Chinese government demanded compensation, while the Japanese government expressed its condolences. The position of Japan was, however, not to comply with such demands because of China's waiver (*see supra*) of claims to wartime reparations when the two countries normalized their relations in 1972. (JT 23-08-03)

It was reported that Japan was nevertheless prepared to pay 100 million Yen to cover hospital fees and to provide a token of sympathy. Consequently, the compensation issue became the subject of negotiations both on the amount and in view of the Japanese reference to the 1972 Joint Communiqué provision referred to earlier. In October 2003 a settlement was reached by payment of 300 million Yen to China by way of "fees for operations to dispose of abandoned chemical weapons", while China committed itself to "appropriately distribute" the funds to the victims and their families. (JT 20-10-03)

The Japanese government's insistence on the 1972 arrangement was also caused by its wariness of possible inconsistency with its attitude at a different front, *viz*. in a court case instituted by residents of Heilongjiang Province before the *Tokyo District Court*, demanding compensation for damage to their health caused by alleged injurious poisonous gas leaks. The Court dismissed the claim in May 2003, ruling that it was difficult for Japan to survey and collect poisonous gas by the time of the exposure to the abandoned chemical weapons. The claimants appealed against the decision. (JT 15-09-03)

Meanwhile, however, the same *Tokyo District Court* had given a decision in 1996 in a similar case filed by thirteen other Chinese victims in 1996 relating to three incidents in Heilongjiang Province in 1974, 1982 and 1995, in which the Japanese state was, for the first time, convicted and ordered to pay compensation. The Court said the (Japanese) government could have predicted the dangers if it had examined documents left by the military or asked for information from former soldiers who had returned from China, and that the government could have prevented the accidents by providing China with relevant information or by offering to search for and recover the weapons. With regard to the argument of China's renunciation of war reparation the Court held, *inter alia*: "What is at question is the government's inaction, which has continued after each incident since the Joint Communiqué. As this inaction was not a wartime act, the plaintiffs retain the right to claim damages." The Court also rejected the applicability of the 20-year statute of limitations to the 1974 incident as such application in the case in question "runs against the principle of justice and fairness". (JT 30-09-03)

Forced labourers

The US Supreme Court on 6 October 2003 turned down appeals in four cases concerning persons who had claimed compensation from Japanese companies for being forced to work for these companies during World War II. The plaintiffs included Chinese, Korean, and Philippine nationals. The lawsuits were filed under a 1999 California State law entitling former prisoners of war to file lawsuits over their suffering. The Supreme Court rejected the appeals and upheld an earlier Appeals Court ruling that treaties to which the US were a party barred the plaintiffs from bringing the lawsuits, thus supporting the Japanese rejection of comparable demands on grounds of the settlement of all war claims by the 1951 San Francisco Peace Treaty. (JT 08-10-03)

In a lawsuit filed in 1999, the *Sapporo District Court* in its decision of 23 March 2004 accepted the defendant's exception of expiry of the statute of limitations; it referred to the non-retroactive applicability of the 1947 State Redress Law under which the claim might have succeeded. Under the (pre-war) Meiji Constitution, which applied until replaced by the post-war Constitution, the government was exempt from liability to compensate those harmed by the exercise of state power. The Court held the statute of limitations also applicable to the defendant companies, citing relevant provisions of the Civil Code. The decision differed from that given by the *Fukuoka District Court* of 2002 when the Court ruled in a similar case, for the first time, that the government and the companies both had committed a crime in using wartime slave labour, although it only ordered the defendant company to pay compensation. (JT 24-03-04) This ruling was in fact followed by the *Niigata District Court* in a landmark decision of 26 March 2004. The plaintiffs had claimed that being forcibly taken from China to Japan was "an illegal act conducted jointly by Japan and the company". The Court ordered the state as well as the defendant company to pay compensation. The Court dismissed the defendants' argument of the expiration of the statute of limitations. It also held that the state's argument of being exempted from liability at the time concerned were, from the standpoint of justice and fairness, inappropriate. The government appealed against the decision. (JT 27-03, 01-04-04)

A 1997 lawsuit of Koreans for forced labour in a spinning factory was rejected by the *Shizuoka District Court*, whose decision was upheld by the Supreme Court in 2003. (JT 20-05-04

No compensation for suffering inflicted during internment

The Japanese Supreme Court on 30 March 2004 decided to reject two appeals by former Allied prisoners of war who had claimed compensation from Japan for suffering inflicted during internment during the war. It was the first Supreme Court ruling in such a suit. The District and High Courts had ruled earlier that under international law individuals had no right to sue a (foreign) government for compensation. (JT 31-03-04)

"Comfort women"

The Japanese Supreme Court on 25 December 2003 turned down a 1993 suit for damages by [the relatives of] 81 Filipino women who had been forced into sexual

slavery for the Japanese military during the war. It thereby upheld the decisions of the Tokyo District Court and the Tokyo High Court. These lower courts ruled that international law does not allow individuals directly to sue a foreign country for damages. Two earlier decisions in similar cases equally rejected the plaintiffs' claim. Seven other cases were still on the docket of Japanese courts. (JT 26-12-03)

The Tokyo High (Appeal) Court on 9 February 2004 rejected a claim by seven Taiwanese women for an official apology from the Japanese state and damages for forced "comfort women" services for the Japanese army before and during World War II. It thereby upheld a ruling of the Tokyo District Court of 15 October 2002. The High Court held that "Individuals do not qualify to directly claim the fulfilment of international responsibilities by a victimizer state". (JT 10-02-04)

SELECTED DOCUMENTS

THE SECOND BANDUNG DECLARATION ON THE NEW ASIAN-AFRICAN STRATEGIC PARTNERSHIP

Declaration on the New Asian-African Strategic Partnership

24 April 2005

We, the Leaders of Asian and African countries, have gathered in Jakarta, Indonesia, on 22-23 April 2005 for the Asian-African Summit to reinvigorate the Spirit of Bandung as enshrined in the Final Communiqué of the 1955 Asian-African Conference and to chart the future cooperation between our two continents towards a New Asian-African Strategic Partnership (NAASP).

We reiterate our conviction that the Spirit of Bandung, the core principles of which are solidarity, friendship and cooperation, continues to be a solid, relevant and effective foundation for fostering better relations among Asian and African countries and for resolving global issues of common concern. The 1955 Bandung Conference remains as a beacon in guiding the future progress of Asia and Africa.

We note with satisfaction that since the 1955 Conference, Asian and African countries have attained significant political advances. We have successfully combated the scourge of colonialism and consistently fought racism. In particular, the abolishment of apartheid represents a milestone in Asian-African cooperation, and we reaffirm our continued determination to eradicate racism and all forms of discrimination. As a result of our efforts over the last fifty years, we are all independent, sovereign and equal nations striving for the promotion of human rights, democracy, and the rule of law. However, having made these political gains, we are concerned that we have not yet attained commensurate progress in the social and economic spheres. We recognize the need continuously to strengthen the process of nation and state-building, as well as social integration.

We remain committed to the principle of self-determination as set forth in the Final Communiqué of the 1955 Bandung Conference and in accordance with the Charter of the United Nations. In particular, we express our abhorrence that, fifty years after the 1955 Bandung Conference, the Palestinian people remain deprived of their right to independence. We remain steadfast in our support for the Palestinian people and the creation of a viable and sovereign Palestinian state, in accordance with relevant United Nations resolutions.

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We emphasize the importance of multilateral approaches to international relations and the need for countries strictly to abide by the principles of international law, in particular the Charter of the United Nations. As Asia and Africa represent the majority in the community of nations, we reaffirm the need to support and strengthen multilateralism in order to address global issues, including reforming multilateral institutions.

We recognize that the current global situation and the prevailing conditions in Asia and Africa necessitate the need actively to pursue a common view and collective action to ensure the equitable sharing of the benefits of globalization. We are determined to meet the internationally agreed targets and goals aimed at poverty eradication, development and growth, and underline the necessity for all parties to honour their commitments in this regard. We emphasize the importance of enhancing cooperation with all regions.

We underline the importance of dialogue among civilizations to promote a culture of peace, tolerance, and respect for religious, cultural, language, and racial diversities as well as gender equality.

We acknowledge the positive development of intra-regional/sub-regional integration in both continents. Nevertheless, continent-wide inter-regional cooperation among the two continents needs to be developed. We are convinced that cooperation between sub-regional organizations, through sharing experiences and best practices, can propel growth and sustainable development.

We underline the importance of bringing the regions closer together by utilizing the advantages derived from the commonalities and diversity of, as well as the new and encouraging developments in, both regions. We emphasize both the collective responsibilities and the important role of all stakeholders in exploring innovative and concrete ways and means to strengthen cooperation between Asia and Africa.

In this regard, we acknowledge the importance of complementing and building upon existing initiatives that link the two continents, *inter alia*, Tokyo International Conference on African Development (TICAD), China-Africa Cooperation Forum (CACF), India-Africa Cooperation, Indonesia-Brunei Darussalam sponsored Non-Aligned Movement Centre for South-South Technical Cooperation, Vietnam-Africa Business Forum, the Smart Partnership Initiative, and the Langkawi International Dialogue. We stress the importance of streamlining and aligning existing initiatives for coherence and maximum benefit and to avoid duplication.

We acknowledge the New Partnership for Africa's Development (NEPAD) as the African Union's programme for poverty eradication, socio-economic development and growth and accept it as the framework for engagement with Africa. We express our support for the implementation of NEPAD.

We underscore the urgency of promoting economic development in the Asian and African regions, as stipulated in the 1955 Bandung Conference. We stress that poverty and under-development, gender mainstreaming, communicable diseases, environmental degradation, natural disasters, drought and desertification, digital divide, inequitable market access, and foreign debt remain as issues of common concern which call for our closer cooperation and collective action.

