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VOLUME 20
2014

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HANDONG INTERNATIONAL LAW SCHOOL

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ASIAN YEARBOOK OF INTERNATIONAL LAW

VOLUME 20

2014

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Foundation for the Development of International Law in Asia (DILA)

DILA was established in 1989, at a time when its prime movers believed that economic and political developments in Asia had reached the stage at which they would welcome and benefit substantially from a mechanism to promote and facilitate exchanges among their international law scholars that had failed to develop during the colonial era.

The Foundation was established to promote the study of: (a) and analysis of topics and issues in the field of international law, in particular from an Asian perspective; and (b) dissemination of knowledge of, international law in Asia; promotion of contacts and co-operation between persons and institutions actively dealing with questions of international law relating to Asia.

The Foundation is concerned with reporting and analyzing developments in the field of international law relating to the region, and not primarily with efforts to distinguish particular attitudes, policies or practices as predominately or essentially “Asian”. If they are shown to exist, it would be an interesting by-product of the Foundation’s essential function, which is to bring about an exchange of views in the expectation that the process would reveal areas of common interest and concern among the State of Asia, and even more importantly, demonstrate that those areas of interest and concern are, in fact, shared by the international community as a whole.

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The Asian Yearbook of International Law

Launched in 1991, the Asian Yearbook of International Law is a major internationally-refereed yearbook dedicated to international legal issues as seen primarily from an Asian perspective. It is published under the auspices of the Foundation for the Development of International Law (DILA) in collaboration with the Handong International Law School in South Korea. When it was launched, the Yearbook was the first publication of its kind, edited by a team of leading international law scholars from across Asia. It provides a forum for the publication of articles in the field of international law, and other Asian international legal topics.

The objects of the Yearbook are two-fold. First, to promote research, study and writing in the field of international law in Asia; and second, to provide an intellectual platform for the discussion and dissemination of Asian views and practices on contemporary international legal issues.

Each volume of the Yearbook contains articles and shorter notes, a section on State Practice, an overview of the Asian states' participation in multilateral treaties and succinct analysis of recent international legal developments in Asia, as well as book reviews. We believe this publication to be of importance and use to anyone working on international law and in Asian studies.

In keeping with DILA's commitment to encouraging scholarship in international law as well as in disseminating such scholarship, its Governing Board has decided to make the Yearbook open access.

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The Asian Yearbook of International Law 1995–2015: A Historical and Personal Reflection

*Kevin Y.L. Tan*¹

FOUNDING MOMENTS

INTERNATIONAL LAW SOCIETIES IN ASIA

As the *Asian Yearbook of International Law* was established to realise the vision of the founders of the Foundation for the Development of International Law in Asia (DILA), a little background to DILA is in order.

A few national societies of international law existed in Asia since the turn of the nineteenth century. The oldest of them – and the first such society in the world – is the Japanese Society of International Law, founded in 1897. Republican China established what is now the Chinese (Taiwan) Society of International Law in 1913, and the People’s Republic of China established the Chinese Society of International Law in 1980. In between the Indian Society of International Law was established – in 1959.

However, there was no organisation to facilitate dialogue and discourse between students and scholars on a pan-Asian basis. Indeed, the first such regional organisation was the African Association of International Law, that was established in 1986. It was against this backdrop that DILA was founded

1 Adjunct Professor, Faculty of Law, National University of Singapore; Professor, S Rajaratnam School of International Studies, Nanyang Technological University, Former Chairman, DILA, and Editor-in-Chief, *Asian Yearbook of International Law*.

on 21 December 1989 by three Asian émigré international lawyers – Ko Swan Sik; JIG Syatauw and MCW Pinto – then living in the Netherlands.

Ko Swan Sik and the Founding of DILA

While it has always been the official position that the *Asian Yearbook* was set up to further the aims of DILA, it was in fact the vision for the *Yearbook* that led to the founding of DILA. The chief architect and true founding father of the *Asian Yearbook* was undoubtedly Professor Ko Swan Sik.

Ko was born on 4 January 1931 in Magelang in Central Java, Indonesia. His father, Ko Tjay Sing and granduncle, Ko Kwat Tiong, were both distinguished legal scholars and academics.² Ko graduated from the Faculty of Law of the University of Indonesia in 1953 after which he proceeded to the the Leiden University where he obtained a PhD (*cum laude*) in 1957. During his studies in Leiden, Ko spent a year at the University of Mainz and also attended the Hague Academic of International Law's summer course in 1954. He returned to Indonesia after his studies and practised as an attorney in Semarang between 1957 and 1963 before moving to Jakarta to practise. Between 1959 and 1965, he was concurrently Senior Lecturer of Public International Law at the University of Indonesia.

In February 1965, Ko left for the Netherlands where he joined the newly created TMC Asser Institute of International Law at The Hague where, among other things, he founded the *Netherlands Yearbook of International Law* in 1970. In 1988, he moved to Rotterdam where he became Professor of International Law at Erasmus University. He retired and was made Emeritus Professor in 1996. In response to questions from the *Journal of East Asia and International Law* in 2010, Ko explained how the *Yearbook* and DILA came about:

... In 1983 it so happened that I was assigned to participate in the organization of an international symposium for the commemoration of the fourth centenary of the birth of Hugo Grotius. As part of the effort to emphasize the international character of the gathering I was to select and invite a number of speakers from outside Europe, particularly Asia, which I did. The ensuing broader contacts with these Asian colleagues led to the idea of starting initiatives

2 For this brief biographical account, I relied on LEO SURYADINATA, PROMINENT INDONESIAN CHINESE: BIOGRAPHICAL SKETCHES, 4 ED (Singapore: ISEAS Yusof Ishak Institute, 2015) 102–105.

in an Asian context and resulted in the publication, in 1990, of a multi-authored volume on a topic of international law ‘*in Asian perspective*’³ that was intended to be the beginning of a series under that name. Unfortunately a second volume has yet to appear.

The practical failure of continuing the ‘in Asian perspective’ series led, around 1988, to the alternative idea of starting a regular periodical publication which has since been the Asian Yearbook of International Law. The option for an annual rather than a higher frequency periodical was a quite conscious one but not relevant in the present context. Another aspect, however, may be quite relevant to be noted here. The possibility of financial consequences of the publication project and the wish of preventing individual persons from being burdened with such responsibility gave rise to the decision of founding a separate legal entity under whose auspices the Yearbook would be published. The entity that finally came about and that was DILA happens to be molded in the formal structure of a ‘foundation’ under Dutch law for the simple reason that the founders, MCW Pinto (Sri Lanka), Ko Swan Sik (Indonesia) and JJG Syatauw (Indonesia) had their residence in the Netherlands. The official founding of DILA took place on December 21, 1989 by deed of a notary public in The Hague.⁴

Ko was, nevertheless, quick to point out that while the founding of DILA the founding of DILA was ‘primarily intended to meet the contingency of financial responsibility in connection with the publication of the Yearbook’, it was not ‘an organization for the exclusive purpose of publishing the Yearbook’. Instead, it embodied

... a rather broad program of academic activities in the field of international law in Asia or relating to Asia, thereby aiming at promoting contacts among Asian jurists, enhancing their endeavours in the field of research and education, improving their information of whatever developments in the field of research and literature in

3 This was Ko Swan Sik (ed), *Nationality and International Law in Asian Perspective* (Dordrecht & Boston: Martinus Nijhoff, 1990)

4 A Dialogue with Judicial Wisdom: Professor Ko Swan Sik (2010) 3(2) *JOURNAL OF EAST ASIA AND INTERNATIONAL LAW* 451, at 455.

the field concerned, and promoting the recording and dissemination of relevant Asian materials.⁵

JJG Syatauw and MCW Pinto

Ko's close collaborators in the DILA enterprise were Jacob Johannes Gustaaf ('Joop') Syatauw, another Indonesian international law scholar, and Moragodage Christopher ('Chris') Pinto, a diplomat and scholar. Like Ko, Pinto was born in 1931 in Colombo, Sri Lanka (then Ceylon), the son of Moragodage Walter Walter Leopold Pinto and Judith Beatrice Blazé. He was educated at the University of Ceylon at Peradeniya where he graduated with an LLB degree. He then attended the Sir Lanka Law College where he qualified as an Attorney, and thereafter studied at Magdalene College, Cambridge University where he obtained another LLB degree as well as a Diploma in International Law. He was called to the bar at the Inner Temple in 1958. Pinto worked as a legal officer in the International Atomic Energy Agency in Vienna between 1960 and 1963, and then at the Legal Department of the World Bank from 1963 to 1967. He then returned to Sri Lanka to become Legal Advisor and Head of the Legal and Treaties Division of the Ministry of Foreign Affairs, a post he held till 1979. In 1976, he was appointed Sri Lanka's Ambassador to Germany and Austria. Pinto represented Sri Lanka at the UN Conference on the Law of the Sea between 1980 and 1981, and was, from 1982, Secretary-General of the United States-Iran Claims Tribunal till his retirement in 2011. It was during this last phase of Pinto's career that he came into contact and worked with Ko in the founding of DILA, since both of them lived in The Hague.

The third member of the DILA triumvirate was Joop Syatauw⁶ who unfortunately passed away on 8 February 2015,⁷ just a year after we celebrated the Silver Jubilee of DILA. Syatauw was born on 9 December 1923 in an army camp in Bandung where his father was stationed as a Non-Commissioned Officer of the Royal Netherlands Indies Army (KNIL). His family came from the island of Ambon in the Moluccas. Syatauw's secondary education was interrupted by the Japanese Occupation (1942–1945) and

5 *Ibid*, at 455–456.

6 Most of the following information about Professor Syatauw was kindly shared by Professor Ko Swan Sik in two emails to me, dated 20 Mar 2015 and 8 Apr 2015.

7 'In Memoriam' (2015) 17(1) DEVELOPMENT ISSUES 9.

worked in the Department of Mining in Bandung during the War. In 1949, he obtained a scholarship to study at Leiden where he graduated with an LL.M. and then proceeded to the Yale Law School where he obtained his J.S.D. in 1960 for his thesis, *Some Newly Established Asian States and the Development of International Law* which was later published by Martinus Nijhoff in 1961.

After completing his doctorate, Syatauw spent some time doing additional research at the London School of Economics and Social Science. Upon his return to the Netherlands, he became assistant to Haro Fredrik Van Panhuys, Professor of International Law at the University of Leiden. At the prompting of Van Panhuys, Syatauw joined the Institute of Social Studies (ISS) in The Hague as ‘Lector’ – a Junior Professor, and the highest academic position at the ISS in the early 1960s – in the Department of International Law and Relations and remained there till his retirement as Professor in 1988. Ko first came to know of Syatauw around 1961 when he was still in Indonesia when ‘rumours began to circulate about an Indonesian who had obtained his J.S.D. at Yale on a dissertation on newly established Asian states.’ However, it was not till 1965, when Ko relocated to The Hague that he first met Syatauw. When Ko began conceptualising the *Asian Yearbook* in the 1980s, he turned to Pinto and to Syatauw for support. He recalled:

When I decided to start the DILA project I decided that what I needed most was a number of people around me by way of touchstone who were able to share the essentials of my ideas and who would be approachable at any time to be consulted on the elaboration and realization of any plans. It was obvious that, next to Pinto, Joop was most qualified to be invited as a member of the team.⁸

OBJECTS AND MODALITIES

The three founders of DILA believed that economic and political developments in and among the countries of Asia had reached the stage that they would welcome and benefit substantially from a mechanism to promote and facilitate exchanges among their international law scholars. At the same time, they believed that a regular and reliable source of information concerning international law as applied or interpreted by states in Asia

8 Ko Swan Sik to Kevin Tan, 20 Mar 2015.

would be of interest to other states and contribute significantly to the progressive development of an international legal order.

Having determined that the time was not yet ripe for a pan-Asian society of international law, the founders registered DILA as a foundation or *stifting* in the Netherlands. This remains how the organisation is structured today. The Foundation was established to promote:

- a. the study and analysis of topics and issues in the field of international law, in particular from an Asian perspective;
- b. the study of, and the dissemination of knowledge of, international law in Asia;
- c. contacts and co-operation between persons and institutions actively dealing with questions of international law relating to Asia.

The 'principal means by which the Foundation will seek to accomplish its aims and purposes' declared the founders, 'is publication of the *Asian Yearbook of International Law*.'⁹ This they did by constituting themselves as General Editors of the *Yearbook* with principal responsibility for its editing and publication. The rest of the Editorial Board was made up of some of the most distinguished Asian international law scholars at the time: Chang Hyo Sang (South Korea), Rahmatullah Khan (India), Onuma Yasuaki (Japan), M Sornarajah (Sri Lanka), and Sompong Sucharitkul (Thailand). Despite the inclusion of many distinguished scholars as part of the *Yearbook's* editorial boards through the years, right up till 2009, the three General Editors remained the persons most responsible for the its content, quality, and publication. The founding General Editors explained what they planned to do in the first volume of the *Yearbook*:

It is the aim of the General Editors to include in each volume of the *Yearbook*, in addition to scholarly essays of an analytical, descriptive or speculative nature, materials that are evidence of the practice of States in the region. To that end the General Editors are currently engaged in trying to establish a network of correspondents in Asian countries, who would keep them currently informed of significant developments, and provide them with the associated

9 'Introduction by the General Editors' (1991) 1 ASIAN YEARBOOK OF INTERNATIONAL LAW xi, at xiii.

documentation on a regular basis. The problem of securing and maintaining the collaboration of scholars, all of whom are already fully engaged in routine pursuits of their own, is compounded by a variety of difficulties including variations in the efficiency of communications and the fact that no funds are available to compensate collaborators for their efforts, or even for expenses connected with providing information. Also to be included in the *Yearbook* are a chronicle of events relating to the region and of relevance from an international law perspective, notes on selected activities of regional and international organizations, and a survey of selected works in the field of international law¹⁰

This statement of objectives and modalities set the template for the *Yearbook* in the years to come. In the 2010 revamp of the *Yearbook*, it was determined that the ‘Chronicle’ section – which was typically the longest section of the *Yearbook* up till this time, should cease to be prepared and published. In 1991, the Editors felt that a ‘Chronicle’ would record ‘events and incidents relating to, or involving, Asian states and which are clearly relevant for the position of these states in international law.’¹¹ Ko Swan Sik was personally responsible for this particular segment of the *Yearbook* was inspired by the ‘classic’ chronicle of Charles Rousseau in the *Revue Generale de Droit International Public* and edited it continuously from 1991 to 2009. It was time-consuming, back-breaking work, scouring newspapers, news digests and weeklies to extract news items that would make the Chronicle useful. By the mid-2000s, the section was losing its usefulness as news sites and archived newspaper databases on the internet made it so much easier for anyone wishing to tap into the news that would impact international law.