We envision an Asian-African region at peace with itself and with the world at large working together as a concert of nations in harmony, non-exclusive, bonded in dynamic partnership and conscious of our historical ties and cultural heritage. We visualize an affluent Asian-African region characterized by equitable growth and sustainable development as well as a common determination to enhance the quality of life and well-being of our people. We further envisage a caring Asian-African society where the people live in stability, prosperity and dignity, free from the fear of violence, oppression and injustice.

To this end, we hereby declare, as an expression of our new political will, the establishment of a New Asian-African Strategic Partnership (NAASP) as a framework to build a bridge between Asia and Africa covering three broad areas of partnership, namely political solidarity, economic cooperation, and socio-cultural relations. The strategic partnership provides a momentum in achieving peace, prosperity and progress, and will be based on the following principles and ideals:

1. The Ten Principles of Bandung of the 1955 Asian – African Conference;
2. Recognition of diversity between and within the regions, including different social and economic systems and levels of development;
3. Commitment to open dialogue, based on mutual respect and benefit;
4. Promotion of non-exclusive cooperation by involving all stakeholders;
5. Attainment of practical and sustainable cooperation based on comparative advantage, equal partnership, common ownership and vision, as well as a firm and shared conviction to address common challenges;
6. Promotion of sustainable partnership by complementing and building upon existing regional/sub-regional initiatives in Asia and Africa;
7. Promotion of a just, democratic, transparent, accountable and harmonious society;
8. Promotion and protection of human rights and fundamental freedoms, including the right to development;
9. Promotion of collective and unified efforts in multilateral fora.

The NAASP shall emphasize the need to promote practical cooperation between the two continents in areas such as trade, industry, investment, finance, tourism, information and communication technology, energy, health, transportation, agriculture, water resources, and fisheries.

The NAASP shall also address issues of common concern, such as armed conflict, weapons of mass destruction, transnational organized crimes, and terrorism, which are fundamental to ensuring peace, stability, and security.

We are determined to prevent conflict and resolve disputes by peaceful means and endeavour to explore innovative mechanisms for confidence building and dispute resolution as well as for post- conflict peace-building.

The NAASP shall promote human resource development, enhanced capacity building and technical cooperation in order to create an enabling environment for the betterment of the regions.

We resolve that the sustainability of the NAASP shall be conducted through three tiers of interaction: an intergovernmental forum; sub-regional organizations, and people-to-people interaction, particularly business, academia, and civil society.

We are determined to develop an institutionalized process of the NAASP through convening: a Summit of Heads of State/Government every four years; a Ministerial Meeting of Foreign Ministers every two years; and Sectoral Ministerial and other Technical Meetings when deemed necessary. A Business Summit in conjunction with the Summit of Heads of State/Government will be held every four years.

We pledge to our peoples our joint determination and commitment to bringing the NAASP into reality by implementing concrete actions for the benefit and prosperity of our peoples.

Done in Bandung, Indonesia, on the Twenty-fourth of April in the year Two Thousand and Five, in conjunction with the Commemoration of the Golden Jubilee of the Asian-African Conference of 1955.

ANTI-SECESSION LAW OF THE PEOPLE'S REPUBLIC OF CHINA

Anti-Secession Law of the People's Republic of China
Adopted at the Third Session of the Tenth National People's Congress on 14 March 2005

Article 1

This Law is formulated, in accordance with the Constitution, for the purpose of opposing and checking Taiwan's secession from China by secessionists in the name of "Taiwan independence", promoting peaceful national re-unification, maintaining peace and stability in the Taiwan Straits, preserving China's sovereignty and territorial integrity, and safeguarding the fundamental interests of the Chinese nation.

Article 2

There is only one China in the world. Both the mainland and Taiwan belong to one China. China's sovereignty and territorial integrity brook no division. Safeguarding China's sovereignty and territorial integrity is the common obligation of all Chinese people, the Taiwan compatriots included. Taiwan is part of China. The state shall never allow the "Taiwan independence" secessionist forces to make Taiwan secede from China under any name or by any means.

Article 3

The Taiwan question is one that is left over from China's civil war of the late 1940s. Solving the Taiwan question and achieving national re-unification is China's internal affair, which bows to no interference by any outside forces.

Article 4

Accomplishing the great task of re-unifying the motherland is the sacred duty of all Chinese people, the Taiwan compatriots included.

Article 5

Upholding the principle of one China is the basis of peaceful reunification of the country.

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To reunify the country through peaceful means best serves the fundamental interests of the compatriots on both sides of the Taiwan Straits. The state shall do its utmost with maximum sincerity to achieve a peaceful reunification.
After the country is reunified peacefully, Taiwan may practise systems different from those on the mainland and enjoy a high degree of autonomy.

Article 6

The state shall take the following measures to maintain peace and stability in the Taiwan Straits and promote cross-Straits relations:
(1) to encourage and facilitate personnel exchanges across the Straits for greater mutual understanding and mutual trust;
(2) to encourage and facilitate economic exchanges and cooperation, realize direct links of trade, mail and air and shipping services, and bring about closer economic ties between the two sides of the Straits to their mutual benefit;
(3) to encourage and facilitate cross-Straits exchanges in education, science, technology, culture, health and sports, and work together to carry forward the proud Chinese cultural traditions;
(4) to encourage and facilitate cross-Straits cooperation in combating crimes; and
(5) to encourage and facilitate other activities that are conducive to peace and stability in the Taiwan Straits and stronger cross-Straits relations.
The state protects the rights and interests of the Taiwan compatriots in accordance with law.

Article 7

The state stands for the achievement of peaceful re-unification through consultations and negotiations on an equal footing between the two sides of the Taiwan Straits. These consultations and negotiations may be conducted in steps and phases, and with flexible and varied modalities.
The two sides of the Taiwan Straits may consult and negotiate on the following matters:
(1) officially ending the state of hostility between the two sides;
(2) mapping out the development of cross-Straits relations;
(3) steps and arrangements for peaceful national re-unification;
(4) the political status of the Taiwan authorities;
(5) the Taiwan region's room of international operation that is compatible with its status; and
(6) other matters concerning the achievement of peaceful national re-unification.

Article 8

In the event that the "Taiwan independence" secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that

possibilities for a peaceful re-unification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity.
The State Council and the Central Military Commission shall decide on and execute the non-peaceful means and other necessary measures as provided for in the preceding paragraph and shall promptly report to the Standing Committee of the National People's Congress.

Article 9

In the event of employing and executing non-peaceful means and other necessary measures as provided for in this Law, the state shall exert its utmost to protect the lives, property and other legitimate rights and interests of Taiwan civilians and foreign nationals in Taiwan, and to minimize losses. At the same time, the state shall protect the rights and interests of the Taiwan compatriots in other parts of China in accordance with law.

Article 10

This Law shall come into force on the day of its promulgation.

PROTOCOL BETWEEN INDIA AND CHINA ON CONFIDENCE BUILDING MEASURES

Protocol between the Government of the Republic of India and the Government of the People's Republic of China on Modalities for the Implementation of Confidence Building Measures in the Military Field along the Line of Actual Control in the India-China Border Areas

The Government of the Republic of India and the Government of the People's Republic of China (hereinafter referred to as "the two sides"),

Recalling that both sides are committed to developing their long-term constructive and cooperative partnership on the basis of the Five Principles of Peaceful Co-existence, mutual respect and sensitivity for each other's concerns and aspirations, and equality,

Reaffirming that the two sides seek a fair, reasonable and mutually acceptable settlement of the boundary question,

Reaffirming their commitment that, pending an ultimate solution to the boundary question, both sides shall strictly respect and observe the Line of Actual Control in the India-China border areas,

Noting the utility of confidence building measures already in place along the Line of Actual Control in the India-China border areas,

Recognizing that the maintenance of peace and tranquillity along the Line of Actual Control in the India-China border areas accords with the fundamental interests of the two sides, and will facilitate the process of early clarification and confirmation of the alignment of the Line of Actual Control,

Convinced of the need for agreed modalities for the implementation of confidence building measures between the two sides in the military field along the Line of Actual Control in the India-China border areas, and

Recalling further the relevant provisions of the Agreement on the Maintenance of Peace and Tranquillity along the Line of Actual Control in the India-China Border Areas signed in September 1993 and Agreement on Confidence Building Measures

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in the Military Field along the Line of Actual Control in the India-China Border Areas signed between the two sides in November 1996,

Have agreed on the modalities as follows:

Article I

In accordance with Article II of the Agreement on Confidence Building Measures in the Military Field along the Line of Actual Control in the India-China Border Areas signed between the two sides in November 1996, the two sides should strictly respect and observe the Line of Actual Control and work together to maintain peace and tranquillity in the border areas.

Article II

In accordance with Article IV of the Agreement on Confidence Building Measures in the Military Field along the Line of Actual Control in the India-China Border Areas signed between the two sides in November 1996,

(a) Both sides shall avoid holding large-scale military exercises involving more than one Division (approximately 15,000 troops) in close proximity to the Line of Actual Control. However, if such exercises are to be conducted, the strategic direction of the main force involved shall not be towards the other side.
(b) If either side conducts a military exercise involving more than one Brigade Group (approximately 5,000 troops) in close proximity to the Line of Actual Control, it shall not be targeted against the other side. The side undertaking the exercise shall give, through Flag Meetings, the other side prior intimation 15 days in advance of the exercise with regard to type, level, planned duration, and area of exercise as well as the number and type of units or formations participating in the exercise.
(c) Each side shall be entitled to obtain timely clarification within 15 days from the side undertaking the exercise in respect of data specified in paragraph (b) above of the present article, through Flag Meetings. (d) Each side shall give prior intimation of changes in the timing of any scheduled exercise 15 days in advance, through Flag Meetings.

Article III

In accordance with Article V of the Agreement on Confidence Building Measures in the Military Field along the Line of Actual Control in the India-China Border Areas signed between the two sides in November 1996,

(a) In the event of an alleged air intrusion of its controlled airspace by the military aircraft of the other side, either side may seek a Flag Meeting within 48 hours of the alleged air intrusion in order to seek a clarification. The investigation shall

be completed by the other side and its results communicated through a Flag Meeting within a period of four weeks.