The first edition of the *Yearbook* was published through a guarantee from the Netherlands Ministry of Development Cooperation to purchase of 200 copies for distribution to various institutions in the Asian developing countries. The entire subvention went directly to the publishers, Martinus Nijhoff (later known as Kluwer). Thereafter, Nijhoff undertook to bear the cost of producing and marketing Volume 2 of the *Yearbook*, but the General Editors needed to raise more money to meet the expenses of Volume 3 which they were able to do through a Swedish International Develop-

10 *Ibid.*

11 ‘Chronicle of Events and Incidents Relating to Asia with Relevance to International Law, January–September 1991’ (1991) 1 ASIAN YEARBOOK OF INTERNATIONAL LAW 265.

ment Authority grant of US\$45,000. For the 1997 edition of the *Yearbook*, Professor Onuma Yasuaki convinced industrialist Mr Sata Ysuhiko ('Mike Sata') of Tokibo Co Ltd to make an annual donation to institute the Sata Prize for the best article submitted by a young (aged 35 and under) Asian international law scholar. In 2012, at the insistence of Mr Sata, this prize was renamed the DILA Prize.

In 2007, due to the lack of editorial support and ever higher and higher prices that made the *Yearbook* unaffordable, DILA terminated its relationship with its publisher Brill – the successor to Martinus Nijhoff and Kluwer – and commenced publishing the *Yearbook* with Routledge. This relationship was, unfortunately, shortlived as Routledge – who halved the subscription price of the *Yearbook* – found it unprofitable to continue publishing the series and terminated its contract with DILA in 2010. For five volumes thereafter, we decided to move the *Yearbook* to an open platform and make it available free of charge to the world at large. It was a bold move that pleased many 'consumers' since they did not need to pay for content nor subscribe to expensive databases, but worried many contributors and would-be contributors who constantly felt that their work was not being picked up by the various journal ranking services like Scopus and ISSN. Thus, it was for this reason that the DILA Governing Board decided at the end of 2016 to return to the Brill fold.

REFLECTIONS

I became associated with DILA and the *Yearbook* at a meeting in Manila in April 1997. I was not supposed to have been at that meeting, but was asked by my senior colleague, Professor Tommy Koh, to attend the meeting on his behalf. Professor Ko Swan Sik had convened the meeting, with the assistance of the Law Faculty of the University of the Philippines to discuss succession plans for DILA. After two days, I was mysteriously 'voted' into DILA's Governing Board and onto the Editorial Board of the *Yearbook* as well. Over the past 20 years, I have spent much time grappling with the more practical side of running the *Yearbook*. The lack of funds always worried me, as did the fact that it was nigh impossible to get busy scholars to keep to a deadline insofar as production was concerned.

Yet, it had to be done. When Brill began neglecting the *Yearbook* in the early 2000s, I proposed that we find a more responsive publisher. We

thought that Routledge would be the key to our continued success and longevity, but alas, a cardinal truth emerged from this experience. Commercial publishers only respond to commercial success. I then proposed that we take advantage of the internet to distribute the *Yearbook* for free. After all, what could be cheaper than something that was free? For readers and consumers – nothing. But for the contributors, the crushing pressure to not only publish or else perish, but to publish in ‘recognised’ or ‘ranked’ journals reinforced the stranglehold of the world’s major publishers. When asked to consider submitting an article, many scholars’ first question is ‘Is the *Yearbook* a Scopus or ISSN journal?’ The importance of the journal is irrelevant; neither is the quality of its content. It appears that it matters not whether a publication is peer-reviewed, only whether it sits within the stable of a journal aggregator which is penetrable only if you are a major publisher.

Twenty volumes after the first *Asian Yearbook of International Law* was published, its noble aims remain but DILA’s second objective, to disseminate knowledge of international law in Asia, awaits fulfilment.

EDITORS OF THE ASIAN YEARBOOK OF INTERANTIONAL LAW

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Sumaiya KHAIR	2010	2017	Editor
Rahmatullah KHAN	1991	2006	Editor
KIM Charn Kiu	1995	2006	Editor
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Kriangsak KITTICHAIRSAREE	1996	2006	Editor
Ko Kwan Sik	1991	1999	General Editor
	2000	2006	Editor
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	2000	2006	Editor
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	2011	2013	Editor
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Editor	Years Served		Position
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	2005	2006	Editor
Kevin YL TAN	1996	2006	Editor
	2010	2017	Editor-in-Chief
THIO Li-ann	2005	2008	General Editor
KI VIBUTE	1998	2009	Editor

Life as a UN Special Rapporteur: The Role of UN Special Rapporteurs in Developing International Law, the Impact of Their Work, and Some Reflections of the UN Special Rapporteur for Human Rights in Cambodia

Surya P. Subedi, QC¹

1. INTRODUCTION

I am standing here today to deliver a public lecture of this nature since my first inaugural public lecture 10 years ago in May 2005 as the first Professor of International Law ever appointed at Leeds University. It remains the last inaugural public lecture delivered by any professor in this Law School thus far.’ Today, I am proposing to examine the role of UN Special Rapporteurs in developing international law and the impact of their work with some reflections of my own.

I hope you will forgive me if it sounds like a ‘swan song’ at some points, but this lecture is partly an account of the work that I have been proud and privileged to do in Cambodia as the UN Special Rapporteur for the last six years. The idea of giving this public lecture was suggested to me by colleagues and doctoral students familiar with my work. The title of this lecture is ‘Life as a UN Special Rapporteur’. I will talk about my experi-

1 Of the Board of Editors (1997-2006); LL.B. (Tribhuvan); LL.M. with Distinction (Hull); D.Phil. (Oxford); Barrister of the Middle Temple (London); O.B.E.; QC (Hon), UK; Professor of International Law at the School of Law of the University of Leeds; Former United Nations Special Rapporteur for Human Rights in Cambodia. This article is based on a public lecture that the author delivered at the University of Leeds on 5 May 2015.

ence - with both challenges and achievements. It is basically a first-hand account of the interplay between law, politics and diplomacy.

My UN appointment came to an end on April 30, 2015 after working hard for six long years. I left the job with a mixed feeling of both relief and sadness. I enjoyed it, and I am satisfied with the progress the country has made during my tenure. It was an interesting but demanding position, especially while trying to juggle it with a full-time position at the University.

Before I proceed, I would like to take this opportunity to thank a number of people who have enabled me to carry out my duties for the UN to the best of my abilities. Among them are Professor Halson and Professor McCormack who were Head of School and Director of Research respectively at this Law School when I was appointed by the UN, and Professor Mullis, the current Head of Law School, after he joined Leeds. Others include my colleagues, Dr. Amrita Mukherjee, Chloe Wallace, Amanda Hemingway, and Tracey Rogers. I thank them for their understanding and assistance.

Within the UN system, my sincere thanks go to a number of people, both national and international staff at the Office of the High Commissioner for Human Rights, both in Phnom Penh and Geneva, who have assisted me and especially Christophe Peschoux, Wan-Hea Lee, Rory Mungoven, James Heenan, Olga Nakajo, Maureen Teo, Jung Rin Kim, and Robert Vaughan.

2. THE ROLE OF THE UN SPECIAL RAPPORTEURS FOR HUMAN RIGHTS

The main function of the UN Special Rapporteurs for human rights is to monitor the situation of human rights in a certain country and report publicly to the UN. It is about holding governments accountable for violations of human rights by asking sensible and often difficult questions to probe into the situation. In common parlance, it is about poking your nose into the 'internal' affairs of a State. Therefore, Special Rapporteurs are rarely welcomed with any degree of enthusiasm in any country, but they have to work with the government of a given country to have their recommendations implemented – a difficult balancing act in itself. The endeavour is to induce governments towards compliance with their international human rights obligations flowing from the treaties ratified by the country and to

assist them to travel along the road to a stronger democracy, genuine rule of law and greater respect for human rights and to building their capacity to achieve this.²

Special Rapporteurs for human rights come in two different forms: thematic and country-specific mandate holders. The thematic mandate holders focus on a narrow human rights theme, but have a global mandate. The country-specific mandate holders are responsible for only one country, but cover the whole range of human rights issues within the country that can range from civil and political rights to economic, social, and cultural rights.³ One day you are dealing with issues relating to freedom of speech and the next day dealing with land rights or LGBTI rights, etc. There are only 12 of us in the world who are country-specific mandate holders and they are for some of the most challenging countries in terms of the protection of human rights. Examples are Cambodia, North Korea, Myanmar, Iran, Syria, Somalia, and Sudan.

The institution of Special Rapporteurs for human rights, known as special procedures, is one of the main mechanisms employed by the UN to protect and promote human rights worldwide. The Office of the UN High Commissioner for Human Rights describes this as “the most directly accessible mechanism of the international human rights machinery.”⁴ The

2 See generally Philip Alston, *Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?*, 52 HARVARD INTERNATIONAL LAW JOURNAL 561, 563-649 (2011); David Weissbrodt, *The Three ‘Theme’ Special Rapporteurs of the UN Commission on Human Rights*, 80 AMERICAN JOURNAL OF INTERNATIONAL LAW 684, 685-699 (1986); Helena M. Cook, *The Role of the Special Procedures in the Protection of Human Rights: The Way Forward After Vienna*, 50 REVIEW OF THE INTERNATIONAL COMMISSION OF JURISTS 31 (1993); Marc J. Bossuyt, *The Development of Special Procedures of the United Nations Commission on Human Rights*, 6 HUMAN RIGHTS LAW JOURNAL 179 (1985); Surya P. Subedi, *Protecting Human Rights Through the Mechanism of UN Special Rapporteurs*, 33 HUMAN RIGHTS QUARTERLY 201 (2011).

3 *Special Procedures of the Human Rights Council*, U.N. HUM. RTS. OFF. HIGH COMM’R, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (last visited May 15, 2016).

4 Office of the U.N. High Comm’r for Human Rights, *United Nations Special Procedures: Facts and Figures 2009*, <http://www.ohchr.org/Documents/HRBodies/SP/factsfigures2009EN.pdf> (last visited May 15, 2016).

UN Special Rapporteurs have long played an important role in promoting and protecting human rights in some of the most at-risk countries, such as those ruled by oppressive regimes and those that face some of the most challenging human rights issues of our times. The institution of rapporteurs has been in existence in some form since the late 1960s.⁵ Various Special Rapporteurs have been appointed since then incrementally and on an *ad hoc* basis by various agencies within the UN system, mainly by the Human Rights Commission until 2006, and since then by the Human Rights Council.⁶

When the international human rights standard-setting process reached a certain height with the adoption of a number of international instruments, the UN program of human rights began to move to the next phase of development characterized by initiatives to implement through reporting, monitoring, and enforcement, the norms enunciated in such instruments. Accordingly, in spite of the principle of non-interference in the internal affairs of States embodied in Article 2(7) of the Charter of the United Nations,⁷ the UN began a process to examine the respective internal situations of human rights in individual countries and to report publicly the findings of investigations. The appointment of Special Rapporteurs with investigative and related powers was one of the mechanisms developed for this purpose.⁸ They are independent UN experts ‘on a mission’ whose primary task is fact-finding and reporting to the UN.⁹

Thus, the appointment of Special Rapporteurs was, as stated by Buerghenthal, an attempt by the UN “to pierce the veil of [the] national sovereignty” of States to handle serious cases of human rights violations.¹⁰ This may be one reason why Kofi Annan, the former Secretary-General of the

5 U.N. GAOR, 13th Sess., ¶ 24, U.N. Doc. A/HRC/13/39 (Feb. 9, 2010).

6 U.N. GAOR, 59th Sess., 56th plen. mtg. at ¶ 291, U.N. Doc. A/59/565 (2004); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶¶ 181-183, U.N. Doc. A/59/2005 (May 26, 2005).

7 U.N. Charter art. 2, ¶ 7.

8 Economic and Social Council Res. 2000/109 (May 27, 1970).

9 INGRID NIFOSI, *THE UN SPECIAL PROCEDURES IN THE FIELD OF HUMAN RIGHTS* 1 (2005).

10 Thomas Buergenthal, *New Customary Law: Taking Human Rights Seriously?*, 87 *AMERICAN SOCIETY INTERNATIONAL LAW PROCEEDINGS* 229, 231 (1993).

UN, described the institution of UN Special Rapporteurs for human rights as the “crown jewel” of the UN human rights machinery.¹¹

In practice, the Special Rapporteurs perform a supervisory, consultative, advisory, or monitoring function, rather than one of enforcement. They are a special UN mechanism of a quasi-judicial nature. Hence, the name itself is “special procedures,” and they are described in common parlance as the UN human rights envoys in many countries around the globe, especially by the media, or as the UN experts within the UN system itself. Indeed, it is an extraordinary mechanism based on the Charter of the United Nations and not on any particular human rights treaty.

The Special Rapporteurs have been crucial in promoting and protecting human rights through not only monitoring and fact-finding, but also standard-setting. They have significantly influenced the elaboration, interpretation, and implementation of international human rights law and have brought the human rights work of the UN to ordinary men and women around the globe. The institution of Special Rapporteurs is indeed a vibrant, autonomous, and flexible mechanism and their work can produce speedy and tangible benefits for the victims of human rights violations and can attract attention to such violations in both the national and international media.

In discharging their responsibilities, Special Rapporteurs receive information on specific allegations of human rights violations and send urgent appeals or letters of those allegations to governments to ask for clarifications. Another major feature of their activity is country visits, which help them investigate the situation of human rights of each country at a ground level. The Special Rapporteurs, especially those holding country mandates, face a huge challenge in meeting the expectations of the populations living under repressive regimes. Moreover, the UN system itself has high expectations from the rapporteurs, and their mandates are

11 *Annan Calls on Human Rights Council to Strive for Unity, Avoid Familiar Fault Lines*, U.N. NEWS CTR. (Nov. 29, 2006), <http://www.un.org/apps/news/story.asp?NewsID=20770>.

formidable. The following six different functions are combined into one package of the functions of Special Rapporteurs:

1. Analyze the relevant thematic issue or country situation, including undertaking on-site missions;
2. Advise on the measures which should be taken by the Government(s) concerned and other relevant actors;
3. Alert United Nations organs and agencies; in particular, the Human Rights Council, and the international community in general to the need to address specific situations and issues (In this regard, they have a role in providing “early warning” and encouraging preventive measures);
4. Advocate on behalf of the victims of violations through measures, such as requesting urgent action by relevant States and calling upon Governments to respond to specific allegations of human rights violations and provide redress; and
4. Activate and mobilize the international and national communities, and the HRC to address particular human rights issues and to encourage cooperation among Governments, civil society and inter-governmental organizations and follow-up to recommendations.¹²

Thus, a Special Rapporteur is expected simultaneously to become a human rights activist, a rallying point for human rights, an international diplomat, an academic, and a government advisor. Special Rapporteurs are selected on the basis of their personal integrity, independence, impartiality, objectivity, expertise, and experience in the area of the mandate.¹³ The key to performing their duties effectively depends on their independent

12 OLIVIER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIAL, COMMENTARY* 964 (2014).

13 *Nomination, Selection and Appointment of Mandate Holders*, U.N. HUM. RTS. OFF. HIGH COMM’R, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Nominations.aspx>.

status and their ability to command respect from different stakeholders in a given society.