(b) If a military aircraft of either side is required to fly across the Line of Actual Control or to overfly the airspace of the other side, prior permission shall be sought from the other side according to procedures and formats to be mutually agreed upon.

(c) If a military or civilian aircraft of either side is required to fly across the Line of Actual Control or to land on the other side of the Line of Actual Control in an emergency situation, the two sides will ensure flight safety in such situations by adhering to procedures to be mutually agreed upon.

Article IV

In accordance with Article VI of the Agreement on Confidence Building Measures in the Military Field along the Line of Actual Control in the India-China Border Areas signed between the two sides in November 1996, if the border personnel of the two sides come to a face-to-face situation due to differences on the alignment of the Line of Actual Control or any other reason, they shall exercise self-restraint and take all necessary steps to avoid an escalation of the situation. To this end, they shall follow the procedures as given below:

(a) Both sides shall cease their activities in the area, not advance any further, and simultaneously return to their bases.

(b) Both sides shall then inform their respective Headquarters and, if necessary, enter into immediate consultations through border meetings or diplomatic channels so as to prevent an escalation of the situation.

(c) Throughout the face-to-face situation, neither side shall use force or threaten to use force against the other.

(d) Both sides shall treat each other with courtesy and refrain from any provocative actions. Neither side shall put up marks or signs on the spots.

Article V

In accordance with Article VII of the Agreement on Confidence Building Measures in the Military Field along the Line of Actual Control in India-China Border Areas signed between the two sides in November 1996,

(a) Both sides shall hold two additional border meetings each year at Spanggur Gap in the Western Sector, Nathu La Pass in the Sikkim Sector, and Bum La in the Eastern Sector respectively in celebration of the National Day or Army Day of either side. Specific arrangements shall be decided through consultation between the border forces of the two sides.

(b) Both sides agree in principle to expand the mechanism of border meeting points to include Kibithu-Damai in the Eastern Sector and Lipulekh Pass/Qiang La in

the Middle Sector. The precise locations of these border meeting points will be decided through mutual consultations.

(c) Both sides shall conduct exchanges between the relevant Military Regions of China and Army Commands of India. Specific arrangements shall be decided upon through mutual consultations between the relevant agencies under the Ministries of Defence of the two sides.

(d) Both sides shall strengthen exchanges between institutions of training of the two armed forces, and conduct exchanges between institutions of sports and culture of the two armed forces. Specific arrangements shall be decided upon through mutual consultations between the relevant agencies under the Ministries of Defence of the two sides.

Article VI

In accordance with Article VIII of the Agreement on Confidence Building Measures in the Military Field along the Line of Actual Control in the India-China Border Areas signed between the two sides in November 1996,

(a) In the event the personnel of one side in the border areas cross over to the other side due to *force majeure* such as natural disasters:
   i. The side having discovered it should promptly contact and notify the other side;
   ii. The personnel crossing over to the other side should, in the light of the prevailing circumstances, take measures to return to their own side or proceed to places designated by the other side *en route* to return to their own side;
   iii. The receiving side will provide all possible assistance to the personnel from the other side and ensure their earliest possible return; and
   iv. At the request of the side affected by the natural disaster, the other side may consider all possible measures to help alleviate the situation.

(b) In order to prevent infectious diseases in specific areas on either side in the border areas from spreading to the other side:
   i. Both sides should share relevant information promptly through border meetings or diplomatic channels;
   ii. Each side should take measures to prevent the spread of diseases from spilling onto the other side; and
   iii. At the request of the side suffering from spread of infectious diseases, the other side may consider all possible measures to help alleviate the situation.

Article VII

The Protocol shall enter into force on the date of signature of this Protocol and will automatically be rendered invalid if the Agreement on Confidence Building Measures in the Military Field along the Line of Actual Control in the India-China Border Areas signed between the two sides in November 1996 ceases to be in force. Subject to

agreement after mutual consultations between the two sides, the Protocol may be amended and supplemented at any time.

Done in duplicate in New Delhi on 11 April 2005 in the Hindi, Chinese, and English languages, all three texts being equally authentic. In case of any divergence, the English text shall prevail.

For the Government of the Republic of India
For the Government of the People's Republic of China

New Delhi
11 April 2005

AGREEMENT BETWEEN INDIA AND CHINA ON BOUNDARY QUESTIONS

Agreement between the Government of the Republic of India and the Government of the People's Republic of China on the Political Parameters and Guiding Principles for the Settlement of the India-China Boundary Question

The Government of the Republic of India and the Government of the People's Republic of China (hereinafter referred to as the two sides),

Believing that it serves the fundamental interests of the peoples of India and China to foster a long-term constructive and cooperative partnership on the basis of the Five Principles of Peaceful Co-existence, mutual respect and sensitivity for each other's concerns and aspirations, and equality,

Desirous of qualitatively upgrading the bilateral relationship at all levels and in all areas while addressing differences through peaceful means in a fair, reasonable and mutually acceptable manner,

Reiterating their commitment to abide by and implement the Agreement on the Maintenance of Peace and Tranquillity along the Line of Actual Control in the India-China Border Areas, signed on 7 September 1993, and the Agreement on Confidence Building Measures in the Military Field along the Line of Actual Control in the India-China Border Areas, signed on 29 November 1996,

Reaffirming the Declaration on Principles for Relations and Comprehensive Cooperation between India and China, signed on 23 June 2003,

Recalling that the two sides have appointed Special Representatives to explore the framework of the settlement of the India-China boundary question and the two Special Representatives have been engaged in consultations in a friendly, cooperative and constructive atmosphere,

Noting that the two sides are seeking a political settlement of the boundary question in the context of their overall and long-term interests,

Convinced that an early settlement of the boundary question will advance the basic interests of the two countries and should therefore be pursued as a strategic objective,

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Have agreed on the following political parameters and guiding principles for a boundary settlement:

Article I

The differences on the boundary question should not be allowed to affect the overall development of bilateral relations. The two sides will resolve the boundary question through peaceful and friendly consultations. Neither side shall use or threaten to use force against the other by any means. The final solution of the boundary question will significantly promote good neighbourly and friendly relations between India and China.

Article II

The two sides should, in accordance with the Five Principles of Peaceful Coexistence, seek a fair, reasonable and mutually acceptable solution to the boundary question through consultations on an equal footing, proceeding from the political perspective of overall bilateral relations.

Article III

Both sides should, in the spirit of mutual respect and mutual understanding, make meaningful and mutually acceptable adjustments to their respective positions on the boundary question, so as to arrive at a package settlement to the boundary question. The boundary settlement must be final, covering all sectors of the India-China boundary.

Article IV

The two sides will give due consideration to each other's strategic and reasonable interests, and the principle of mutual and equal security.

Article V

The two sides will take into account, *inter alia*, historical evidence, national sentiments, practical difficulties, and reasonable concerns and sensitivities of both sides, and the actual state of border areas.

Article VI

The boundary should be along well-defined and easily identifiable natural geographical features to be mutually agreed upon between the two sides.

Article VII

In reaching a boundary settlement, the two sides shall safeguard due interests of their settled populations in the border areas.

Article VIII

Within the agreed framework of the final boundary settlement, the delineation of the boundary will be carried out utilizing means such as modern cartographic and surveying practices and joint surveys.

Article IX

Pending an ultimate settlement of the boundary question, the two sides should strictly respect and observe the line of actual control and work together to maintain peace and tranquillity in the border areas. The India-China Joint Working Group and the India-China Diplomatic and Military Expert Group shall continue their work under the Agreements of 7 September 1993 and 29 November 1996, including the clarification of the line of actual control and the implementation of confidence building measures.

Article X

The Special Representatives on the boundary question shall continue their consultations in an earnest manner with the objective of arriving at an agreed framework for a boundary settlement, which will provide the basis for the delineation and demarcation of the India-China boundary to be subsequently undertaken by civil and military officials and surveyors of the two sides.

Article XI

This Agreement shall come into force as of the date of signature and is subject to amendment and addition by mutual agreement in writing between the two sides.

Signed in duplicate in New Delhi on 11 April, 2005, in the Hindi, Chinese, and English languages, all three texts being equally authentic. In case of divergence, the English text shall prevail.

For the Government of the Republic of India

For the Government of the People's Republic of China

New Delhi
11 April 2005

THE KATHMANDU DECLARATION OF THE SAARC

South Asian Association for Regional Cooperation

HEADS OF STATE OR GOVERNMENT:

ELEVENTH MEETING

Kathmandu, 4 – 6 January 2002

SAARC/SUMMIT.11/12
DECLARATION OF THE ELEVENTH SAARC SUMMIT

The Prime Minister of the People's Republic of Bangladesh, Her Excellency Begum Khaleda Zia; the Prime Minister of the Royal Government of Bhutan, His Excellency Lyonpo Khandu Wangchuk; the Prime Minister of the Republic of India, His Excellency Mr. Atal Behari Vajpayee; the President of the Republic of Maldives, His Excellency Mr. Maumoon Abdul Gayoom; the Prime Minister of the Kingdom of Nepal, Right Honourable Mr. Sher Bahadur Deuba; the President of the Islamic Republic of Pakistan, His

Excellency General Pervez Musharraf; and the President of the Democratic Socialist Republic of Sri Lanka, Her Excellency Mrs. Chandrika Bandaranaike Kumaratunga met at the Eleventh Summit meeting of the South Asian Association for Regional Cooperation (SAARC) in Kathmandu, Nepal from 4 to 6 January 2002.

Regional Cooperation

1. The Heads of State or Government reaffirmed their commitment to regional cooperation through SAARC and underscored the importance of annual Summit meetings in charting common strategies for the realization of the objectives and principles set out in the Charter of the Association. Meeting for the first time at the dawn of the new millennium, they solemnly renewed their pledge to strengthen the Association and make it more cohesive, result oriented, and forward looking, by adopting clearly defined programmes and effective implementation strategies in line with popular expectations. To give effect to the shared aspirations for a more prosperous South Asia, the Leaders agreed to the vision of a phased and planned process eventually leading to a South Asian Economic Union.