A Consultative Group of the Human Rights Council, comprised of five ambassadors to the UN nominated by each regional group of States, draws up a short list of candidates from the nominations or applications received and submit it to the President of the Council who makes a decision to appoint a Special Rapporteur. The President's decision has to be approved by the Council.¹⁴ While country specific Special Rapporteurs are normally appointed for one year at a time, the thematic mandate holders are appointed for a term of three years, renewable for a further term of three years.¹⁵ Special Rapporteurs are high-ranking UN officials who are regarded as being on par with the position of the Assistant Secretary-General of the United Nations for internal practical and logistical purposes. They enjoy certain functional diplomatic immunities and privileges because they are legally classified as "experts on mission" for the purposes of the Convention.¹⁶

3. THE IMPACT OF THE WORK OF SPECIAL RAPORTEURS

There are of course critics who doubt whether the institution of Special Rapporteurs actually produces any tangible results for the victims of human rights violations. Indeed, in the absence of an effective follow-up system, many recommendations of the Special Rapporteurs remain unimplemented. However, the effectiveness of Special Rapporteurs may vary from one situation to another and from one Special Rapporteur to another, depending on the approach they adopt for the implementation of their mandates, the level of expertise and experience that they possess, and the approach that they adopt in implementing their mandate. The overall impact of their work, though, seems to significantly impact the enjoyment of human rights by people around the globe and especially those living under oppressive regimes. Just the fact that someone is watching over their activities makes governments think twice before taking measures against their own citizens. It is harder for governments to violate the human rights

14 *Id.*

15 Human Rights Council Res. 5/1, U.N. Doc. A/60/251, at 45 (June 18, 2007).

16 U.N. Convention on the Privileges and Immunities art. 6, Feb. 14 1946, 1 U.N.T.S. 15 (entered into force Sept. 17, 1946).

of their populations under the watchful eyes of the Special Rapporteurs. This is especially true for countries with a country mandate holder.

The fact that States do not respond formally to the communications by special procedures mandate-holders does not necessarily mean that the communications have no impact. In some cases, the very fact that matters under consideration have been brought to international attention can deter governments from taking questionable actions and galvanize them into positive action. Furthermore, the effectiveness of the work of the special procedures cannot be measured by the rate of response alone. It is the quality of the response that matters. A state may respond, but the response may be no more than a formality.

The effectiveness of the special procedures should thus be measured against the overall impact of their work on the Government, on the victims of human rights violations, the position taken by local human rights organizations, and so on. Even if there is no visible or tangible immediate impact of the work of the Special Rapporteurs, the long-term impact of human rights education and awareness of their work on the population in general in a given country and on the civil society organisations, human rights defenders and the youth in particular cannot be underestimated. Further, effectiveness of the work of Special Rapporteurs should be judged against their mandate and the powers that they have.

4. THE UN MANDATE IN CAMBODIA

The UN human rights mandate in Cambodia is one of the oldest and strongest. However, the nature of the mandate has changed over the years, and I saw it as more of a mandate to assist the Government with the management of transition rather than finger pointing. As a country which has gone through nearly 30 years of conflict, Cambodia has its own challenges in moving forward. “The new UN human rights envoy is welcome to Cambodia, but I hope he will not be as ignorant as his predecessor”¹⁷:

17 Cheang Sokha & Georgia Wilkins, *U.N. Envoy Welcomed, Warned*, PHNOM PENH POST, June 17, 2009, <http://www.phnompenhpost.com/national/un-envoy-welcomed-warned>.

these were the words in the headlines of *The Phnom Penh Post*¹⁸ reported to be from Prime Minister Hun Sen that greeted me upon my arrival in Cambodia on my first mission to the country in June 2009. The relations between the successive UN Special Rapporteurs and the Government of Cambodia had been controversial since the creation of the UN mandate for the country in 1993. The work of the Special Rapporteurs in Cambodia has been a rollercoaster journey for each of the mandate holders since then, and my experience is no different.

a. A Tragic Past

Cambodia is a country still coming into terms with a tragic past of nearly 30 years of conflict created by both internal and external factors. The trials of some of the Khmer Rouge rulers before the hybrid court, which is a national court with international UN involvement, are still ongoing. The Tribunal has already convicted the head of detention and torture camp and two of the most senior leaders of the Pol Pot regime on charges of crimes against humanity.

While the country suffered from the rivalry and proxy war between the major international powers of the day, it also witnessed one of the most brutal regimes of the twentieth century – the Khmer Rouge between 1975 and 1979 – resulting in the huge loss of life and the destruction of the state apparatus. The legal, institutional, and political systems had to be rebuilt

18 See Paris Conference on Cambodian Agreements, Oct. 23, 1991, <http://www.usip.org/publications/peace-agreements-cambodia>; United Nations Transitional Authority in Cambodia, G.A. Res. 46/608, U.N. Doc. A/46/608-S/23317 (Oct. 30, 1991). The Paris Peace Accords of 1991 consist of the following main agreements concluded by 19 countries which included all major powers of the day, the neighbouring countries of Cambodia, some regional powers and other States which had a significant interest in Cambodia: The Agreement on a Comprehensive Political Settlement of the Cambodia Conflict; the Agreement concerning the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia; Declaration on the Rehabilitation and Reconstruction of Cambodia; and Annexes 1 to 5 to the Paris Peace Accords. See: www.usip.org/library/pa/cambodia/agree_comppol_10231991.html.

effectively from scratch when the country began to pull itself together after the end of the Khmer Rouge rule in 1979.

The Paris Peace Accords concluded in 1991 paved the way for political reconciliation and the establishment of a democratic Cambodia.¹⁸ The United Nations Transitional Authority in Cambodia (UNTAC) created under the Paris Peace Accords led the transition. Consequently, Cambodia adopted the 1993 Constitution founded on the rule of law, respect for human rights, the independence of the judiciary, separation of powers, and the democratic governance of the country.¹⁹ However, Cambodia remains a complex country in terms of the protection and promotion of human rights, as democratisation has not yet fully taken root. The major areas of concern are those relating to access to land and housing rights, freedom of expression, and the numerous challenges faced by the judiciary. These issues continue to dominate the legal and political landscape.

b. Bridge-building Act

When I was appointed by the UN Human Rights Council as the UN Special Rapporteur for human rights in Cambodia in March 2009, relations between the previous UN Special Rapporteur and the Government had broken down and the country was heading towards greater authoritarian rule. My predecessor had virtually been declared a *persona non grata*²⁰ by the Government and had difficulty visiting the country. According to the WikiLeaks reports, leaked under the direction of Julian Assange, an Australian Internet activist, the American Ambassador to Cambodia, Carol Rodley, had stated in her sensitive/secret report to the State Department that my predecessor had effectively been banned from Cambodia in March

19 *Constitution of the Kingdom of Cambodia*, WIKISOURCE, https://en.wikisource.org/wiki/Constitution_of_the_Kingdom_of_Cambodia (last modified Nov. 26, 2015).

20 Refers to foreign person whose entering or remaining in a particular country is prohibited. *Persona Non Grata*, WIKIPEDIA, https://en.wikipedia.org/wiki/Persona_non_grata (last modified May 12, 2016).

2008.²¹ There were genuine fears that the country with its tragic past would witness violence yet again.

Given the tragic past of the country and confrontational relations between my predecessors and the Government, I had to tread a careful path when I was appointed. I started to build bridges and restore lines of communications with the Government by adopting a constructive approach, designed to bring about positive results by engaging the Government in reform and employing diplomatic skills to this effect. I billed my first mission as a 'listening tour' or a 'diplomatic mission.'

c. Painting a Picture at a Bigger Canvass

I took a macro rather than a micro approach to tackle human rights problems in Cambodia and gave constructive recommendations to the Government in this regard. My attempt was to paint a picture on a bigger canvass. In fact, this is an approach I take in life generally, whether it is in my academic writing or other activities in life. I have a habit of taking a macro approach to any task at hand, strategically looking at the broader picture, and grappling with the main issues of the day. I do not think that I am a man of details.

Perhaps, being a person born and brought up in a country with towering mountains, I have a natural tendency to see things further afield, on the wider horizon from a hilltop, rather than in the immediate periphery. Therefore, when I began my work in Cambodia, I believed it was important to grapple with the broader picture of the country and decided to examine the whole structure of governance that led to human rights violations rather than to examine myself to examine the situation of human rights in a narrow thematic area, such as freedom of speech, the rights of people with disability, and LGBTI rights. This does not mean that I neglected those issues. I included many of them in my annual reports, but the focus of my attention was improving the system of governance as a whole, with

21 *For Human Rights in Cambodia*, WIKILEAKS, (June. 29, 2009, 10:54), https://wikileaks.org/plusd/cables/09PHNOMPENH426_a.html.

the hope that, by doing so, the overall situation of human rights in the country would improve.

5. THE DEVELOPMENT OF DEMOCRACY IN CAMBODIA

There was a liberal democratic constitution in Cambodia and national institutions that existed to protect the rights of the people. But, human rights violations were a daily occurrence and these national institutions have not been effective in protecting the rights of Cambodian citizens. I thought there was something fundamentally wrong at the heart of governance in Cambodia which led to human rights violations. Accordingly, I proposed to the Government that I would like to examine the effectiveness of the State's institutions responsible for upholding people's rights, such as the judiciary, parliament, national election committee, and national institutions, responsible for land management and resolution of land disputes. Whether the people in the Government understood my approach or not, they consented to it.

I began my work by assessing the whole political structure of the country, and I produced four substantive and substantial reports focusing on the judiciary, parliamentary, and electoral reform as well as on the impact of economic and land concessions on people's lives. Collectively, these four reports provided an analytical picture of democracy, human rights and the rule of law in the country and quickly became a primary source of reference for human rights defenders, UN agencies, donor agencies and the ordinary citizens.

a. Enhancing the Independence of the Judiciary

Not surprisingly, as a lawyer by both training and profession, I thought I should begin my work by examining the effectiveness of the judiciary in Cambodia in protecting people's rights. I examined the ability of the judiciary to deliver justice and to command the respect, trust, and confidence of the people. After conducting two fact-finding visits to Cambodia, focusing on its judiciary, I identified a number of shortcomings in the functioning of the judiciary and made recommendations to address them. The purpose of this assessment was to identify the ways and means of strengthening their capacity to protect and promote human rights. After

my two fact-finding missions, I realised that the reasons why the judiciary was not able to enjoy the reputation it should were manifold. While some of the roadblocks were attributable to the historical legacy of the Khmer Rouge period during which the judiciary was dismantled and judges and lawyers killed, there were a variety of other factors that contributed to it.

First, there was an absence of law on the status of judges and prosecutors that could have provided them with the protection, security of tenure, and independence that they needed to discharge their responsibilities in an effective and independent manner.

Second, the absence of the (subsequently created) “Law on the Organization and Functioning of the Courts” seemed to have a detrimental impact on the effectiveness and independence of the judiciary in impartially reaching justice in a timely manner. The law mentioned above was needed to achieve a degree of unity, cohesion, and certainty within the system of justice. The legal and judicial reform programme, part of the Government’s “Rectangular Strategy,” provided for the enactment of this law, but it had not yet materialised.

Third, many judges and lawyers, particularly of the older generation, seemed to have no proper grounding in the fundamental principles of the rule of law and international legal standards, which are generally expected of a judge. There were relatively few eminent senior jurists in the country. Inadequate legal education or training of judges and prosecutors on the fundamental principles of natural justice, the rule of law, and international standards of fair trial seemed to have contributed to making the judiciary a weak institution in the structure of governance.

Fourth, much of the population seemed generally fearful of courts, partly due to corruption and partly due to the manner in which the court system operated. There were not enough defence lawyers in criminal cases, and the conviction rate was very high. In a significant proportion of cases, the accused were convicted by courts on the basis of their confessions extracted while in police custody, and often while under duress. There were a large number of poor people involved in land disputes, but since they were civil cases, there were no provisions providing legal aid from the State for the poor. There were not enough women police to investigate crimes against women. There were no provisions that provided any proper training in forensic science for the judicial police, prosecutors, or investigating

judges. Because there was no clear differentiation between the prosecutors and judges, Cambodians had difficulty in understanding their roles.

Fifth, corruption seemed to be widespread at all levels in the judiciary. Because no laws needed to protect the judges were in place, the judges were treated as civil servants and seemed to rely on patronage and political protection rather than on the law for the security of their jobs. This had resulted in individual judges' and prosecutors' compromising their independence.

Sixth, judicial proceedings were being used by the rich and powerful in many cases to dispossess, harass, and intimidate the poor as well as their own lawyers and those working for them in the civil society sector.

Seventh, the lack of human, budgetary, and physical infrastructure-related resources seemed to be seriously hindering the work of the judiciary. The judiciary in Cambodia was chronically underfunded, under-resourced, and understaffed. Prosecutors had insufficient funds to order proper scientific investigation of crimes. Hence, the tendency was to rely on confessions extracted from the accused by the judicial police. The judicial police themselves were not properly trained in criminal investigations, and frequently used constraint or force to obtain confessions of guilt.

Eighth, the ratio of lawyers and judges per head of the population in Cambodia was very low. This was particularly of concern in a system where, without lawyers, one cannot have access to court files. What is more, most judgments were treated as confidential. There was only one Court of Appeal in Phnom Penh and the poor could not afford to travel to the capital city for justice. Even the State machinery did not seem to have an adequate budget to transfer inmates to Phnom Penh for their appeal hearings. As a result, many appeal hearings took place without the presence of the accused or even their lawyers.

Ninth, although the Constitution of Cambodia provided for the separation of powers between the three main organs of State, in practice, the distinction between these organs was blurry; the executive branch dominated the judiciary whether by providing resources to the judiciary or in making appointments to various judicial positions. This remained a key challenge for the country in implementing the rule of law and in promoting and protecting people's rights.

On the basis of the above analysis, I wrote a report on enhancing the independence and capacity of the judiciary and made a series of recommendations to the Government including enacting three different sets of

laws to this effect. I recommended that two new laws, namely the “Law on the Status of Judges and Prosecutors” and the “Law on the Organization and Functioning of the Courts,” should be enacted, while the “Law on the Organization and Functioning of the Supreme Council of Magistracy” should be amended.²²

b. Parliamentary Reform

After examining the judiciary, I turned my attention to Parliament, which had been operating basically as a rubber-stamp institution subservient to the all-powerful executive. The Cambodian Parliament faced the same institutional and structural upheavals that the country as a whole faced in the preceding 40 or so years. Like the judiciary, Parliament and parliamentary culture had to be rebuilt from scratch, following the systematic destruction of all democratic institutions during the Khmer Rouge period. After conducting two further fact-finding missions, I identified a number of shortcomings in the workings of Parliament in general and the National Assembly in particular.