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2. The Heads of State or Government stressed that equitable sharing of the benefits of regional cooperation is essential to achieve and maintain a minimum acceptable level of economic and social development in each Member State. To this end, they expressed their commitment to a speedier process of harmonizing the policies and practices, and imbibing regional goals and strategies in their national development programmes.

3. The Heads of State or Government expressed their firm determination fully to benefit from the wealth of traditional wisdom, creativity, and enterprise in the region. They also pledged to enhance transparency and accountability in governance, and to encourage effective participation of the peoples and civil societies in the formulation as well as the implementation of the programmes of cooperation.

4. Reiterating their resolve to promote the regional identity and to strengthen cooperation at the international level, the Heads of State or Government also emphasized the need to evolve common positions on issues of shared interests at the international fora.

Cooperation in the Economic Sector

5. The Heads of State or Government agreed to accelerate cooperation in the core areas of trade, finance, and investment to realize in a step-by-step manner the goal of an integrated South Asian economy. They expressed their determination to make full use of regional synergy to maximize the benefits of globalization and liberalization, and to minimize their negative impacts on the region. While recognizing that trade and economic expansion are closely inter-linked, the Leaders made a commitment to widen and deepen the scope of regional networks of activities in trade and financial matters.

6. The Heads of State or Government noted with satisfaction the outcomes of the successive meetings of the SAARC Commerce Ministers aimed at enlarging the scope of cooperation in the core areas. They recognized the importance of achieving a free trade area and reaffirmed that the treaty regime for creating a free trade area must incorporate, *inter alia*, binding time-frames for freeing trade, measures to facilitate trade, and provisions to ensure an equitable distribution of the benefits of trade to all states, especially for small and least developed countries, including mechanisms for compensation of revenue loss.

7. Recognizing the need to move quickly towards a South Asian Free Trade Area, the Heads of State or Government directed the Council of Ministers to finalize the text of the Draft Treaty Framework by the end of 2002. They also directed that in moving towards the goal of SAFTA, the Member States expedite action to remove tariff and non-tariff barriers, and structural impediments to free trade. They were also instructed to conclude the meeting of the Inter-Governmental Group on Trade

Liberalization for the Fourth Round of Trade Negotiations under SAPTA as early as possible as *per* the decision of the Tenth SAARC Summit in Colombo.

8. The Heads of State or Government renewed their commitment to encourage the participation of the private sector and assured their full support for their socially responsible economic initiatives. While welcoming the practice of holding trade fairs in cooperation with the private sector at the regional level, they appreciated the efforts of the SAARC Chamber of Commerce and Industry to promote regional economic cooperation in the spirit of public and private sector partnership.

9. The Heads of State or Government also decided to instruct the Secretary-General to facilitate an early finalization of a regionally agreed investment framework to meet the investment needs of the SAARC Member States.

10. The Heads of State or Government recognized the immense tourism potential of South Asia and underlined the need to take measures to promote South Asia as a common tourist destination through joint efforts in areas such as the upgrading of infrastructure, air linkages, the simplification and harmonization of administrative procedures, and training and joint marketing.

Poverty Alleviation

11. The Heads of State or Government acknowledged that investment in poverty alleviation programmes contributes to social stability, economic progress, and overall prosperity. They were of the view that widespread and debilitating poverty continued to be the most formidable developmental challenge for the region. Conscious of the magnitude of poverty in the region, and recalling also the decision of the UN Millennium Summit 2000 to reduce world poverty by half by 2015, and also recalling the commitments made at the Eve year review of the World Summit for Social Development to reduce poverty with enhanced social mobilization, the Heads of State or Government made a review of the SAARC activities aimed at poverty alleviation and decided to reinvigorate them in the context of the regional and global commitments to poverty reduction.

12. The Heads of State or Government expressed their firm resolve to combat the problem of poverty with a new sense of urgency by actively promoting the synergetic partnership among national governments, international agencies, the private sector, and the civil society. They reaffirmed their pledge to undertake effective and sustained poverty alleviation programmes through pro-poor growth strategy and social as well as other policy interventions with specific sectoral targets. The Leaders also agreed to take immediate steps for an effective implementation of the programmes for social mobilization and decentralization, and for strengthening institution building, and of support mechanisms to ensure participation of the poor, both as stake-holder and beneficiary, in governance and the development process.

13. The Heads of State or Government decided to undertake sustained measures to extend rural micro-credit programmes with a focus on women and the disadvantaged sections of the society. They also stressed the need for widening the opportunities for gainful employment. While highlighting the importance of promoting agriculture, indigenous skills, and small scale and cottage industries to address the incidence of rural poverty, they decided to enhance cooperation in agricultural research extension and adoption. They specifically instructed that the Technical Committees should identify programmes and activities that impact on poverty alleviation. They urged the need to create gainful employment and promote cooperation in vocational training.

14. The Heads of State or Government emphasized the need to promote the sharing of best practices and experiences among the Member States and, to this end, instructed the Secretary-General to disseminate such information to the Member States on a regular basis. They directed the Council of Ministers to review on a continuous basis the regional poverty profile to be prepared by the Secretary-General with the assistance of the related UN agencies, nodal agencies, and independent research institutions specialized in the field.

15. In order to ensure social stability and to protect the vulnerable sections of the population from the adverse impacts of globalization and liberalization, the Heads of State or Government stressed the need to enhance cooperation to create and maintain appropriate safety nets.

16. The Heads of State or Government agreed that a special session on poverty alleviation at the Ministerial level should undertake a comprehensive review and evaluation of the status of implementation of poverty eradication policies and programmes carried out so far, and to recommend further concrete measures to enhance effective cooperation at the regional level to the Twelfth SAARC Summit. They also directed the Council of Ministers to take necessary steps fully to activate the existing three-tier mechanism for poverty alleviation.

17. The Leaders directed the Council of Ministers to coordinate efforts to integrate poverty alleviation programs into the development strategies of Member States. In this context, they agreed to reconstitute the Independent South Asian Commission on Poverty Alleviation, with Nepal as its Convenor and Bangladesh as Co-convenor, for reviewing the progress made in cooperation on poverty alleviation, and for suggesting appropriate and effective measures. They instructed the Chairman of the Council of Ministers to seek two nominations from each Member State by end of January 2002 to enable its first meeting to be held before the proposed Ministerial Meeting on Poverty Alleviation in Pakistan in April 2002.

18. Expressing concern at the region's special vulnerability in the slow-down in world economy and its negative impact on the poor and the marginalized, the Heads of State or Government called for a supportive international environment and

enhanced level of assistance by international community for poverty alleviation programmes in South Asia.

Cooperation in the Social and Cultural Sector

19. The Heads of State or Government reiterated the need for an early finalization of the SAARC Social Charter and instructed the Inter-Governmental Expert Group to expedite their work on the basis of the draft submitted by the Secretary-General as a working paper for its consideration, to complete the draft framework of the Charter as early as possible, and to present it for consideration at the next meeting of the Council of Ministers. While drawing up the Charter, they also directed the Council of Ministers to include the important areas of poverty eradication, population stabilization, empowerment of women, youth mobilization, human resources development, the promotion of health and nutrition, and the protection of children.

20. The Leaders recognized the debilitating and widespread impact of the HIV/AIDS, TB and other communicable deadly diseases on the population of South Asia, and stressed the need for evolving a regional strategy to combat these diseases. The strategy should include, *inter alia*, culturally appropriate preventive measures and an affordable treatment regime, and should especially target the vulnerable groups. In this regard, they felt that SAARC should collaborate with the international organizations and civil society on those diseases. They also emphasized that the SAARC Tuberculosis Centre in Kathmandu should play a coordinating role in the related areas.

21, In accordance with the Colombo Declaration, the Heads of State or Government decided to mandate the Ministers of Cultural Affairs Meeting in Sri Lanka to finalize the details relating to the establishment as well as the financing of the SAARC Cultural Centre, and submit its report to the next session of the Council of Ministers.

Women and Children

22. The Heads of State or Government welcomed the signing of the SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, and expressed their collective resolve to treat trafficking in women and children for the commercial sexual exploitation as a criminal offence of a serious nature. They also welcomed the signing of the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia and observed that the Convention reflected their commitment to place the child first in the national and regional programmes of the Member States. They instructed the Secretary-General, in consultation with Member States and other specialized agencies, to present a report on measures for the effective implementation of the Conventions to the next meeting of the Council of Ministers.

23. The Heads of State or Government agreed to establish, on the basis of recommendations of the Regional Task Force responsible for the implementation

of the provisions of the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, a voluntary fund with contributions from Member States, individuals, and donor countries and agencies for the rehabilitation and re-integration of the victims of trafficking.

24. The Leaders recognized the need to form an autonomous advocacy group of prominent women personalities from the Member States with a view to making recommendations to the SAARC bodies on a broad spectrum of gender-related issues. They directed the Council of Ministers to take necessary steps to prepare and present for consideration at their next meeting the Terms of Reference for the purpose.

25. The Heads of State or Government recognized the need actively to pursue and promote social development through the empowerment of women, and to achieve their full participation in decision making at all levels. They reaffirmed their commitment to uplift the social status of the people, women and children in particular, in the region and expressed their common resolve to accord the highest priority to promoting social development through specific and targeted programmes. The Leaders directed the Council of Ministers to take necessary measures to ensure the enjoyment by women and girl children of their inherent potentials. They also directed the Council of Ministers to constitute a Task Force to review the status of implementation of past decisions related to the social sector and to suggest guidelines for their effective implementation in the future.