Many bills were being rushed through the Assembly without a proper debate. The tightly controlled system of adopting laws in the Assembly had meant, in practice, that amendments were rarely accepted at any stage of the process. This highlighted the limited effectiveness of the Assembly in scrutinizing legislation prepared by the executive. Furthermore, a number of pieces of legislation adopted had tended to narrow the scope of human rights. Overall, the ability of Parliament in Cambodia to restrain this executive tendency had been limited.

A key obstacle was the lack of a properly functioning parliamentary culture. The notions of pluralism and liberalism enshrined in the Constitution were designed to ensure space for all to participate in the process of democratization and nation building. However, there was an absence of a culture of debate and discussion, as well as political will to foster a climate that was conducive to constructive dialogue and acceleration of the process of democratization of Cambodian society.

In my opinion, parliament is the soul of democracy. For democracy to work properly, all individual members of parliament should be able to

22 Surya Subedi, *Special Rapporteur on the Situation of Human Rights in Cambodia*, U.N. Doc. A/HRC/15/46 (Sept. 14, 2010).

exercise their freedom of speech in the course of discharging their official duties. It is a fundamental condition for a member of parliament to be able to speak his or her mind without fear. Democracy is about dialogue and debate on all issues of national importance, and this is especially so in the case of a parliament, which by definition is a chamber where members can debate freely any issues of national importance.²³ It is for this reason that they have been accorded parliamentary immunity.

However, some of the internal rules of procedure of the National Assembly were not conducive to enabling all individual members to enjoy their freedom of speech when holding the executive to account and defending the rights of the people that they represent. The scope for Members of Parliament in Cambodia to participate in parliamentary debate had been limited and the parliamentary immunity of a number of Members of Parliament had been lifted, even for speaking out on issues of national importance. Further, many of these members had not been given an opportunity to make a representation in their defence, which goes against the basic principles of natural justice.

A properly functioning democracy requires effective checks on the executive and on the majority. However, some of the provisions of the Law on the Status of National Assembly Members seemed to go beyond the freedom of speech guaranteed to members through the Constitution.

Ministers rarely attended the meetings in Parliament to answer questions from Members of Parliament. The Members of Parliament belonging to the main party in opposition and some other minority parties were virtually cut off from the law-making process. The Cambodian People's Party, with its large majority in the National Assembly, had a tendency to ignore the political role of other parties. The opposition party and many other minority parties complained that they were treated by the ruling party as an enemy of the State rather than as political partners with differing views. Although the Constitution required a secret ballot for important decisions in Parliament, most important decisions in the National Assembly were taken on the basis of bloc voting and by show of hands so that the Government could identify the people voting against any of its motions.

23 *Id.* at 5.

The individual members of Parliament seemed therefore to lack the courage to vote independently or against proposals tabled by the Government.

An individual Member of Parliament was not able to speak in Parliament without going through a group leader and without getting the permission to do so from the President of the National Assembly. These rules had the effect of denying Members of Parliament belonging to minority parties with fewer than 10 seats any meaningful role in Parliament. For the reasons outlined above, the role of Parliament had been limited to overseeing the work of the executive. With this in mind, I made a series of recommendations for parliamentary reform designed to enable members of parliament to hold the executive to account for violations of human rights and to protect the rights of the electorate.²⁴

c. Electoral Reform

After my work on parliamentary reform, the focus of my activity was on electoral reform. This is because free and fair elections underpin respect for international human rights norms. Indeed, Article 25 of the International Covenant on Civil and Political Rights (to which Cambodia is a State party) provides that everyone has the right to take part in the conduct of public affairs in the country, and to vote (and to be elected) “at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”²⁵

The Constitution of Cambodia firmly establishes the country as a liberal democracy, and elections are central to democracy.²⁶ During my fact-finding missions, I received a large amount of information from people and institutions, including allegations of irregularities or systemic problems that undermined the country’s ability to hold free and fair elections. I carried out my own independent assessment of the situation. I argued that reforms should be carried out to ensure that elections in Cambodia are free and fair and that Cambodians can exercise their right to democratic governance in a free political environment. I stated that free and fair elections could take place only when there is a free political environment and

24 U.N. GAOR, 18th Sess., 33d plen. mtg., U.N. Doc. A/HRC/18/46 (Aug. 2, 2011).

25 International Covenant on Civil and Political Rights art. 25, *opened for signature* Dec. 16, 1966, 6 U.S.T. 3518, 999 U.N.T.S. 171.

26 U.N. GAOR, 21st Sess., 32d mtg. at 4, U.N. Doc. A/HRC/21/63 (July 3, 2012).

the people are able to exercise their rights and freedoms, such as freedom of expression and assembly, as well as the freedom to stand for election. To hold credible elections, the Government must ensure high standards in line with its international human rights obligations before, during, and after the casting of votes. It must also ensure the independence of the National Election Committee.

There were major flaws in the administration of elections in Cambodia and urgent and longer-term reforms were needed to give Cambodians confidence in the electoral process and in the workings of the National Election Committee. Accordingly, I made a series of recommendations for electoral reform. The main one was to grant constitutional, independent, and autonomous status to the National Election Committee. My key recommendations were as follows:

1. The National Election Committee should have independent and autonomous status in the constitutional and legal structure of Cambodia, with its own independent budget allocated by the Parliament. The President and members of the Committee should be drawn from a pool of retired senior judges, senior and distinguished members of the Cambodian bar and senior professors of law, politics and public administration.
2. There should be consensus among the major political parties represented in the Parliament on the appointment of the president and members of the National Election Committee and the provincial election committees.
3. The President and members of the National Election Committee and the provincial election committees should be appointed for a fixed term and have security of tenure. They should be barred from holding positions in political parties during and up to two years after the expiry of their terms of office.
4. All major political parties should have fair and equal access to the mass media to convey their messages to the electorate.
5. The Government must ensure that all civil servants, police and military personnel do not participate in political activities or use

Government resources while working in their official capacities, and that neutrality is paramount.

6. The leader of the opposition should be allowed to return to the country from his exile in France to participate in the political process in the country and this was crucial especially in the run-up to the general elections.²⁷

It was after I submitted my report on electoral reform with the above recommendations that I faced the wrath of the Government. Undeterred from my mission, I responded to the criticisms from the Prime Minister in a diplomatic and professional manner which seemed to then put the Prime Minister back from an aggressive position into a defensive one.

d. Land Reform

The issues associated with land and housing rights are rather unique in Cambodia. Most of the issues concerning land management and the evictions of people from land are the result of one of the most horrendous human tragedies of modern times, i.e., the movement of people in huge numbers from east to west and from north to south in search of sanctuary during the conflict in Cambodia. Millions were forced to leave the capital, and other cities and towns during the rule of the Khmer Rouge, while many other millions were traumatized by the conflict fled from their homes to save their lives.²⁸ The situation was further complicated when the notion of the communal ownership of land was introduced during the period between 1979 and 1989.²⁹

When relative peace returned to Cambodia, people from the countryside began to return to their homes and land, and those who had gone abroad to seek refuge also began to come back. However, many had lost evidence proving their ownership of such property. During the rule by the Khmer Rouge, nobody was allowed to own anything. Official records were systematically destroyed, and lawyers and surveyors were killed, to make

27 *Id.* at 16.

28 Surya Subedi, *The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country*, 15 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 249, 252 (2011).

29 *See supra* note 25, at 8-9.

way for the so-called the “new society”. Thus, the task of land management and land titling was, and is still, a mammoth one in the country.

However, the manner in which the authorities dealt with the urban poor, those on the margins of society, and the indigenous communities, had been haphazard. The Government had no proper national guidelines on land evictions. Although there seemed to be some politicisation of eviction issues and some of the problems may have been created by the so-called land-grabbers and land speculators, many of the evictions by the authorities had been rather heavy-handed, favouring the rich at the expense of the poor. Although the Government had gone to great lengths to protect the interests of the urban poor, it had not followed international human rights standards in evicting people from disputed land sites; nor had the Government followed the provisions of the 2001 Land Law in doing so.³⁰ The Government was slow in distributing land titles to possible owners and quick in evicting them from sites designated for developmental purposes, regardless of whether they had possession rights under the law.

The issues associated with land rights disputes and evictions were the number one human rights issue in Cambodia so far as ordinary citizens were concerned, and it continued to dominate the headlines in the media in Cambodia. The manner in which land was managed and used by the Government for various purposes continued to be a major problem. Land-grabbing by those in positions of power was a common occurrence. Economic land concessions leased to companies and other land transactions had severe consequences for the rural and urban poor, as well as for indigenous people. For instance, in 2009 alone, at least 26 evictions displaced approximately 27,000 people in Cambodia.³¹

The 2001 Land Law did provide a legal framework to deal with issues of land ownership, but there have been problems in implementing this law properly. Therefore, during my mission in the country, delegations after delegations, both large and small that consisted of members from some of the most vulnerable sections of society, came to see me with their petitions

30 *Land Law_010430*, COUNCIL FOR DEV. CAMBODIA, CDC, http://www.cambodiainvestment.gov.kh/land-law_010430.html (last visited May 15, 2016).

31 *Overall Status of Economic Land Concession in Cambodia*, MINISTRY AGRIC., FORESTRY, AND FISHERY FOR FOOD SEC. AND SUSTAINABLE DEV., <http://www.elc.maff.gov.kh/index.php/news/8-overal-status-of-economic-land-concession-in-cambodia> (last visited Apr. 24, 2016).

urging me to intervene to protect their rights. The issues they raised related to land concessions, including forced evictions, poorly planned resettlement and relocation, environmental destruction, unsustainable exploitation of natural resources, and threats to indigenous peoples' livelihood, culture, and traditions, among others.

An increasing number of cases also came to my attention in which individuals and communities (claiming their rights to land), land activists, and other human rights defenders have been harassed, threatened or criminalized based on challenges to the granting and management of economic and other land concessions. It was against this backdrop that I decided to focus two of my missions on examining the situation of land and housing rights in general and the human rights impact of economic land concessions in particular.

The objective was to have a fresh look at the human rights challenges posed by land concessions in light of the rapid growth in the number of concessions granted to both national and foreign companies and the detrimental impact of such concessions on the lives of the people. On the basis of an extensive fact-finding mission which focussed on the human rights impact of economic land concessions I submitted a detailed report analysing the breadth, depth and gravity of the issues and included a series of recommendations to improve the situation.

I acknowledged that historical circumstances, including the policies of the Khmer Rouge regime and the widespread destruction and dislocation left in the wake of Cambodia's lengthy civil war, had led to the proliferation of land disputes that the Government was trying to manage. I also stated that Cambodia, as a developing country, might wish to prioritize utilization of its land and natural resources in order for the country to develop and become more prosperous. Nevertheless, I stated that land concessions should be granted and managed within a sound legal and policy framework, including due consideration for and consultation with those who are affected, and with the sustainable use of natural resources in mind.

I pointed out that the majority of the challenges I have identified in the report derived from a failure to apply the domestic legal framework – that is, the laws, policies and regulations. Consequently, the granting and management of economic and other land concessions in Cambodia suffered

from a lack of transparency and adherence to existing laws. Accordingly, my key recommendations to this effect were as follows:

1. The Government should be rigorous and transparent in granting and monitoring land concessions, especially when negotiating concession agreements with both foreign and national companies, avoiding conflicts of interest, and holding concession companies to account by exercising oversight over their activities and resolving land disputes.
2. The Government should make information available concerning land investment, land deals and bidding processes, review of proposals for land concessions and future plans publicly accessible.
3. The Government should make available information on the systematic mapping, classification and registration of state public and private land and create and maintain a state land database. Information on the allocation, management and reclassification of state land should be made available in accordance with the existing laws.
4. Companies of all sizes, structures and modes of operation, both domestic and foreign, and whether wholly or partly owned by the State, should address their human rights impact by practicing due diligence, including implementing measures to identify, prevent, and mitigate adverse human rights consequences and account for their business activities.
5. In the case of foreign-owned companies, the home States should ensure that representatives of private business enterprises under their jurisdiction do not contribute to adverse human rights impacts by regular monitoring and oversight.
6. Evictions and resettlement should only be used as a last resort, and a moratorium on forced evictions should be in place in relation to all concession activity. When due process has been followed and eviction has been deemed to be legal and in the public interest, affected families should be consulted on how and when the relocation will occur and all efforts made to ensure it is carried out under conditions that adhere to international human rights standards related to adequate housing and fair and just compensa-

tion. Additional efforts should be made to reestablish livelihood opportunities.

7. In the case where a land concession has been granted on the land traditionally occupied and used by indigenous peoples, restitution should be provided and the land reinstated, with the opportunity for the communities to register as legal entities and apply for communal land title.
8. The court system should not be used as a mechanism to criminalize land activists, individuals making claims for their land, human rights defenders and local authorities.³²

This report on the human rights impact of economic land concessions was welcomed by the development partners of Cambodia and civil society. After criticising me for some of the conclusions that I reached about the real benefits of the economic land concessions for the people of Cambodia, the Government started to appreciate the report on the whole and started implementing some of the recommendations that I had made.

6. IMPACT OF MY WORK

It is difficult to measure the impact of the work of any Special Rapporteur. This is because while some impact is visible and short-term, others are not easily visible and may have a longer-term impact. Furthermore, along with the Special Rapporteur, various other stakeholders would be working on any given human rights issue. Thus, any change in the Government's policy or any positive action generally would be the result of a collective endeavour. Having said this, the Government of Cambodia takes seriously what its Special Rapporteur does or says in public. Often, the response from the Government to any criticism of governmental policy is quick and is made through the media. On most occasions, the Prime Minister himself reacts to the work or comments of the Special Rapporteur; on other occasions it is the Foreign Minister³³ or the spokesperson of the Ministry of Foreign

32 U.N. GAOR, 21st Sess., U.N. Doc. A/HRC/21/63/Add.1 (Sept. 24, 2012).

33 *Hor Nam Hong: By Keeping UN in Cambodia, We Want Further Enhancement of Democracy and Human Rights*, KAMPUCHEA THMEY DAILY NEWSPAPER, Jan. 25-26, 2015.

Affairs or of the Cabinet. It could also sometimes be another leading figure within the ruling political party – Cambodian People’s Party (CPP) – who would express the views of the Cambodian Government.

Major powers and other international development partners, including human rights organisations and other sections of civil society, have referred to my work in formulating their own policies concerning Cambodia.³⁴ For instance, according to the reports leaked by WikiLeaks, the American Ambassador to Cambodia, Carol Rodley, stated in her secret and sensitive report to the State Department assessing my work in the country that I was “off to a better start than could be expected” and she “was glad to see [my] optimism because it would be needed.”³⁵ Both members of the Government and in the opposition have picked and chosen bits and pieces from my report for their own purposes. The media, too, have done the same, selecting those snippets from my reports and statements that fit into their news stories and to support their own perspectives.³⁶

International organizations have also referred to my reports in their work on Cambodia. For instance, the Inter-Parliamentary Union (IPU) made a reference to my report to the Human Rights Council in expressing its own concern³⁷ when the leader of the opposition in Cambodia was sentenced to 10 years’ imprisonment on some politically motivated charges. The IPU went on to urge the Government of Cambodia to “heed the recommendations made by the United Nations Special Rapporteur on the situation of human rights in Cambodia.”³⁸ Similarly, the World Bank froze new loans in 2011 to Cambodia when many other stakeholders and

34 Letter from Lady Catherine Ashton & Karel de Gucht, Head of EU’s Foreign Affairs Div. & EU Trade Comm’r, to Members of Eur. Parliament (May 15, 2013) (on file with author).

35 *For Human Rights in Cambodia*, *supra* note 21.

36 *Cambodia’s Politics: The Vision Thing*, *ECONOMIST*, July 19, 2014, <http://www.economist.com/news/asia/21607876-opposition-does-not-know-what-do-except-obstruct-vision-thing>; David Pilling & Michel Peel, *Cambodia: Wave of Discontent*, *FINANCIAL TIMES*, July 29, 2014, <https://next.ft.com/content/b01c354e-13f2-11e4-8485-00144feabdc0>; *UN Envoy Rebukes Cambodia Over Shooting of Protesters*, *BBC*, May 10, 2012, <http://www.bbc.co.uk/news/world-asia-18015436>.

37 Governing Council of the Inter-Parliamentary Union [IPU], 187th Sess., *CMBD/01* (Oct. 6, 2010), <http://www.ipu.org/hr-e/187/Cmbd01.htm>.

38 *Id.*

I highlighted the plight of the people who were forcibly evicted from their lands and homes in the Boeung Kak Lake located in the middle of the city of Phnom Penh to make way for foreign investors to commercially develop the area. It considered unfreezing the loans when the situation of human rights in the country improved, especially after a political deal was reached between the Government and the opposition party.³⁹

a. Policy Impact

After I produced four substantial and substantive reports on judicial, parliamentary, and electoral reform and on the impact on human rights of economic and other land concessions in the country, I came under criticism from the Government. I had, in my reports, called for sweeping reforms to ensure the independence of the judiciary and free and fair elections in the country - this did not go down well with the Government. Government officials and others often asked why I was recommending the reform of institutions that were not broken. I was told that there was nothing wrong, for instance, with the National Election Committee. However, as the date of the Cambodian parliamentary elections drew closer in 2013, and when the elections took place, the veil was lifted and its weaknesses were exposed. I received widespread support both at the national and international level, including from President Obama, in my dealings with the Cambodian Government.

While making the first ever visit by a U.S. President to Cambodia in November 2012 to attend the U.S.-ASEAN summit meeting in Phnom Penh, President Barack Obama called Cambodia's lack of respect for fundamental freedoms an 'impediment' to deeper relations between the two countries, adding that countries that do not uphold certain universal principles, such as respect for human rights, will have more difficulty integrating with

39 *World Bank Mulls Funds*, PHNOM PENH POST, Nov. 12, 2014, at 1; *See also World Bank Promises Meetings Before Ending Funding Freeze*, CAMBODIA DAILY, Nov. 19, 2014, at 4.

the international community.⁴⁰ Similarly, the European Parliament,⁴¹ the Inter-Parliamentary Union (an inter-governmental organisation of national parliaments of 162 countries),⁴² and the Senates of Australia⁴³ and the Philippines⁴⁴ passed resolutions calling on the Cambodian Government to implement my recommendations. It was a rare display of international support for my work which made the Government reconsider its position.

Nevertheless, the general elections in July 2013 went ahead without implementing my recommendations for electoral reform. Consequently, the opposition party refused to accept the results which had declared the ruling party the winner and started a campaign of protests which was gaining momentum and receiving widespread support. Alleging electoral irregularities in the July 2013 general election and challenging the independence of the National Election Committee, the opposition party members refused to take their oath of office to join parliament and took to the streets.

As soon as the world was preparing to welcome and celebrate the New Year 2014, the scale of demonstrations in Cambodia had increased resulting in violence. Five people were killed in clashes with the police and military police on the 4th of January. As a result, I decided to issue a strong statement condemning the Government for using live ammunition against peaceful demonstrators. I had to act fast and issue the statement that very day to maximize its impact by putting the Government on notice and under the international spotlight. Thankfully, Cambodia being 7 to 8 hours ahead of us, I had the time to receive information, verify the facts, digest them and react immediately. National and international media picked up

40 *Rapporteur Backed: Rights or a Rough Ride, Warns U.S.*, PHNOM PENH POST, Dec. 14, 2012 (reporting that the U.S. State Department in a letter sent on behalf President Obama to a group of leading U.S. senators concerned about the situation of human rights in Cambodia stated that the U.S. had called on the Cambodian Government to heed the recommendations of Professor Subedi).

41 2014 O.J. (C 72) 6.

42 Governing Council of the Inter-Parliamentary Union [IPU], 191st Sess., CMBD/01 (Oct. 24, 2012), <http://www.ipu.org/hr-e/191/cmbd01.htm>.

43 Commonwealth, Senate Daily Summary, 29 Oct. 2012, 3152 (Austl.).

44 S. Res. 130, 15th Cong. (2012) (Phil.).

my statement quickly. Soon after issuing this statement, I was heading to Cambodia on my fact-finding mission.

Concerned perhaps by the consequences of my visit for the people in power, I was informed that the Prime Minister together with more or less the entire cabinet would meet with me since the situation in the country was very grave indeed. When I reached Phnom Penh, large number of people took out a rally and came to see me with a petition. The opposition party requested me to act as a mediator to resolve the political deadlock in the country.⁴⁵ I had a meeting with the Prime Minister and most of his cabinet colleagues for three and a half hours in the main meeting hall of the Council of Ministers, where I boldly and strongly delivered my message and concerns to Prime Minister, Hun Sen, and his Cabinet colleagues.

I said what the Government had done did not meet the tests of proportionality, legality, and necessity and called for a thorough, credible, and independent investigation into the deaths of peaceful demonstrators.⁴⁶ I reiterated that unless and until there was a clear commitment to carry out the reforms that I had suggested, the country would be witnessing more violence. It was at that meeting that the Prime Minister agreed to many of my recommendations relating to the judicial, electoral, and other political reforms.

The Prime Minister asked me to convey his message of reconciliation to the leaders of the opposition which I did. Thus, much of the time spent during my visit to Cambodia was acting as some sort of an informal mediator⁴⁷ to achieve political reconciliation, and I believe I achieved a great deal during this time. I felt vindicated and came back to Leeds satisfied. Working from England, I thought I had influenced the political course of history in Cambodia. The leaders of the ruling party and the opposition

45 Heng Reaksmey & Sok Khemara, *UN Envoy Says He Would Consider Mediating Political Talks*, VOA CAMBODIA (Jan. 16, 2014), <http://www.voacambodia.com/content/un-envoy-says-he-would-consider-mediating-political-talks/1831431.html>.

46 Lauren Crothers & Khy Sovuthy, *Subedi Calls for Accountability in Meeting With Hun Sen*, CAMBODIA DAILY (Jan. 16, 2014), <https://www.cambodiadaily.com/archives/subedi-calls-for-accountability-in-meeting-with-hun-sen-50675>.

47 Heng Reaksmey, *Hun Sen Asks UN Envoy To Mediate Political Talks*, VOA CAMBODIA (Jan. 16, 2014), <http://www.voacambodia.com/content/hun-sen-asks-un-envoy-to-mediate-poli/1830750.html>.

struck a deal on July 22, 2014 to end the political deadlock in the country, and the deal included a commitment to carry out the electoral reform that I had recommended.⁴⁸ The leader of the opposition in Cambodia wrote to me on August 6, 2014 stating that:

I want to thank you for your guidance, especially over the last twelve months. Without your insightful recommendations and your discreet and tactful intervention, Cambodia wouldn't have seen this end to the political crisis. However a historic challenge still lies ahead. To ensure the success of a difficult but necessary reform process in the key sectors you have addressed in your reports Cambodians from all political affiliations need your constant support and that of the United Nations.⁴⁹

He also wrote to me on June 9, 2011 stating that he deeply appreciated my "continuous effort to promote democracy and defend human rights in Cambodia. The Khmer people are very lucky to have a friend like you."⁵⁰

Of course, there were periods of despair when the leader of the opposition was in exile in France due to politically motivated charges, a prominent human rights activist and director of an independent radio station was imprisoned, there were attempts to silence dissent from many quarters, including through assassinations, and I myself was subjected to orchestrated harassment. But I remained persistent, objective, independent, and impartial in the implementation of my mandate, which I continued to fulfill in a constructive manner and things began to take a turn for the better. I received the support of the international community and civil society organizations in the country. I was humbled by the overwhelming support I received, particularly from the youth, many human rights defenders, and the friends and well-wishers of Cambodia.

Owing to the endeavours of those fighting for human rights, including myself, the leader of the opposition was able to return to the country to

48 Press Release, Office of the U.N. High Comm'r for Human Rights, Cambodia: UN human rights expert hails political breakthrough, calls for promised reforms, U.N. HUM. RTS. OFF. HIGH COMM'R (July 22, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14892&LangID=E>.

49 Letter from Sam Rainsy, President, Cambodia Nat'l Rescue Party, to author (Aug. 6, 2014) (on file with author).

50 Letter from Sam Rainsy, President, Cambodia Nat'l Rescue Party, to author (June 9, 2011) (on file with author).

participate in the political process following a royal pardon,⁵¹ a number of leading human rights defenders were released from prison, and the Government returned to a normal mode of cooperation with my mandate. After a year of protesting against alleged electoral irregularities, opposition party members joined the National Assembly, and the Government accepted the rationale for electoral reform contained in my reports. Accordingly, on October 1, 2014, the National Assembly passed a bill turning the National Election Committee into a constitutional body and implementing one of my key and long-standing recommendations.⁵²

With regard to judicial reform, three long overdue fundamental laws were enacted in the autumn of 2014. They were the “Law on the Status of Judges and Prosecutors,” the “Law on the Organization and Functioning of the Courts,” and the “Law on the Organization and Functioning of the Supreme Council of Magistracy.” Although these laws are by no means perfect, I believe that they provide a framework for improvement in the future. Therefore, I welcomed the enactment of these three laws, but pointed out the lack of consultation with civil society and transparency in the process of enacting these laws.⁵³

Regarding land reform, one of the first concerns I expressed to the Government was the absence of an adequate package of compensation or resettlement policy for the people evicted from land. Soon after my first mission to the country, I was told that the Government had put in place a package of compensation for the people evicted from their land. Although the amount of compensation was still very small, nonetheless, this was a positive step in the right direction. One of the ideas that I championed and which was supported by the UN Human Rights Council was to encour-

51 Royal Decree No.NS/RKT/0713/827, July 12, 2013 (Cambodia).

52 Hul Reaksmeay, *Lawmakers Enshrine Election Panel in Constitution*, CAMBODIA DAILY (Oct. 2, 2014), <https://www.cambodiadaily.com/archives/lawmakers-enshrine-election-panel-in-constitution-68826>. The bill table before parliament was sent to my office by the Secretary-General of the National Assembly on 22 August 2014.

53 Press Release, Office of the U.N. High Comm’r for Human Rights, Cambodia: Lack of Consultation on key laws sets worrying pattern for future legislation, warns UN expert, U.N. HUM. RTS. OFF. HIGH COMM’R (May 27, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14648&LangID=E>.

age the Government to put in place national guidelines on evictions and resettlements and some sort of guidelines are now in place.

Similarly, when I called upon the Government to impose a moratorium on the granting of economic and other land concessions until there was a proper policy and legal framework to ensure that such concessions did not undermine people's rights, the Government issued a decree in May 2012, during my visit to the country that focused on examining the human rights impact of economic land concessions, announcing a moratorium on new concessions, and pledging to review the existing concessions.

In August 2014, the Government decided to establish an inter-ministerial commission to examine, demarcate, and assess the economic land concessions already granted to private companies, whether foreign or national.⁵⁴ By October 2014, the Government had cancelled eight of the economic land concessions.⁵⁵

So far as freedom of expression is concerned, one of the foci of my oral statement delivered to the Human Rights Council on October 1, 2010 was on the need to decriminalise defamation and disinformation altogether in Cambodia. When the National Assembly adopted the new Penal Code later that month, there was no longer a prison sentence for defamation, even though the new Code had not gone far enough to meet the obligations of Cambodia under international law and practice.⁵⁶

The work of my predecessors and myself, as well as of many national and international human rights organisations, had laid emphasis on the need to decriminalise defamation and disinformation. Addressing the Human Rights Council in October 2009 I had expressed concern about the reported instances of lawsuits against the opposition party leaders brought by the Government and had requested further information about such cases. The Government responded to the communication by stating that they had taken such measures in compliance with the rule of law, implying reliance on the existing laws in the country.

However, the concern that I expressed was that the laws in question themselves fell short of the standards required by international human

54 Sub-Decree No. 245 ANK/BK, Sept. 9, 2014 (Cambodia).

55 Phak Seangly, *Land concessions cancelled*, PHNOM PENH POST (Oct. 17, 2014), <http://www.phnompenhpost.com/national/land-concessions-cancelled>.

56 CRIMINAL CODE bk. 2, tit. 2, ch. 6, § 2, art. 305 (Cambodia).

rights treaties and practice. In other words, in my view, the laws went beyond what is a permitted level of restriction on freedom of expression under the 1966 International Covenant on Civil and Political Rights. I went on to state that regardless of what the practice may be in any given country, whether a more established or less established democracy, the spirit of the provisions guaranteeing freedom of speech in international human rights treaties is to treat any matters relating to restrictions on such freedom, including defamation issues, under civil law rather than under criminal law, unless such matters are of a grave nature and thus, pose a threat to national security or public order in the country concerned.

I know there are a number of colleagues at Leeds Law School, including Professor Mullis, who are experts in this area, and they may have different views on this matter. But, what I was advocating in Cambodia was on the basis of international standards and the general comments issued by the UN Human Rights Committee on the provisions concerning freedom of speech in the 1966 Covenant on Civil and Political Rights.

Overall, when I concluded my mandate, things looked cautiously optimistic. It remains to be seen how sincerely and swiftly the promised reforms will be carried out in practice. There are a number of other serious human rights issues that remain unresolved. For instance, the list of impunity cases is long and growing. Little has been done to bring perpetrators to justice.