26. The Leaders directed the Council of Ministers to take concrete steps to give priority to investing in children as an effective means for poverty reduction in the long run. Reaffirming their commitment to the Colombo Plan of Action and the Rawalpindi Declaration and recalling the declaration of 2001 to 2010 as the SAARC Decade of the Rights of the Child, the Heads of State or Government noted with appreciation the South Asia High-level Meeting on Children held in Kathmandu in May 2001. They reaffirmed their conviction that the children in South Asia deserve urgent and focused attention to enhance the long-term and overall progress of the countries of the region.

27. The Heads of State or Government agreed to mobilize the necessary resources and intensify broad based actions to achieve a set of priority goals related to improving the status of children, such as polio eradication by 2005, protection of children from mother-to-child transmission of HIV/AIDS, and quality basic education to the children, within a time-bound period.

Education

28. The Heads of State or Government instructed the concerned Ministries of the Governments to devise appropriate strategies for raising the quality of education through the exchange of information among the universities in the region. While emphasizing the importance of mutual recognition of the educational institutions,

they agreed to give the necessary impetus to realize the goal of a common regional educational standard through uniform methods of instruction and teaching aids. They were unanimous in recognizing the benefit of introducing SAARC in the national curricula at appropriate levels of study in order to enhance awareness of the Association's goals and objectives.

29. The Heads of State or Government recognized that access to quality education was an important element for the empowerment of all segments of society, and undertook to develop or strengthen national strategies and action plans to ensure that all children, particularly girl children, have access to quality primary education by 2015; and to improve levels of adult literacy by fifty per cent by eliminating gender disparities in access to education as envisaged in the Dakar Framework for Action on Education for All adopted by the World Education Forum held at Dakar in April 2000.

International Political and Economic Environment

30. The Heads of State or Government reiterated their firm support for the principles and purposes of the United Nations in order to create a just, balanced and equitable world order. They reaffirmed their commitment to continue working with the NAM and other like-minded countries for the reform and democratization of the United Nations System with a view to making it an effective and more democratic institution for international peace, security, progress, and cooperation.

31. The Heads of State or Government were of the view that stability, peace, and security in South Asia should be promoted together with efforts to improve the global security environment. They underscored their commitment to general and complete disarmament including nuclear disarmament on a universal basis, under effective international control. They agreed that global non-proliferation goals could not be achieved in the absence of progress towards nuclear disarmament and in this context called upon all nuclear weapon states, whether party or non-party to the NPT, to engage constructively through a transparent and credible process of negotiations at the Conference on Disarmament. The Leaders also recognized the linkage between disarmament and development.

32. The Leaders emphasized the need to take appropriate measures to make international financial institutions and the global trading regime more responsive to the needs and concerns of the developing countries. They reiterated the call for genuine partnership among the developed and developing countries in international trade and finance, and for the reform of the global financial architecture with the enhanced level of resources.

33. The Leaders also called upon the developed countries to facilitate and ensure an unimpeded and enhanced level of market access to products from the developing, the least developed, and the land-locked countries.

34. Recognizing the important role that trade can play in advancing the overall development of a country, thus contributing to an equitable and sustainable world order, the Heads of State or Government also called for an early realization of a rule-based and non-discriminatory world trade regime. In this context, they appreciated the positive elements of the Fourth VVTO Ministerial Conference held in Doha and called upon the developed countries to fulfil their commitments to address the particular concerns and needs of the developing and the least developed countries. The Leaders also instructed the forthcoming meeting of the Committee on Economic Cooperation to devote at least half a day for discussions on the evaluation of the decisions of the recently concluded Doha conference in order to evolve better coordinated positions among the Member States on all WTO issues. They further stressed the need to intensify coordination among the SAARC missions in Geneva and to begin the necessary preparation to advance the common interest of the region in the Fifth WTO Ministerial conference.

35. The Heads of State or Government noted with serious concern the adverse impact of the shrinking Official Development Assistance (ODA) and other concessional financial flows on developing countries in general, and the least developed among them in particular. They further noted with concern the current trend of global economic slowdown and its adverse effects on these economies. Taking into account the interdependent nature of the global economy, the Leaders urged the developed countries to enhance the level of ODA flows to meet the internationally agreed targets.

36. Recalling the recommendations of the Third United Nations Conference on the Least Developed Countries held at Brussels in May 2001 and the decisions of the Zanzibar Declaration of July 2001, the Leaders urged the developed countries to adopt more liberal trade and aid policies responsive to the particular needs of the least developed countries. Referring to the forthcoming International Conference on Financing for Development to be held in Mexico in March 2002, the Leaders urged the international community to strengthen cooperation for development by addressing international and systemic issues related to financing for development in the developing and the least developed countries in a holistic manner.

37. The Heads of State or Government welcomed the initiative of the donor countries to relieve the external debt burden of the Highly Indebted Poor Countries. They urged the international donor community and financial institutions to widen the scope and extent of debt relief initiatives to cover all those developing and the least developed countries, which are facing developmental difficulties due particularly to the current global recession. In the context of growing global interdependence, they underlined the importance of forging cooperative partnership between the developed and the developing countries to ensure equitable benefits to all.

38. The Heads of State or Government expressed concern over the continued violence and bloodshed in the Middle East, and the set-backs suffered by the peace process. They reaffirmed their support for the achievement of a just, lasting and

comprehensive peace based on Security Council Resolution 242 (1967) and Resolution 338 (1973), and the establishment of a sovereign Palestine State under the leadership of the PLO, which could co-exist with its neighbours in peace, security, and harmony.

Security of Small States

39. The Heads of State or Government recognized that due to their particular vulnerability, small states require special measures of support from the international community for the safeguarding of their sovereign independence and territorial integrity. They reiterated that the real protection of small states should be firmly rooted in scrupulous adherence to the UN Charter and the rule of law, and strict adherence to universally accepted principles and norms related to the sovereign rights and territorial integrity of all states, irrespective of size. This, they stressed, should be ensured by all countries, either severally or collectively through the pursuit of appropriate action.

Terrorism

40. The Heads of State or Government were convinced that terrorism, in all its forms and manifestations, is a challenge to all states and to all of humanity, and cannot be justified on ideological, political, religious or on any other ground. The Leaders agreed that terrorism violates the fundamental values of the United Nations and the SAARC Charter, and constitutes one of the most serious threats to international peace and security in the twenty-first century.

41. The Heads of State or Government emphasized the need for the urgent conclusion of a Comprehensive Convention on Combating International Terrorism. They also emphasized that international cooperation to combat terrorism should be conducted in conformity with the UN Charter, international law, and relevant international conventions.

42. The Heads of State or Government reiterated their support to United Nations Security Council Resolution 1373 of 28 September 2001 and affirmed their determination to redouble efforts, collectively as well as individually, to prevent and suppress terrorism in all its forms and manifestations, including by increased cooperation and full implementation of the relevant international Conventions relating to terrorism to which they are parties. In this context, they called on all states to prevent and suppress the financing of terrorist acts by criminalizing the collection of funds for such acts and refraining from organizing, instigating, assisting or participating in terrorist acts in states, or from acquiescing in organized activities within its territory directed towards the commission of such acts. The Leaders reaffirmed that the fight against terrorism in all its forms and manifestations has to be comprehensive and sustained.

43. The Heads of State or Government were unanimous in recognizing the distinct and ominous link between terrorism, drug-trafficking, money laundering and other transnational crimes, and emphasized the need to coordinate efforts at the national and regional levels to strengthen the global response to this serious challenge and threat to international security. They called upon the international community to assist Member States of SAARC to deal effectively with the adverse economic effects of terrorism in general, and to meet the rising insurance and security related costs in particular.

44. The Heads of State or Government reaffirmed their commitment to SAARC Regional Convention on Suppression of Terrorism, which, among others, recognizes the seriousness of the problem of terrorism as it affects the security, stability, and development of the region. They also reiterated their firm resolve to accelerate the enactment of enabling legislation within a definite time-frame for the full implementation of the Convention, together with the strengthening of SAARC Terrorist Offences Monitoring Desk and the SAARC Drug Offences Monitoring Desk in an effective manner.

Report of the Group of Eminent Persons

45. The Leaders noted with appreciation that the Report of the Group of Eminent Persons (GEP) was an important contribution in the on-going process of introspection into the functioning of the Association as well as in setting out a perspective plan of action for it. They endorsed the report of the Council of Ministers on the implementation of the recommendations of the GEP Report, and directed the Council of Ministers to undertake a review of progress in this regard.

Enhancing Political Cooperation

46. The Heads of State or Government reaffirmed their commitment to the promotion of mutual trust and understanding and, recognizing that the aims of promoting peace, stability and amity, and accelerated socio-economic cooperation may best be achieved by fostering good-neighbourly relations, relieving tensions and building confidence, agreed that a process of informal consultations would prove useful in this regard. The Leaders further recognized that this process would contribute to the appreciation of each other's problems and perceptions as well as for decisive action in agreed areas of regional cooperation. They underlined the importance of consultations in promoting mutual understanding and reinforcing the confidence building process among the Member States.

Sub-regional Cooperation

47. The Heads of State or Government reaffirmed the validity of the idea of encouraging the development of specific projects relevant to the individual needs

of three or more Member States under the provisions of Articles VII and X of the SAARC Charter

South Asian Development Fund (SADF)

48. The Heads of State or Government underlined the urgent need to make the South Asian Development Fund operational by making possible utilization of the existing funds. They also instructed the Secretary-General to submit a proposal for seeking assistance from possible regional and international sources for the implementation of specific regional poverty alleviation priority projects.

Environment

49. The Heads of State or Government noted with satisfaction the growing public awareness of the need for protecting the environment within the framework of regional cooperation. They reiterated their call for the early and effective implementation of the SAARC Environment Plan of Action as endorsed by the SAARC Environment Ministers. They directed their Environment Ministers to take this into account and come up with an agreed position in their forthcoming meeting.

50. The Heads of State or Government also felt a strong need to devise a mechanism for cooperation in the field of the early warning as well as preparedness and management of natural disasters along with programmes to promote conservation of land and water resources.