The peaceful transition now underway remains fragile. Many of the issues surrounding land rights remain unresolved, and the people on the margins of society continue to suffer from serious violations of their rights. However, without a doubt, the most significant change since July 2013 is that the Cambodian people have found their voice. It is my belief that Cambodia is on the cusp of historical change.

b. Examples of Other Direct Impact

I believe that my sustained efforts have brought about other tangible results for the people of Cambodia, including the release of a prominent journalist and human rights defender, Mr. Mam Sonando from prison in March 2013, better treatment to another leading journalist in a prison in the outskirts of Phnom Penh, and the return of the leader of the opposition party, Mr. Sam Rainsy, from his long exile in Paris in July 2013. Mr. Rainsy's return

was allowed under a royal pardon that was made in time, allowing him to participate in the country's elections, which took place that year.⁵⁷

I have also been credited for dissuading the Government of Cambodia from enacting a restrictive law on NGOs,⁵⁸ persuading the Government to impose a moratorium on economic land concessions that have a detrimental impact on human rights, and encouraging the Government to enact a law on expropriation to provide compensation to people affected by land evictions.⁵⁹

During my second mission to Cambodia in January 2010, I went to visit two journalists imprisoned on charges of defamation in the main prison, known as Central Correctional Centre 1 (CC1), in the outskirts of Phnom Penh. They were Mr. Hang Chakra and Mr. Ros Sokhet. When I met the Minister for Interior after the prison visit, I urged him to explore ways of releasing them from prison, arguing that in a democracy they would not be imprisoned for criticising the policies of the Government or of Government Ministers. Three months later, Mr. Hang Chakra was released from prison after being pardoned by the King of the country to mark the Khmer New Year in April 2010.

During my visit to the prison, I made a direct appeal to the prison Governor to improve the conditions under which these men were held in the prison. The day on which I completed my second mission to the country, the sister of Mr. Ros Sokhet published a letter in the main national daily newspaper of Cambodia, *The Cambodia Daily*, under the title "UN Envoy

57 Letter from Mam Sonado to author (on file with author); Letter from Sam Rainsy, President, Cambodia Nat'l Rescue Party, to author (on file with author); Letter from the editor of a main national daily English newspaper to author (on file with author).

58 Sen David & Vincent Maclsaac, *Government makes U-turn on NGO law*, PHNOM PENH POST (Oct. 28, 2011), <http://www.phnompenhpost.com/national/government-makes-u-turn-ngo-law>.

59 Mark Tran, *UN expert calls on Cambodia to amend draft NGO law*, GUARDIAN (London) (Sept. 28, 2011), <http://www.theguardian.com/global-development/2011/sep/28/special-rapporteur-cambodia-draft-ngo-law>; Mark Tran, *UN urges Cambodia to hold companies to account over land disputes*, GUARDIAN (London) (May 14, 2012), <http://www.theguardian.com/global-development/2012/may/14/un-cambodia-companies-land-disputes>.

should be praised for helping imprisoned journalist.”⁶⁰ Since the prison Governor had started to accord both of them much better treatment from the day I visited these journalists.⁶¹

7. MY APPROACH TO IMPLEMENTING THE UN MANDATE

Many people both within and outside of the UN have asked me what are the lessons that we can draw for the institution of UN Special Rapporteurs from my experience as the longest serving rapporteur for Cambodia. Therefore, without meaning to be self-publicising or self-aggrandising, I would like to, if I may, outline my own experience and the approach that I adopted in discharging my mandate. I believe the reason I was able to accomplish as much as I did in Cambodia and lasted in the UN mandate for the country as long as I did, i.e. full six years, and more than any of my predecessors was down to the following factors:

First, I took a constructive approach. In other words, I went beyond naming and shaming to offering suggestions. I saw it as more of a mandate to assist the Government with the management of transition rather than finger-pointing. It is not easy to go to a sovereign country and tell the leaders of that country what the shortcomings are in their system of governance. But this is the job of a Special Rapporteur for human rights. If the task of pointing out the shortcomings is coupled with friendly constructive recommendations one can keep them engaged in the dialogue.

Second, I carried out thorough fact-finding missions into the country, making sure that I could not be challenged on my factual accuracies. Third, as an international lawyer, I took a professional approach to the human rights problems facing Cambodia. I was principled and resolute in my approach, and I believe people across the board respected me for what I stood for. I maintained my objectivity, impartiality, and independence throughout my tenure. I tried to play the role of an international diplomat,

60 Ros Rada, *UN Envoy Should be Praised for Helping Imprisoned Journalist*, CAMBODIA DAILY, Jan. 29, 2010, at 12.

61 TED PICCONE, CATALYSTS FOR RIGHTS: THE UNIQUE CONTRIBUTION OF THE UN'S INDEPENDENT EXPERTS ON HUMAN RIGHTS 15 (2010).

a human rights activist, a human-rights law academic, and a government adviser – simultaneously.

Fourth, utilizing the flexibility of the UN mandate, I went on to define my own mandate and implemented it in the manner I thought it would be most effective. Fifth, rather than regarding myself solely as a human rights envoy focussed narrowly on thematic, technical, and mechanical aspects of human rights I took on the role of a political envoy as and when I deemed desirable to do so, expanding the scope of my work, and dealt with the totality of the political picture which had direct bearings on human rights. After all, we all know there is a very fine line between politics and human rights.

Sixth, I selected the areas for closer examination for which I thought I was most suited in terms of my expertise and background. I knew that the institution of Special Rapporteurs was a weak mechanism, but it was a mechanism which could show direction. Therefore, I chose the areas which I thought needed the most attention and at the same time the areas in which I could act most effectively.

Seventh, when making my case to reform State institutions that are responsible for upholding people's rights, I relied on a comparative analysis that I had carried out in a number of other developing countries from different continents with better and stronger democracies, such as Philippines, India, South Africa, Ghana, and Brazil. I knew that it would not go well in Cambodia if I said that the British or the French or the Americans did things in this way. I also drew on my own experience of work during my earlier career for the Royal Commission on Judicial Reform in Nepal, a country that is similar in so many respects to Cambodia.

Eighth, I sought to engage myself with the Government through conversations rather than isolate myself from the Government. I also maintained my diplomatic decorum and professionalism even when I came under unfair criticism and bias from the Government. So much so, even when I was harassed and intimidated by the Government in an effort to silence me, I did not give in to my temptation to retaliate against it in any manner. Nearly half way through my mandate, I did consider resigning in the face of hostile attitude from the Government, but decided to continue on.⁶² After all, I had a job to do and a mission to accomplish. In an article

62 Kevin Ponniah, *Optimistic Subedi bids adieu to Cambodia*, PHNOM PENH POST, Jan. 24, 2015, at 3.

posted on the website of the Council of Ministers, Professor Pen Ngoeun, one of the many vocal critics of my work in Cambodia and also an advisor to the Government, commented on my determination to stay in the country and my persistence in having my recommendations implemented.⁶³ He wrote, “[a] consummated diplomat [he] will not leave acrimony behind nor stain his swan song.”⁶⁴ He added that I had “thick enough skin to withstand the attacks from all sides. Facing untenable situation many UN officials . . . washed their hands and walked away, right or wrong who cares? Not Prof. Surya Subedi.”⁶⁵

Ninth, I established and maintained formal and informal diplomatic and political channels with the people in the Government to convey my concerns and to ask for information. They were willing to give information on most of the occasions. There were a number of occasions in which I wrote directly to the Prime Minister and he responded to my letters. On some occasions, the Ministers themselves would give me the information that I needed to write my reports. For instance, on 2 June 2014, Senior Minister and Minister of Land Management, Urban Planning and Construction, Im Chhun Lim, wrote me detailed information concerning land and housing rights and economic and other land concessions.

Tenth, I was sensitive to the Asian notion of ‘losing face.’ I did my utmost to be respectful to the people in the Government and tried not to put them publicly in any awkward position. I was more candid in delivering my message to the Prime Minister in private than in public and maintained a balance so as not to deviate from diplomatic niceties in public. I was aware that every nation had its own pride, and I did my best to respect the pride of Cambodia with its rich ancient Hindu-Buddhist cultural heritage.

Eleventh, I was prepared to give credit to the people in the Government whenever it was due. This made them clamour for my praise, and remain engaged with me. This is because any praise that I would give could be used for publicity, often in an amplified form, aimed at the domestic audience. Twelfth, I always remained optimistic even in the midst of adversity and

63 Pen Ngoeun, Opinion, *UN Special Rapporteur Surya P. Subedi, His moment to take final credit on his job, His swan song to Cambodians*, AGENCE KAMPUCHEA PRESSE (Jan. 16, 2015), <http://www.akp.gov.kh/?p=56883>.

64 *Id.*

65 *Id.*

kept my hope alive for a constructive engagement of both the Government and the opposition party.

Thirteenth, I built a personal rapport with a number of key people in different walks of life in Cambodia, including the leaders of the opposition party, civil society organizations, and the media. By doing this, I made it harder for the Government to dismiss my recommendations or my services. Fourteenth, I made alliance with the foreign diplomatic community in Phnom Penh, so that they could help me deal with the Government. As a result, they stood by me in my difficult times.

Fifteenth, I chose soft diplomatic language to deliver difficult messages to the Government. On one of my reports, I said that the judiciary in Cambodia was not independent in the most diplomatic manner. In fact, the Prime Minister commented publicly that I was no different from my predecessors in delivering difficult messages, but went on to say that I was a pleasant enough man to talk to. He said I was ‘an old whisky in a new bottle!’ Commenting on the style of my reports, *The Phnom Penh Post*, which is an independent and critical English daily newspaper in Cambodia, made the following remarks: “At first sight, the report [my report to the UN] may appear to give a positive outlook for the human rights situation in the country. But if you read it in between the lines, you will find one of the most powerful indictments of the Cambodian Government in years.”⁶⁶

Sixteenth, I knew from the very beginning that the UN was an organization with its own imperfections, and the UN human rights machinery was chronically underfunded and understaffed. Therefore, I was one of those few UN Special Rapporteurs who never complained about any shortcomings in the level of support provided by the UN in discharging our responsibilities. I accepted the fact that once you volunteer for such a position, you have to commit your own private time needed to do the job to the best of your ability and mobilize any other resources at your disposal. Consequently, the UN staff and many assistants in Geneva and Phnom Penh rendered me a superb level of support throughout my mandate, which enabled me to perform my duties well.

Seventeenth, I maintained a good balance by taking a principled and pragmatic stand on various issues, and I believe this approach greatly helped me. Eighteenth, I was driven by my desire to make a tangible impact

66 Nicolas Agostini, *Overcoming Cambodia Fatigue*, PHNOM PENH POST (Sept. 30, 2014), <http://www.phnompenhpost.com/overcoming-cambodia-fatigue>.

on the situation of human rights in Cambodia, and I had the same focus throughout my mandate. Other matters became secondary. My objective was not to make a point, but to make a difference, even if it was a small difference.

Nineteenth, while maintaining my dialogue with senior members in the Government, I made a lot of efforts to keep the leaders of the opposition party confident. The leader of the opposition party, Sam Rainsy, paid several visits to me in England during his exile in France to confide me about his views and concerns and also to ask for my help. Twentieth, I acted as a friend and as rallying point for human rights NGOs and other human rights defenders in our collective endeavour. I built a personal rapport with the leading human rights activists who became important allies to me in my dealings with the Government.

Twenty-first, I was always mindful of the fact that, as an independent Special Rapporteur, you have to pick up the pieces yourself from any fall-outs from your reports. The UN has no mechanism to come to your rescue when governments become hostile. That was the fate of my predecessor, and I came close to facing that fate myself. The argument for non-action heard in the corridors of the UN buildings in Geneva is that if the UN intervenes in defence of an Special Rapporteur, then their impartiality could be questioned. The implication of this is that Special Rapporteurs should be left to their own devices.

Twenty-second, I made every effort to keep ambassadors from key countries informed so that they would know what was going on and support me when needed. After all, they were the decision makers within the UN Human Rights Council. I ended up making history within the UN system, which does not allow a renewal of the mandate of country-specific mandate holders for more than one year at a time, by having my mandate renewed twice for an unprecedented term of two years.

I knew I would come under sharp criticisms from the Government of Cambodia after releasing a report stating that the National Election Committee was not independent and sweeping electoral reforms were necessary. I thought the Government would make its utmost efforts to abolish or make it harder for me to continue my mandate. Therefore, I wanted to have my mandate protected for two years at a time, taking it beyond the reporting period. Thanks to the support of the ambassadors from key countries, the

Human Rights Council renewed my mandate for two years in 2011.⁶⁷ *The Cambodia Daily*, an independent and critical newspaper, had made the following remarks on the decision made by the Human Rights Council:

The extension came only two days after the envoy, Surya Subedi, delivered a strongly worded report on the shortcomings of the National Assembly and urged the Government not to pass a controversial law on NGO . . . deviating from the usual one-year renewal, though, the Council agreed to extend Mr. Subedi's term to allow the envoy to better plan his future moves and save itself the trouble of revisiting the issue a year from now.⁶⁸

Once this precedent was established, it was not difficult for the Council to renew my mandate for another two years for the second time in 2013. This provided me stability and enabled me to be more strategic in my approach to the human rights challenges in the country and denied the country any chance of garnering enough political support within the UN Human Rights Council, a political body, to abolish the UN mandate in Cambodia.

As anticipated, the Government became hostile towards me after I released my report on electoral reform. I had a lot of explaining to do to the Government and all other stakeholders. Many ambassadors, especially the EU Ambassador to Cambodia, Jean-François Cautain, went out of their way in defending my work publicly. I was on the verge of being declared a *persona-non-grata* in Cambodia. If they had done so it would have done a lot of good to me since this status is regarded as a 'badge of honour' within UN human rights circles. But this would have meant that I would not have been able to work with the Government any more or have my recommendations implemented. My reports would have gone to the shelves gathering dust, as do many UN reports.

After receiving two badges of honour already from the monarchs of two countries – an OBE⁶⁹ from Her Majesty the Queen of the UK and a

67 Human Rights Council Res. 18/25, U.N. Doc. A/HRC/RES/18/25, ¶ 9 (Oct. 17, 2011).

68 Zsombor Peter, *UN Envoy Gets New Two-Year Term Extension*, CAMBODIA DAILY, Oct. 3, 2011.

69 See *International Lawyer Receives Award*, ILA NEWSLETTER (Int'l L. Ass'n, London), no. 22, 2005, at 10-12 (The full texts of the then British Foreign Secretary Mr. Jack Straw's speech and my OBE acceptance speech made at an investiture in London).

SGDB⁷⁰ from the King of Nepal for my services to international law - and after being known in international legal circles as an honorary Yorkshire man from god's own county (as I have spent much of my working life in Yorkshire) I did not need another 'badge of honour' in the form of a PNG (*persona-non-grata*)' from Cambodia!

8. CONCLUSION

The Cambodia mandate has turned out to be more challenging, demanding, and onerous than I had anticipated when I agreed to my appointment to this position. It is a very sensitive mandate and I had to walk a very narrow path in implementing my mandate. However, I have enjoyed the challenges and tried to strike a balance in my approach since I was fully aware that I had to maintain my impartiality, objectivity, and independence in my work so that I could be effective in this job.

The appointment has been a privilege and source of intellectual satisfaction for me. I have come to believe that the challenges thrown at me by the Cambodia mandate has certainly assisted in expanding my brain capacity and its agility. The head of the Cambodia office of the UN High Commissioner for Human Rights, Mr. Christophe Peschoux, had told me when I went on my first mission that as a human rights person there was not a single day which was dull in Cambodia. I came to realise how right he was!