51. The Heads of State or Government also stressed the need to develop a cooperative mechanism for the protection, enrichment, and utilization of bio-diversity as provided for in the UN Convention on Biological Diversity and to establish a regional bio diversity database with a view to providing equitable benefits to all Member States. They also underscored the importance of protecting associated knowledge and other indigenous intellectual manifestations for the advancement of the region. They also directed the Council of Ministers to explore the possibility of establishing a SAARC Seed Security Reserve to strengthen cooperation in the field of agriculture and to protect IPRs of the seeds of the Reserve.

People-to-People Contact

52. The Heads of State or Government were unanimous in recognizing the need for further promoting a sense of regional identity amongst the peoples of the region. The Leaders lauded the roles played by the intellectuals, professionals and eminent persons in promoting people-to-people contacts within the region and agreed to encourage such endeavours as a healthy sign of regional cohesion and fraternity. In this context, they took note of the activities of the SAARCLAW, including other recognized bodies. They also took note of the First Meeting of the Chief Election Commissioners of SAARC Countries held in Kathmandu in February 1999 and

appreciated the initiative on free and fair election. The Leaders instructed the Secretary-General to collect on a regular basis study reports and other relevant documents and information from the civil society on matters relating to regional cooperation for dissemination to Member States.

Rationalization and Institutional Issues

53. The Heads of State or Government were in agreement that the Summit and all other meetings of SAARC needed to be made more business-like and result-oriented with their focus on programmes and activities supported by informed regional inputs from cross-sections of society. They directed the Chairman of the Council of Ministers to undertake a review of the functioning and operation of the SAARC Secretariat, and to make recommendations, to advance the process of rationalization and to make SAARC more functional and business-like, to the next meeting of the Council of Ministers.

SAARC Award

54. The Heads of State or Government noted with appreciation the proposal made by Nepal to institute a SAARC Award to honour the outstanding work of individuals and organizations with the region in the fields of peace, development, poverty alleviation, and regional cooperation, and requested His Majesty's Government of Nepal to submit a concept paper for consideration by the next session of the Council of Ministers.

Date and Venue of the Twelfth Summit

55. The Heads of State or Government welcomed with appreciation the offer of the Government of the Islamic Republic of Pakistan to host the Twelfth Summit Meeting of the Heads of State or Government of the South Asian Association for the Regional Cooperation (SAARC) in Pakistan in early 2003.

56. The Heads of State or Government of Bangladesh, Bhutan, India, Maldives, Pakistan, and Sri Lanka expressed their deep appreciation for the exemplary manner in which the right Honourable Prime Minister of Nepal conducted the proceedings of the Eleventh SAARC Summit in his capacity as Chairperson. They also expressed their deep gratitude for the generous hospitality extended to them by His Majesty's Government and people of Nepal, and for the excellent arrangements made for the Summit.

LITERATURE

BOOK REVIEWS*

The Legal Regime of International Watercourses: Progress and Paradigms Regarding Uses and Environmental Protection, by KATAK B. MALLA, University of Stockholm, 2005. ISBN 91-7155-006-2, pp 479

The world has fewer freshwater resources than are required to serve all of the increasing human populations. It also has a limited volume on which all future generations have to rely for survival. One of the biggest challenges in water resource management today is about how to provide sufficient clean and safe drinking water for everyone. Irrigation is another area where existing water management schemes have been neither sufficient nor efficient. The current debate centres on who can better manage the available water resources for various purposes, and what the approach should be. The corporate world, through different global fora including the World Water Forum, is advocating the privatization of water resources for commercial purposes. The proponents' arguments are based on their capacity for adequate financing, proper technology and efficient management. Similarly, the counter arguments are based on the public control of water resources alongside the tightly-regulated involvement of the private sector – with a guarantee of reasonable profits in order to attract investment. Furthermore, the social control of water resources and related projects is also thought to be the best option for preserving the water resources for future generations while providing water for every individual as a basic human right. Whatever the policy and development approach may be, one major problem that we are facing today is how to negotiate each others' rights and interests as co-riparian countries and communities while also preventing and minimizing unnecessary conflicts and differences.

The development of international law relating to the common sharing and utilization of trans-boundary water resources is very recent. It was only in 1997 that the United Nations was able to conclude an international treaty, the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, still in the process of ratification by States thus not yet in force. Up to today, in most cases, the governance of trans-boundary water resources has been based on bi-lateral agreements, and in a few cases multilateral ones, e.g., the Mekong framework treaty.

In the case of bi-lateral agreements, the large and powerful countries have successfully imposed their terms and conditions upon smaller and weaker States in the harnessing and utilizing of water resources. The more powerful countries' approach to and practice of negotiation has also been inconsistent, depending on whether the other negotiating party is a lower or upper riparian State. One example can be drawn from the experience of South Asia in which India claims for Nepal the right of prior consumptive use, yet denies the same in the case of Bangladesh. The absence of mandatory international law and/or the rejection of a globally and regionally accepted common framework of principles and parameters of negotiation have intensified water conflicts in all regions of the world, and have in some instances led to war. There is no better option than agreeing on certain principles and approaches for the shared benefit of all, including the taking care of trans-boundary social and environmental issues.

* Edited by Surya P. Subedi, General Editor.

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This new doctoral thesis by Katak B. Malla is a serious attempt towards documenting and developing such a global and regional or multilateral framework for the management of transboundary water resources both at present and in the future. The author discusses the whole history of water-related treaties and agreements between and among all co-riparian States, and critically summarizes good and bad practices. He recommends a framework of principles and approaches for future negotiations and conflict resolutions. Divided into seven parts and seventeen chapters, the book highlights basic problems; the development of legal regimes through international institutions and treaties; case studies of post-1990s treaties; global legal arrangements with the adoption of the above UN Convention, and the development of legal regimes through domestic and international court practices. The author also offers his own overall assessments with conclusions on these issues.

Chapter 2 documents the process of water-law making through the work of the Concert of Europe, the League of Nations, the United Nations, the International Law Institute, and the International Law Association. It has as its main focus the work of the International Law Commission leading to the UN Convention in 1997. Chapters 4 to 13 are dedicated to case studies from European, Asian, African, South American and North American rivers and water basins. Chapter 14 discusses at length the development of the concepts and approaches of the UN Convention, with its substantive principles, implementation mechanisms and dispute settlement. Chapter 15 analyzes the development of legal regime through court practices from the nineteenth century until the 1990s. The author provides an overall view of the study and highlights the paradigm shift from a piecemeal approach to integrated water management.

Malla concludes that "the regimes of uses and environmental protection of international watercourses are intimately related to each other" through a process of an integrated legal perspective. It classifies three regimes as navigational, non-navigational and environmental protection existing on equal footing and leading to legal harmonization, starting from the history of co-operation among riparian States. Through the adoption of modern treaties and the wide recognition of the substantive principles of the uses and protection of international watercourses, the author claims that the principle of equitable utilization has become the fundamental principle of international law to be observed even in the absence of written treaties and agreements. The rule of equitable utilization includes the no-harm rule, the precautionary principle, sustainable development, and equity established through the decisions of the International Court of Justice, and the three main regional framework conventions, i.e., the 1992 ECE Helsinki Convention, the 1995 Mekong Agreement, and the 1995 SADC Protocol, now well defined in the 1997 UN Convention. In this connection, the author mentions the *Danube Gabicikovo-Nagymaros Project Case* in which the ICJ has referred to this principle as a norm of customary international law.

It is further concluded that the modern international law on watercourses is also equipped with effective implementation mechanisms providing for "consultation, information sharing, participation, and institutional cooperation", and for the reconciliation of the diverse positions of developmentalists and environmentalists as regards the "exploitation" of natural resources. The study under the present law of international watercourses also finds three main agenda items for riparian States for the integration of uses and environmental protection: 1) sufficient water for navigational use; 2) consideration of the impact of navigational use on non-navigation uses and *vice versa*, and 3) compensation for damage caused by the uses – aiming at the protection, improvement, and restitution of the watercourse.

As part of an evolving jurisprudence of the courts, the doctrine of community interest of the riparian States has now also been extended to non-navigational uses *(Danube Gabicikovo-Nagymaros Project Case 1997)* from navigational use *(River Oder Case 1929)*. The present legal regime pays balanced attention to both the human environment and to ecology, subject to the application of the principle of equitable utilization and no-harm rule, including protection against cross-media, pollution, and the obligation to prevent, control and abate such pollution, e.g., soil, water and air – unlike in the past. The international environmental law regime also "aims at prevention, improvement and restitution, governed by the polluter-pays principle, precautionary principle and liability to compensate for losses." Furthermore, the prin-

ciple of equitable utilization also recognizes the rights and duties of riparian States as against the classical concept of the "absolute sovereignty of States". The author in his conclusion clarifies that there are two schools of thought regarding the applicability of the principle of equitable utilization: some argue that "a separate and distinct legal principle is ambiguous", while the others argue "that the principles of equity have long been treated as a part of international law". Today, the 1997 UN Convention has defined the principle of "equitable utilization as a process and equity confined to compensation for damages" in line with the no-harm rule.

The author has drawn remarkable conclusions regarding the future of international law regime in this field, which confesses that riparian States always try to protect their vested interests. As a result, it is ultimately a political process – rather than legal principles – that brings negotiated settlement among the riparian countries and communities. Malla also mentions the need for a collectivist approach to participatory water rights in which human beings also have a duty to conserve their water resources while utilizing them for development. The author clearly recognizes the gap within existing legal regimes in dealing with varieties of environmental, technical and political needs. He therefore recommends integrated management and co-operation together with a consolidated legal regime as an ultimate framework for the equitable utilization of international watercourses for development, peace and prosperity.

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International Environmental Law and Asian Values: Legal Norms and Cultural Influences, by RODA MUSHKAT. Vancouver, University of British Press, 2004. pp 241.