Cambodia has come a long way from where it was six years ago. The country is currently in the process of peaceful political transition. Of course, it still has a long way to go in order for it to meet the international benchmark on human rights. A great deal of what has been achieved in Cambodia, such as the enactment of three fundamental laws to enhance the independence of the judiciary⁷¹ or the amendment of the Constitution to grant constitutional status to the National Election Committee,⁷² has been on paper. As the cliché goes, the proof of the pudding is in the eating. The progress in the country will depend on the implementation of

70 It is a high level state honour of Nepal.

71 Vong Sokheng, *CPP passes judicial law in Senate*, PHNOM PENH POST (June 13, 2014), <http://www.phnompenhpost.com/national/cpp-passes-judicial-laws-senate>.

72 Constitution of the Kingdom of Cambodia, amend. Oct. 23, 2014, Ch. XV.

these laws with the degree of sincerity required. Many of the reforms that I have highlighted will not improve the situation of human rights overnight within the country. The impact of these reforms will be felt in five or ten year's time. Many of the people in power in Cambodia are the people with a socialist mind-set and are thus resistance to change. Therefore, my successor, Professor Rhona Smith, who also happens to be a Professor of International Human Rights Law at another British university, will have an equally daunting task ahead of her, and I wish her all the best in this challenging position.

People often say that it depends on whether you see the glass half full or half empty. But I see the glass half full with water and the other half filled with air. In terms of the situation of human rights in Cambodia the water level in the glass is rising gradually and the tide has turned for the better. The Government, the opposition parties, the people, and the civil society organizations were striving to improve the situation of human rights in the country in order to move it forward; they needed international assistance to achieve their objectives. There, I came along to make my own contribution as a UN human rights expert and am thankful to all who have supported me in various ways to enable me to make this contribution at this juncture in Cambodian history.

I am thankful to my own institution, the University of Leeds for its support, without which it would have been great deal harder for me to do this job on behalf of the UN. Of course, there are direct and indirect benefits for the university from such work of its academics. As our Dean, Professor Jeremy Higham, keeps telling me that work of this nature does put Leeds on the wider map of the world and this is especially so in UN circles and in the world of human rights. In addition, my scholarly work has been informed by the experience gained through such engagements and I am of the view that scholarly work and policy making are mutually enriching, and this blend has been to the benefit of both my students and fellow scholars alike. Onerous external commitments of this nature take their own toll on your health, on the family and on the job at the University. I have a very considerate and supportive wife and understanding children, and I thank them for their support.

If you are an international law professor at a leading university such as Leeds, the world expects you to go out and about to make your own contribution to influence the development and implementation of international

law at a global stage. I have been fortunate to have had a number of such opportunities to contribute to policy making at a very high level, whether it is as a UN Special Rapporteur or as an advisor on human rights to the British Foreign Secretary or as a delegate of Nepal to the UN General Assembly or now as an advisor to the World Economic Forum in Davos. In the course of my career I have consistently decided to roll up my sleeves and tried to put my ideas into action and drive myself as hard as I can for good causes – the promotion of rule of law, democracy, and human rights.

The Recognition of New States in Times of Secession: Is State Recognition Turning into Another Means of Intervention?

*Patrick C. R. Terry*¹

1. INTRODUCTION

As globalization's effects are being felt more keenly even in the more rural areas of developed and developing states alike, many people's desire to withdraw into ever-smaller units seems to be increasing concurrently. Across the world, separatist movements are on the up, not only in the less fortunate, but also in established, seemingly successful states. Many observers probably expected war-torn, artificially created Iraq to be exposed to manifold wishes to secede by various parts of its population (notably, the Kurds). However, not that long ago, only few would have predicted that there would be a perhaps soon to be repeated serious attempt by Scotland to secede from the United Kingdom or an ongoing attempt by Catalonia to separate from Spain. It seems the view that "smaller is better" is gaining traction in defence against what many feel are the less attractive consequences of free-trade-agreements and internationalisation of every-day-life.

These developments give rise to many questions, not least in the sphere of international law. This article will look at the legal requirements for recognizing seceding entities as new states. The creation of a new state, after all, has far-reaching consequences: one of the most important being the right to invoke the right of collective self-defence, also in defence against the parent state. It follows that many view the recognition of a seceding entity by other states as the decisive indicator when judging a secession's

1 LL.M. (University of Kent); Ph.D. (University of Kent); Professor, Faculty of Law, University of Public Administration Kehl.

success, as this acknowledgement of a new state's existence enables official bilateral support.

Before turning to secessions, it is necessary to outline the general, sometimes still contested rules in customary international law on the recognition of states. It will be shown that past attempts, mainly by European states, to impose new conditions on statehood, which could easily be construed as having violated the principle of non-intervention, have failed. Examining state practice and analysing the International Court of Justice's advisory opinion on *Kosovo* will then allow the conclusion that the general rules on recognition apply to seceding entities as well. The article will argue that the ICJ's view that, bar two circumscribed exceptions, international law does not address the legality of secessions is correct. It follows that the mere fact a new state has seceded does generally not affect other states' capacity to recognise it.

After thus outlining the current state of the law on recognition in times of secession, new developments in state practice will be scrutinized. Although sufficient *opinio juris* is still lacking, it seems states are incrementally moving towards accepting a new right in international law, namely a right of remedial secession. There are some indications that, as a consequence, states are willing to recognise a seceding entity lacking some or even all of the criteria of statehood in cases where they judge the secession as being justified based on the prior –real or alleged– mistreatment of the seceding population by the mother –country. The article concludes by pointing out that this is a very dangerous development, as it encourages outside intervention in internal conflicts by internationalising it and thereby potentially legalizes the use of military force on behalf of the secessionists, based on collective self-defence.

2. THE RECOGNITION OF STATES IN INTERNATIONAL LAW

The recognition of states is governed by customary international law. Generally applicable rules have not been codified, attempts at doing so have failed. The ICJ, in its recent advisory opinion on *Kosovo*, also declined to address the topic.² Due to this, the recognition of states has always been

2 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 51 (July 22) [hereinafter ICJ Self-Government of Kosovo] (declaring that “it had not been asked

somewhat controversial. Some have even argued that extending recognition is a purely political decision,³ while others disagree on the effects of and criteria for granting recognition.

However, specific rules of international law on state recognition have developed.⁴ Although state practice is not entirely consistent, the views expressed by governments and the many cases where like cases have been

whether or not Kosovo has achieved statehood,” nor had it been asked “about the validity or legal effects of the recognition of Kosovo by those States which have recognised it as an independent state”).

- 3 This is illustrated by the different approaches taken in the late 1940s. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* at v (1947) (stating that “[t]here are only few branches of international law which are of greater, or more persistent, interest and significance for the law of nations than the question of Recognition of States” and that “[y]et there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven”); Philip Marshall Brown, *The Recognition of Israel*, 42 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 620, 621 (1948) (“[I]n spite of the comments and theories of the writers on the subject of recognition the simple truth is that it is governed by no rules whatever . . . the act of recognition is political in nature.”); THOMAS D. GRANT, *RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION* 168 (1999) (“Whether recognition is a subject of law or of politics is indeed one of the centers of debate over recognition today.”); Regarding Yugoslavia, see Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?*, 3 *TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS* 57, 60 (1993); Marc Weller, *Current Development: The International Responses to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 569, 587 (1992); JOHN DUGARD, *THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO* 45-46 (2013).
- 4 For an approach to the recognition of states different from the one adopted here, see, e.g., MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 272-82 (1989) (He claims both the declaratory and the constitutive theories are indefensible and do not “provide[] a satisfactory interpretation of state practice.” He views the granting of recognition in practice as closely aligned to giving “political approval,” *id.* at 243, because neither theory accepts a “duty to recognise” which, in turn, leads to contradictory results in practice.).

treated alike evidence that states do feel bound by certain criteria when recognizing another state.⁵

Before setting out the content of these customary international law rules, it is necessary to examine what effect recognition of another state has, because this will determine the content of the legal rules on recognition.

a. Constitutive or Declaratory Theory?

There are two main theories as far as the effects of recognition on the recognised entity are concerned, the constitutive and the declaratory theory.⁶ More recently, various new theories have developed, which amount to a combination of elements of both theories.

The older constitutive theory is based on the notion that a state only comes into being by obtaining recognition from already existing states. This concept was originally based on 19th century notions prevalent in Europe.⁷ The rulers of the European “family of nations” wanted it to be solely at their discretion whether they would accept and welcome a new

5 Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 36, 55 (1993) (arguing that a “certain degree of consistency” in state practice developed in the 20th century); J.J. Lador-Lederer, *Recognition- A Historical Stocktaking*, 27 NORDIC JOURNAL OF INTERNATIONAL LAW 64, 80 (1957) (quoting a British Government note to the United Nations of August 24, 1948, which states that “the recognition or non-recognition of States is a matter of legal duty and not of policy”).

6 See Stefan Talmon, *The Constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?*, 75 BRITISH YEARBOOK OF INTERNATIONAL LAW 101 (2004), for a detailed examination of the debate and, in particular, of its relationship to the principle of non-recognition.

7 JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 14-16 (2d ed. 2006); Lador-Lederer, *supra* note 5, at 65, 67-76 (“concurrency of imperialism and constitutive theory”); Talmon, *supra* note 6, at 102.

member into that family or not.⁸ Even the most absurd arrangement could be accepted as a state if it suited the recognizing ruler.⁹

The constitutive theory still has adherents, who argue that an entity not recognised by other states simply cannot function properly in international law, and that the ability to act as a legal personality is obtained by recognition.¹⁰ Modern proponents of the constitutive theory, however, have often modified the original concept by laying down certain conditions entities must fulfil before they can be recognised as states, and by imposing a duty on other states to extend recognition once these conditions have been met.¹¹

In the course of the 20th century the declaratory theory, however, has become the dominant view regarding the effect of recognition.¹² The act of

8 Lador-Lederer, *supra* note 5, at 77-78; CRAWFORD, *supra* note 7, at 14-16.

9 CRAWFORD, *supra* note 7, at 14-16; Lador-Lederer, *supra* note 5, at 72 (providing the examples of the recognitions of the Republic of Cracow in 1815, the creation of the State of the Ionian Islands in 1815, and the creation of the State of Albania in 1913).

10 Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUROPEAN JOURNAL OF INTERNATIONAL LAW 491, 491-94 (1998); LAUTERPACHT, *supra* note 3, at 5-7; Jure Vidmar, *Territorial Integrity and the Law of Statehood*, 44 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 736, 743 (2012) (though limiting this to exceptional cases).

11 LAUTERPACHT, *supra* note 3, at 5-7; TALMON, *supra* note 6, at 103 (describing these views).

12 Herbert W. Briggs, *Recognition of States: Some Reflections on Doctrine and Practice*, 43 AMERICAN JOURNAL OF INTERNATIONAL LAW 113, 117 (1949); José Maria Ruda, *Recognition of States and Governments in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 449, 454 (Mohammed Bedjaoui ed., 1991); JOHN O'BRIEN, INTERNATIONAL LAW 172 (2001); HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 140 (2000); JORRI DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES 115 (1996); STEPHANIE BAER, DER ZERFALL JUGOSLAWIENS IM LICHT DES VÖLKERRECHTS 323-24 (1995); Thomas D. Grant, *Territorial Status, Recognition and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, 33 STANFORD JOURNAL OF INTERNATIONAL LAW 305, 325 (1997); Lador-Lederer, *supra* note 5, at 78 (describing the years 1914-1920 as the "great epoch" of the declaratory theory. He believes the declaratory theory dates back to a statement by U.S. President Monroe in 1823 regarding former European colonies); Quincy Wright, *Some Thoughts About Recognition*, 44 AMERICAN

recognition is seen as mere acknowledgement of an already existing state of affairs. Recognition therefore has no direct bearing on the question whether an entity is a state or not; it simply establishes the fact that the recognizing state is prepared to conduct its relations with the recognised state on a state-to-state basis. Hershey, writing in 1927, simply states that “the State exists independently of its recognition.”¹³

The declaratory theory’s success is due to the fact that it is more consistent in its application. The constitutive theory has many inherent weaknesses, which are difficult to overcome. It is, for example, unclear what the status of an entity is that is recognised by some states, but not by others - is it a state only in relation to the recognising states?¹⁴ Furthermore, the constitutive theory poses the risk that realities are ignored. What is to become of a state-like entity that is simply not recognised by other states? Do international law rules apply to its conduct or to the conduct of other states toward it? There are no convincing and easy answers to these questions.¹⁵

Another major weakness of the constitutive theory is the leeway it grants already existing states in relation to emerging states. By declaring their statehood to be dependent on other states’ recognition, they become subject to possibly abusive conditions which other states can impose. One of the alleged new conditions of statehood, “democratic” governance, points in that direction: after all, the ICJ has in the past declared that a state’s political system is one of the issues it must be able to decide on its

JOURNAL OF INTERNATIONAL LAW 548, 557 (1950); CRAWFORD, *supra* note 7, at 22-26; Talmon, *supra* note 6, at 105-07; STEVEN WHEATLEY, RECOGNITION AND SECESSIONIST [sic] IN THE COMPLEX ENVIRONMENT OF WORLD POLITICS 3 (2013) (paper presented at the conference on “States falling apart? Secessionist and autonomy movements in Europe” (University of Fribourg, Switzerland, Aug. 2013)).

13 AMOS S. HERSHEY, ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION 199 (2d ed. 1927); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 19-20 (8th ed. 1924).

14 Herbert W. Briggs, *Community Interest in the Emergence of New States: The Problem of Recognition*, 44 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 169, 172 (1950) (“chaotic”); CRAWFORD, *supra* note 7, at 20-21; Talmon, *supra* note 6, at 102; WHEATLEY, *supra* note 12, at 3.

15 O’BRIEN, *supra* note 12, at 170-71; CRAWFORD, *supra* note 7, at 20-21; Talmon, *supra* note 6, at 102-03.

own, free from outside intervention.¹⁶ The constitutive theory, however, would enable precisely such an imposition.

The attempt by the modern proponents of the constitutive theory to solve these problems by imposing a duty on other states to recognise is not borne out by state practice.¹⁷ States have always and consistently insisted that they are the sole judge of whether an entity is to be recognised or not.¹⁸ In addition to these weaknesses, there is also little support for the constitutive theory in state practice and, especially, in *opinio juris*.

Attempts at combining both theories by, on the one hand, acknowledging that states cannot be created by other states' recognition while, on the other hand, claiming that a non-recognised entity cannot act as and therefore cannot be a state,¹⁹ fail to convince. Somaliland and Rhodesia are

16 Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 106, ¶ 202 (June 27); *see also* Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 226, ¶¶ 161-165 (Dec. 19) [hereinafter ICJ Armed Activities on Congo].