After reading Mushkat's book on international law and Asian values, an obvious message made clear to the reader is that many developing regions of the world – for instance, Asia and Africa – have an identical attitude in respect to prioritizing trade matters *vis-à-vis* environmental matters. This is in contrast to the values held by the Western world which, although a promoter of free trade, equally has in place environmental laws and treaties for the protection of the environment. Mushkat pinpoints some of the ways in which the environment is neglected in the Asian region: one is under the guise of cultural influence and values, while another is as a result of integration into the world trading system *via* the promotion of free trade. This makes one ask whether the cultural and economic values of people from the Asian region in particular and developing countries in general hinder them from making adequate provision for the protection of their respective environments.

This is a book not short of academic commentary. Indeed, it is a well researched and inspiring one, which does not claim to present a broad picture of international environmental law and practice in Asia. However, it modestly undertakes to analyze some of the effects of Asian culture on International Law, with emphasis on International Environmental Law and International Human Rights, on the one hand, and the impact of globalization and trade on the environment as these affect Asia, on the other. This book showcases the author's wide knowledge of international environmental matters and of the Asian region.

The areas covered are limited and seem less comprehensive in respect to Asian values than the title suggests. Nevertheless, it is written in a well co-ordinated style as it discusses legal norms and Asian cultural influences on international environmental law and human rights. The perceived tension between the Western normative influences and Eastern economic interests are not just restricted to the issues of human rights but also to issues of environment issues that have now attained universal recognition.

These 241 pages of interesting work, divided into eight chapters, is well structured, informative, clearly and well written, although the initial style of the first two chapters was more technical. The length of the chapters varies, yet as well as being independent they are also interrelated. The eight chapters fall into two parts. Chapters 1 to 3 focus on the Asian cultural values with a mention of human rights, while Chapters 4 to 8 focus on international environmental law, and the impact of globalization and free trade on Asian culture.

The first chapter analyzes the challenges to a universal conception of international law, based on the theory of cultural relativism, and concludes by accepting that this theory is not diminished as long as claims for differentiation are genuine. In the following chapter the author illustrates that there are strong and weak versions which contend that universal human rights standards are alien to Asian values and tradition. Three types of responses are used to illustrate this, namely, the conceptual repudiation, the no clash of civilization, and the bridgeability approach.

Interestingly, Chapter 3, given its closeness to the title of the book, should be one of the core chapters of the work yet in actual fact is one of the shortest ones. It looks at Asian values and the protection of the environment, and analyzes this from different perspectives. Two schools of thought postulate different views: one is of the opinion that environmental protection should be considered a problem of human survival and that the obligation of creating the relevant legal and managerial regime be placed on the international community as a whole; on the other hand, it is contended that environmental right law is associated with Western liberal values incompatible with the Asian prioritization of economic growth and development. This second view is one which, sadly, is shared by many developing countries. Comprehensive discussion on the impact of the diverse religious backgrounds in Asia as they affect the cultural values could reasonably have been expected, yet unfortunately this is not discussed in any appreciable depth.

Due to the highly diversified types of nature of the region, one appreciates after reading this book the difficulties encountered here in making and implementing international environmental laws; furthermore, the region consists of developed, newly industrialized, and developing countries. A message that comes across in Chapter 5 is that factors such as a lack of policy coordination and political will, combined with a host of other bureaucratic actions of the governments in this region, affects the domestic implementation of international environmental law rather than the cultural values.

Chapter 6 and onwards to the last chapter will be of great interest to scholars of international trade and environmental law. The author illustrates that since trade promotes economic growth, it invariably undermines environmental sustainability since trade liberalization weakens environmental regulations. Mushkat surmises that in the case of Asia, maximizing trade may be deemed to be more important at the moment than is protecting the environment: an assertion which I believe to be true of many developing countries that have failed to ban environmentally unsound imports. This the author has backed with the arguments of some environmentalists that the occurrence of diversity in the international environmental standards of the region is equivalent to the lack of a level playing field and amounts to unfair conditions of trade, which in turn affect competitiveness.

This book is informative to a reader with little or no knowledge of Asian history as to the success and failure of globalization or integration into the world trading system. In Chapter 7 the failure of globalization is illustrated by the Bhopal gas disaster. Although it occurred over twenty years ago, its side effects continue to harm the continent. Mushkat acknowledges in respect to globalization that the problem within the Asian region lies not entirely with globalization *per se*, but with how globalization is managed (p.117). The conclusion is that even though regionalization has its positive aspects, it is not the overall answer to many of the environmental problems afflicting the Asian Pacific region. Rather, a selective approach should be adopted, where problems addressed by regional policy are those that can be handled at regional level more successfully than by either national or global programmes.

It must be noted that this book attempts to inform readers of the different roles of the private sector in Asia in comparison to those roles in developed countries where the Government, with public assistance, is responsible for environmental cleaning up; this is in contrast to the Asia Pacific region, where the private sector often agitates for reform.

This book makes an interesting read for students with some knowledge of international economic and environmental law, as well as academics of public international law, international economic law, international relations, environmental policy, comparative culture, economic development, and social change. It is recommended that readers who are interested in a broader and more detailed picture of inter-

national environmental law and practice in Asia may have to look elsewhere for additional information.

Well written, Mushkat's book offers a philosophical approach to the relationship between Asian culture and international law. The book also addresses Asian cultural values and their impact on international environmental law, and *vice versa*. This is a smooth read, educating the reader who has no prior knowledge of the history of Asia with sufficient information to grasp the general gist without necessarily delving into the history of Asia.

In brief: the book informs on the impact of free trade and globalization in the region, but has not fully succeeded in depicting how Asian values have hindered the implementation of adequate environmental laws. I would suggest that the major hindrances to the protection of the Asian environment are free trade and globalization, and Mushkat confirms existing knowledge within the international community.

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China and the World Trading System, edited by Deborah Z. Cass, Brett G. Williams and George Barker, Cambridge University Press, 2003. ISBN 0-521-81821-4; xxiii + 443pp.

The book *China and the World Trading System* arose from a research project funded by the Australian Research Council and the Australian Department of Foreign Affairs and Trade (DFAT). The 25 contributors to this book are from different parts of the world: the USA, Europe, China, Australia, and Japan. All of their arguments have focused on the topic of the membership of China, the world's sixth-largest trading economy, of the WTO rules-based international trading system. The implications of the accession of China to the world trading system are addressed; the authors argue that effects will be mutual. As well as the WTO's effect on many aspects of the domestic sphere of China, China's membership will affect many parts of the WTO, for example, the WTO's rules, decision-making, dispute resolution procedures, etc. The collection of 22 essays in this book are divided into seven parts, each of which discusses a different aspect of China's accession to the WTO: Part I, the world trading system generally; Part II, the accession of China; Part III, China's domestic economy, and in Parts IV to VII the goods, services, TRIPS, and dispute settlement system, respectively.

The first part, "The world trading system", contains three essays which examine the impact China's accession will have upon the overall architecture. It argues that China's accession to the WTO has the potential to have a significant impact upon the world trading system precisely because it occurs at the time when many of the old verities of geopolitics and law, and law and diplomacy, are being questioned. The contraction of absolute state sovereignty, the pluralization of the centres of legal and state authority, and the growth of a transnational system, the Word Trade Organization, would be a key part in these changes. Deborah Cass examines the constitutionalization of the international trade system and argues that China's entry into the WTO has the potential to influence the phenomenon, whether constitutionalization is conceived of as expanding the trade 'right' recognized by international trade, thus strengthening its institutions, or as creating a new *demon* or community to legitimize the system, in the essay "China and the 'constitutionalization' of international trade law". Sylvia Ostry portrays the scene China confronts entering the world trading system in her essay "WTO membership for China: to be and not to be – is that the answer?" She argues that the old-fashioned notions of market access have expanded since Uruguay, from requiring States simply to remove border barriers to a focus on domestic regulatory policy. States are now more frequently obliged to shift from an emphasis on negative regulation to positive regulation. Also, Ostry claims that China could play a critical role in relation to issues such as the creation of a policy forum to discuss the intersection between international trade rules and legitimate domestic policy intervention, and the role of non-State actors in international trade. Quite similarly, John H. Jackson's essay "The impact of China's accession on the WTO" also argues that China may begin to exercise a role as a diplomatic leader on the WTO stage, especially if it participates in the resolution of a number of key policy questions currently facing the organization. In a word, the landscape of the world trading system and China's role within it were

unsettled, and they seem set to shift in the context of China's accession to the WTO.

Part II of this book is "The accession". The authors in this part, Jeffrey Gertler, Secretary to the Working Party on the Accession of China to the WTO, and Graeme Thomson, who led Australia's negotiations with China, are both experienced observers of the accession process. They examine the accession process and outcomes in detail. Jeffrey Gertler gives "a fascinating account of the longest and most arduous" accession negotiations in WTO history; the primary theme to emerge is that the accession package negotiated represents a significant commitment by China to the disciplines of international trade. Also, "the difficult adjustment continues and is far from completed." Graeme Thomson outlines the broad parameters of the package and comments on the "tremendous nature and range of China's various commitments" from the point of view of a negotiator. Both authors conclude that China's willingness substantially to commit itself to the world trade system is clearly present in the final package negotiated.

The third part of this book, "China – the domestic sphere", focuses on the question of the way in which accession to the WTO will affect China in its domestic sphere. It is the crucial research question not only in this part, but also in many other sectors of the book. For example, in Part VI, related to goods, Ian Dickson points out that the initial benefits of WTO membership for China will not be great in relation to textiles exports, although over the longer term China will improve. Also, two essays in Part VI, related to intellectual property, contain rather different analyses of the impact of the TRIPS Agreement on China. They all provide excellent analyses of how the WTO will affect China. The five essays contained in Part III principally examine the internal effects of WTO membership in relation to aspects of the Chinese economy, legal system, and human rights. In particular essays in this part, Ligang Song uses a number of figures and statistics to review briefly the nature of, and basic approaches to, structural changes in economic transformation; outlines what has been achieved and what remains to be done in carrying out structural changes, and discusses how the structural changes affect the state of the Chinese economy. He then discusses the implications for implementing China's WTO commitments and points out some potential risks that exist in certain areas of the economy. Elena Ianchovichina and Will Martin conclude that the bulk of the benefits of membership will accrue to China through a macro-economic analysis of the economic implications for China of the liberalization of trade that will follow upon entry into the WTO with a prognosis that is largely favourable, as far as China is concerned. Meanwhile, Raj Bhala considers accession from the perspective of labour surplus and Marxist models in relation to transition from agrarian to industrial economies in this part. From his perspective, he concludes that the accession of China will give rise to major structural changes to the domestic economy with concomitant serious adjustment problems that the Chinese government must address. Qingjiang Kong points out that the implementation and enforcement of international agreements might be changed as a result of WTO practice, and argues that a host of factors, including a wide variety of aspects of Chinese internal situation, will affect implementation. Alice E.S. Tay and Hamish Redd analyze the domestic sphere by considering links between trade and human rights. They suggest that China has almost no history of government under law and thus assess the mixed evidence of a move towards the rule of law, noting the potential influence of WTO membership in their essay "China: trade, law and human rights". In short, there is a general idea in this part that China will experience considerable internal change in many areas, but the grand result remains uncertain.

Part IV to Part VII contain the main chapters discussing the respective interactive systems between China and the WTO, and the way in which China's accession transforms or interacts with WTO institutions, rules, politics, and processes. These sections include a discussion of trade in goods, trade in services, competition policy, intellectual property, and dispute settlement. In relation to goods, Ian Dickson and Ichiro Araki both consider how China's accession transforms the WTO in the trade of goods. Ian Dickson argues the important role of China in the textiles sector means China has a significant interest at stake in the interpretation of the rules on safeguards and in any further development of those rules. In relation to trade in service, several authors argued the gap between law-in-practice and the law-in-theory. Christopher

Arup discusses the professional service in China. His analysis is that China's entry to the WTO will stimulate the development of legalized dispute settlement, and will definitely remove restrictions on foreign legal firms doing business in China, in order to attract foreign professional services. Dene Yeaman reviewed various retailing, wholesaling and logistics options to which China has committed itself as regards services, and claims that "China's accession is the first step on the road leading to full foreign participation in the distribution and logistics sectors and is a significant milestone in the development of distribution and logistics industries, [therefore] foreign suppliers will stay the course". The GATT and TRIPS are also discussed in these sectors. Macintosh's essay makes it obvious that China will have a significant role in any further elaboration of the GATT rules. Similarly, Angela Gregory, Daniel Stewart and Brett G. Williams all discuss the fact that the Chinese policy-makers have particular interest in many of the biotechnology issues due for examination by the TRIPS review.

In the last part of this book, the dispute system has been discussed. Michael Lennard provides an anti-dumping case study regarding the use of the principles of interpretation referred to at the DSB; he argues that states seeking to impose anti-dumping duties on China will have the burden of proving, to an objective standard, that Chinese prices are not set under market economy conditions. The focus of Ravi P. Kewalram's essay is on China's WTO obligations with regard to the activities of its sub-national entities, whether the WTO Agreement requires China to remove inconsistent sub-national measures, or whether China's obligation stops at taking available "reasonable measures" to ensure compliance. It is concluded that it may be unreasonable for China to fail to remove a measure, although there are few legal limits, as set out in its Constitution, on the central government's power in relation to the regions. Among federal WTO members the central government must take all reasonable measures to seek the removal of the sub-national WTO-inconsistent measures, an obligation different from that of removing the measures.

This book is not only about the effects of China's accession to the WTO and Chinese internal sphere. Rather, it is also a wide discussion of the spur towards legal and economic reform, the far-reaching social, political and distributional consequences in China. According to most authors' perpectives, Chinese accession facilitates a new role for China in international geopolitical affairs, and alters the shape, structure and content of the world trading system as a whole. Overall, this is a very welcome addition to the body of literature on the WTO and China.

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The Maritime Political Boundaries of the World, by VICTOR PRESCOTT and CLIVE SCHOFIELD, Second edition, Martinus Nijhoff, Leiden/Boston, 2005, ISBN 90-04-14066-2, pp 655 (including notes, illustrations and appendices)

This highly informative book makes a valuable contribution to the crucial subject of the delimitation of maritime boundaries. It is comprehensive and evidences considerable knowledge of the parameters and complexities of the delimitation of the maritime political boundaries around the world. The subject matter is important for legal and political perspectives on the application of international law of the sea. Delimitation, the setting of boundaries of an area already in principle appertaining to a coastal state, has driven academic and judicial debate since the decisions of the International Court of Justice (ICJ) in the *Anglo- Norwegian Fisheries Case* (1951) ICJ Reports 116 and the *North Sea Continental Shelf Case* (1969) ICJ Reports 3.

As the authors point out, no coastal state can claim its maximum marine sphere without its overlapping with similar claims from (a) neighbouring state(s); allied with the marked increase in maritime space coming under coastal state jurisdiction, the importance of the issue of delimitation of maritime boundaries has in no way diminished. With the increased diversity and intensity of maritime activities, the establishment of Arbitral Tribunals established by the Law of the Sea Convention 1982 and the ICJ's continuing to play an important role in dispute settlement in this area, the surrounding debates roll on. Although required to do so by law, the reality is that most States are not able to reach agreement on disputed boundaries; the resulting

tensions have created problems concerning States' legitimate use of the sea.

The approach of this book is to weigh academic analysis with an evaluation of the contested maritime boundaries. The result is a text that appeals to a broad audience of policy-makers, international legal experts and advocates. This two-pronged approach, by firstly assessing the rules and principles under customary international law and treaties that apply to maritime delimitation then examining how these have been applied to regional maritime zones, provides a detailed review of contested maritime boundaries. The drawing of the international maritime boundaries of the world remains a highly charged process requiring precise and consistent application of rules in order that consistency and clarity are enhanced.

However, this is by no means the first written account of their use: there are in print many valuable texts in this area. How, then, does this book add to such scholarship? The authors have included new chapters to the present edition (the first edition of this book, *The Maritime Political Boundaries of the World*, Victor Prescott, was published in 1985) to reflect changes in international law relating to maritime boundaries. The current edition does not analyze existing delimited international maritime boundaries, already covered elsewhere; instead, the focus is on undelimited boundaries, while making passing reference to delimited boundaries in order to identify gaps in the framework of boundaries.

The first part of the book analyzes the bases upon which maritime boundaries are set, and the delimitation of boundaries that separate the claims of opposing, adjacent states. It addresses the suite of boundary lines, each defining the outer limits of a specific zone of seas and seabed. The maritime zones covered relate to the: territorial sea; the contiguous zone; the exclusive economic zone, and the continental shelf zone more than 200 nautical miles from the baseline. The area beyond these zones is known as the High Seas. The second part of the book is a regional study of maritime boundaries in the major seas and oceans.

The book comprises an introduction, twenty-three chapters and one hundred and five pages of extremely helpful illustrations. It lacks an end bibliography; however, at the conclusion of each chapter there is an extensive list of references. The chapters in Part I, Baselines and Boundary Delimitation, cover the following subjects: national and international maritime zones; the influence of geographical advantages and disadvantages on maritime claims; islands and rocks; normal baselines, reefs and low tide elevations; bays, mouths of rivers, ports and roadsteads; straight baselines; archipelagic baselines and navigation rights through archipelagic waters; the Continental Margin; the delimitation of International Maritime Boundaries; Maritime Boundary Disputes and Options for Dispute Resolution, and International Maritime Boundaries: Technical and Practical Considerations. The Maritime regions covered in the second part include the Atlantic Ocean; the Gulf of Mexico and the Caribbean Sea; the Baltic, North and Irish Seas; the Mediterranean and Black Seas; the Pacific Ocean excluding the Asian Rim; the Asian Rim in the Pacific Ocean; the Indian Ocean; the Red Sea; the Persian Gulf; the Arctic Ocean and associated Seas, and the Antarctica and the Southern Oceans. As so many disputed areas are covered, it is understandable that discussion of legal and political issues will be somewhat diluted.

However, what the text lacks is a deeper examination of the guiding principles formulated by the case law and therefore a deeper and wider analysis of international law. The authors have been at pains to avoid consideration of boundaries already delimited, but their lack of depth of analysis of significant case law such as the *Anglo Norwegian Fisheries Case* (1951) and *North Sea Continental Shelf Case* weakens, in the opinion of the reviewer, the analysis contained in the first part of the book. An example of this is the discussion of the emergence of the two-stage approach to delimitation (equidistance/special circumstances rule). Furthermore, the lack of referencing of case law, i.e., through a table of cases, renders orientation throughout the book problematic.

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SURVEY OF INTERNATIONAL LAW LITERATURE PUBLISHED IN 2004 WITH SPECIAL RELEVANCE TO ASIA

Compiled and Edited by Bimal N. Patel*

Areas of international law:

Air and space
Arbitration
Arms control and disarmament
Conflicts and disputes
Criminal law, humanitarian law and terrorism
Economic relations, trade and finance
Environment, natural resources and sustainable development
General
International courts and tribunals
Individuals, groups of persons – human rights
Legal education
National and international law
Peace-keeping, peace-making and peace-building
States and groups of states
United Nations and other international/regional organizations and regional laws

Abbreviations:

AJIL	American Journal of International Law
Arizona JICL	Arizona Journal of International and Comparative Law
Brooklyn JIL	Brooklyn Journal of International Law
CJIL	Chinese Journal of International Law
CLP	China Law and Practice
Fordham ILJ	Fordham International Law Journal
HKLJ	Hong Kong Law Journal
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
JALC	Journal of Air Law and Commerce
JALS	Journal of Air Law and Space

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Asian Yearbook of International Law, Volume 11 (B.S. Chimni *et al.,* eds.)

Penn State ILR	Penn State International Law Review
Texas ILJ	Texas International Law Journal
TJAIL	The Japanese Annual of International Law
Yale JIL	Yale Journal of International Law

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