17 Wright, *supra* note 12, at 548-49 (Quoting from a confidential UN Secretariat memorandum sent by the UN General Secretary to the President of the Security Council (Mar. 8, 1950): “[T]he practice of states shows that the act of recognition is . . . decision which each State decides in accordance with its own free appreciation of the situation.”); Briggs, *supra* note 14, at 171; Ruda, *supra* note 12, at 451; DUURSMA, *supra* note 12, at 115; Briggs, *supra* note 12, at 119; CRAWFORD, *supra* note 7, at 22; Talmon, *supra* note 6, at 103; DUGARD, *supra* note 3, at 49; Vidmar, *supra* note 10, at 703.

18 Briggs, *supra* note 14, at 180 (Responding to Syrian criticism of the U.S. recognition of Israel, the U.S. Ambassador to the UN, Austin, declared in May 1948: “I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the *de facto* status of a State. Moreover, I would not admit here, by implication or by direct answer, that there exists a tribunal of justices or of any other kind, anywhere, that can pass judgment upon the legality or validity of that act of my country.”); Brown, *supra* note 3, at 621.

19 DUGARD, *supra* note 3, at 56, 58-60 (Claiming non-recognised entities cannot be states as they do not fulfil the fourth criterion of statehood, “capacity to enter into relations with other states.” That view is problematic as Jelinek’s Drei-Elementen-Lehre, followed by some states in their recognition policy, does not demand the fourth criterion. Furthermore, the criterion demands the “capacity to enter into,” not the existence of relations with other states. Lastly, as outlined in the text, non-

often cited as examples, because there is widespread agreement as to both entities fulfilling the criteria of statehood, while being universally unrecognised.²⁰ However, at closer inspection, both states do not provide evidence of lacking statehood despite them being unrecognised.²¹ In the past Rhodesia was, of course, disadvantaged due to universal non-recognition. However, the entity was nevertheless treated as a state in the non-political sphere -hence the loans extended to the state by banks and the fact that there were low-level contacts with the Rhodesian government.²² Similarly, Somaliland, while not being recognised as such, nevertheless is treated as a state by many actors, including other states. This is evidenced by various memorandums of understanding the British government has signed with Somaliland,²³ the fact that, for example, the German government has

recognised states usually do have relations with other states, albeit below the level of diplomatic relations.).

20 DUGARD, *supra* note 3, at 58-59, 63-64.

21 Christian Marxsen, *Territorial Integrity in International Law – Its Concept and Implications for Crimea*, 75 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 7, 13-14 (2015); Vidmar, *supra* note 10, at 736 (referring to the FRY and Macedonia).

22 On the flouting of the Rhodesian sanctions, see Joseph Mtisi et al., *Social and Economic Developments During the UDI Period*, in BECOMING ZIMBABWE 115, 133-36 (Brian Raftopoulos & Alois Mlambo eds., 2009) (explaining certain states refused to ratify the sanctions (China, Bangladesh, and North Korea, as well as non-UN members—at that time—West Germany and Switzerland) while others, including France and Spain were reluctant to do so in order to help solve what they regarded as essentially a British problem. Economic dependency on Rhodesia meant that Malawi, Zambia, and Botswana never implemented the sanctions fully. Unsurprisingly, South Africa and Portuguese Mozambique ignored the sanctions altogether (Mozambique implementing them when the country gained its independence in 1975). The U.S. later deviated from the sanctions regime in order to import chrome from Rhodesia, while the oil embargo was violated by major petroleum companies, including British ones (with, it was later to transpire, the knowledge of the British government)). See COLIN STONEMAN, ZIMBABWE'S INHERITANCE 1, at 4, 6 (1981) (referring to the report resulting from the official UK government enquiry into the matter in the late 1970s).

23 See FREEDOM OF INFORMATION ACT 2000 REQUEST REFERENCE (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/356843/

been subsidizing Somaliland's courts, police forces and the prison system since 2008,²⁴ but also by many other diplomatic contacts Somaliland has managed to establish.²⁵ There is also little doubt that many members of the international community would take a dim view of an attempt by the Somalian government to reassert its authority against Somaliland's wishes. Finally, Taiwan is a very good example disproving the aforementioned "compromise" theory. Despite not recognizing the island as a state, there is no doubt that most members of the international community treat Taiwan as a separate, independent state.²⁶ So while a non-recognised state suffers disadvantages, it nevertheless benefits from some of the advantages of being a state.²⁷ Lastly, the claim that Somalia contradicts the declaratory theory as it is still recognised as a state, despite no longer fulfilling the statehood criteria,²⁸ is similarly unconvincing. In describing such entities as "failed

Recognition_of_currently_unrecognised_country_of_the_Republic_of_Somaliland_FOI_ref_0760-13.pdf (In 2007, the UK signed a memorandum of understanding on "immigration returns" with Somaliland and in 2013 on "aviation security," furthermore, the UK government has "close links" to the Somaliland Administration and Somaliland Ministers meet UK government representatives regularly).

- 24 Rainer Stinner, *Piratennetzwerke besser bekämpfen*, INTERNATIONALE POLITIK, May/June 2012, at 115-19, (especially at 115, 119); DUGARD, *supra* note 3, at 179.
- 25 T.G., *The Economist Explains: Why is Somaliland Not a Recognized State?*, THE ECONOMIST, (Nov. 1, 2015, 11:21 PM), <http://www.economist.com/blogs/economist-explains/2015/11/economist-explains>.
- 26 Only 23 states have recognised Taiwan. Nevertheless, many other states have close, though unofficial relations to Taiwan. For example, U.S.-Taiwan relations are governed by the Taiwan Relations Act (93 Stat. 416 (1979); to be reaffirmed in 2016 by Congress (S. Con. Res 38, 114th Cong. (2015-2016), already passed by the Senate)); many states maintain "offices" in Taiwan's capital (though never referred to as Embassies), while Taiwan maintains "representative offices" in those states' capitals. Economic ties are close.
- 27 Hannes Hofmeister & Belen Omos Giupponi, "*Conscious Uncoupling*" – *Legal Aspects of Scot Independence in AUTONOMIE UND SELBSTBESTIMMUNG IN EUROPA UND IM INTERNATIONALEN VERGLEICH 196*, 205 (Peter Hilpold ed., 2016) (describing this situation as "de facto recognition"); Marxsen, *supra* note 21, at 14-15 (referring also to Taiwan).
- 28 DUGARD, *supra* note 3, at 59-60.

states”, the international community has acknowledged the loss of one or more statehood criteria. Somaliland and, possibly, Puntland aside, there is no other state that lays claim to sovereignty over Somalian territory, meaning a much weaker claim to statehood may well be sufficient.²⁹

There is also support only for the declaratory theory as far as treaties are concerned:³⁰ both Article 3 of the 1933 Convention on Rights and Duties of States (Montevideo Convention)³¹ and Article 9 of the 1948 Charter of the Organisation of American States³² support the declaratory theory.

The same applies to *opinio juris*: insofar it has been expressed, it has been in favour of the declaratory theory.³³ In 1991, for example, the EC Arbitration Commission on Yugoslavia stated in its Opinion No. 1: “... the answer to this question should be based on the principles of public international law ... the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory.”³⁴

As early as shortly after the First World War, commissions, tribunals, and courts expressed support for the declaratory theory.³⁵ In 1920 the

29 Legal Status of East Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 5, at 46 (Apr. 5, 1933).

30 Talmon, *supra* note 6, at 106.

31 Convention on Rights and Duties of States art. 3, T.S. No. 881 (1933).

32 Charter of the Organization of American States art. 9, Apr. 30, 1948, 119 U.N.T.S. 47 (entered into force Dec. 13, 1951) (now art. 13 of the Organization of American States Charter, following the latest amendments of 1993).

33 Lador-Lederer, *supra* note 5, at 80 (a British government note to the UN dated Aug. 24, 1948) (“The existence of a State should not be regarded as depending upon its recognition but on whether in fact it fulfils the conditions which create a duty for recognition.”) (the British view expressed here seems to be a mix between the declaratory theory and Lauterpacht’s assumption of a duty to recognise); *e.g.*, Talmon, *supra* note 6, at 106.

34 European Community Arbitration Commission on International Conference for Peace in Yugoslavia, Opinion No. 1, Aug. 27, 1991, 31 I.L.M. 1494 [hereinafter EC Arbitration in Yugoslavia]; for more details on the Badinter Commission’s views, *see* Talmon, *supra* note 6, at 106-07.

35 Talmon, *supra* note 6, at 105-06 (first citing *Institut de Droit International: Resolutions Concerning the Recognition of New States and New Governments*, 30 AMERICAN JOURNAL OF INTERNATIONAL LAW, 185 (No. 4 Supp. 1936); and then citing Convention on Rights and Duties of States art. 3, T.S. No. 881 (1933)).

International Committee of Jurists, when dealing with the Aaland question for the League of Nations, declared regarding Finland that, despite it being recognised by many other states as a state, this did not “suffice to prove that Finland, from this time onwards, became a sovereign state”.³⁶ This amounted to an implicit rejection of the constitutive theory. In 1929 the German-Polish Mixed Arbitral Tribunal in *Deutsche Continental Gas-Gesellschaft v. Poland* stated that “the recognition of a state is not constitutive but merely declaratory. The state exists by itself and the recognition is nothing else than a declaration of this existence.”³⁷

Although dealing with the recognition of governments, the decision in the Tinoco Arbitration is also frequently cited as evidencing the prevalence of the declaratory theory.³⁸ Taft CJ stated that “Such non-recognition for any reason...cannot outweigh the evidence disclosed...as to the de facto character of Tinoco’s government, according to the standard set by international law.”³⁹

State practice, on the other hand, has never been entirely consistent. There clearly have been cases in the past where the act of recognition has not only been declaratory in its effects. Nevertheless, even in these cases, such “constitutive” recognitions very often have been accompanied by statements describing the act of recognition as “declaratory”,⁴⁰ which in

36 *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, LEAGUE OF NATIONS OFFICIAL JOURNAL 8 (Spec. Supp. No. 3 1920) [hereinafter *Aaland Islands Question*]; Lador-Lederer, *supra* note 5, at 81 (mentioning the support for the declaratory theory expressed by the International Commission of American Jurists in 1927).

37 *Deutsche Continental Gas-Gesellschaft v. Poland*, 5 Ann. Dig. 11, 15 (Ger.-Pol. 1929).

38 O’BRIEN, *supra* note 12, at 171.

39 *Tinoco Arbitration (Gr. Brit. v. Costa Rica)*, 18 AMERICAN JOURNAL OF INTERNATIONAL LAW 147, 154 (1924) (Taft, C.J., was the sole arbitrator).

40 EC Arbitration in Yugoslavia, *supra* note 34 (a prime example is the recognition of Bosnia and Herzegovina on April 7, 1992, by EC member states. It is generally agreed that this recognition was not merely declaratory, as that country’s government had no control over its territory, at times not even of the capital city. On April 11, 1992, President Izetbegovic had to ask for outside help. Nevertheless, the EC maintained that the recognition of states was “declaratory” in nature.).

turn implies that states felt the necessity to claim conformity to a rule they believed was binding.

In summary, customary international law on state recognition declares that the recognition extended by another state is merely declaratory of the fact that an entity is already a state. But what criteria have been established in customary international law for judging whether an entity has become a state?

b. Criteria of Statehood

Article 1 of the 1933 Convention on Rights and Duties of States (Montevideo Convention), enumerated these criteria as follows: 1) “permanent population”, 2) “defined territory”, 3) “government”, and 4) “capacity to enter into relations with other states”.⁴¹

These so-called “Montevideo-criteria” were a reflection of state practice and *opinio juris* regarding statehood when the Montevideo Convention was concluded in 1933, notwithstanding the fact that the convention only ever applied in the Americas.⁴² Already in 1874, Woolsey had defined statehood as follows:

A state is a community of persons living within certain limits of territory, under a permanent organization, which aims to secure the prevalence of justice under self-imposed law⁴³...It must have an exclusive right to impose laws within its territory⁴⁴,...For the purposes of international law that state can only be regarded as sovereign, which has retained its power to enter into all relations with foreign states...⁴⁵

In 1929 the German-Polish Mixed Arbitral Tribunal in *Deutsche Continental Gas-Gesellschaft v. Poland* declared that a state “does not exist unless

41 Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934) [hereinafter Montevideo Convention].

42 Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 403, 414-18 (1999).

43 THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW DESIGNED AS AN AID TO TEACHING, AND IN HISTORICAL STUDIES, § 36 (4th ed. rev. and enlarged 1874).

44 *Id.* § 37.

45 *Id.*

it fulfils the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over the people and the territory.⁴⁶

This definition is more or less identical to Jelinek's "Drei-Elementen-Lehre," which he had developed and publicized by 1900.⁴⁷ The difference to "Montevideo" is simply that its proponents argue that the "capacity to enter into relations with other states" is an element of the third criteria, "government."⁴⁸

By the 1930s and 1940s, there was also widespread academic support for the "Montevideo criteria".⁴⁹ The Permanent Mandates Commission of the League of Nations applied similar criteria, which the Council of

46 *Deutsche Continental Gas-Gesellschaft v. Poland*, 5 Ann. Dig. at 15.

47 Talmon, *supra* note 6, at 109-10.

48 BAER, *supra* note 12, at 50-51; Peter Hilpold, *Völkerrechtsprobleme um Makedonien*, 42 RECHT IN OST UND WEST 117, 121 (1998). *But see* Talmon, *supra* note 6, at 116-17 (Talmon is a supporter of Jelinek's Drei-Elementen-Lehre. However, he believes the criterion of "capacity to enter into relations with other states" is a criterion of recognition, *not* of statehood, notwithstanding "some" states' declarations to the contrary.).

49 T. J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 85 (Winfield ed., 7th rev. ed. 1923) ("The community thus recognized must, of course, possess a fixed territory, within which an organised government rules in civilized fashion, commanding the obedience of its citizens and speaking with authority on their behalf in its dealings with other states."); HALL, *supra* note 13, at 19-20 (defining states as follows: "The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community, and in the conformity with the dictates of international law, and finally that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law."); HERSHEY, *supra* note 13, at 158-59 (enumerating the "essential characteristics of a State" as follows: "(1) A people permanently organised for political purposes . . . (2) A definite territory . . . (3) A certain degree of sovereignty . . . and a government that is habitually obeyed."); Briggs, *supra* note 14, at 171; Grant, *supra* note 42, at 414-18; Brown, *supra* note 3, at 620-21 (citing the *Institut de Droit International's* 1936 resolution: "The recognition of a new state is the free act by which one or several states take note of the existence of a human society, politically organised on a fixed territory, independent of any other existing state, capable of observing the prescriptions of

the League of Nations subsequently approved, when deciding whether the British Mandate of Mesopotamia had truly become the independent Kingdom of Iraq by 1931.⁵⁰

In the 1970s and 1980s the US⁵¹ and British⁵² governments were still officially basing their decisions on recognition on the “Montevideo” criteria. The Israeli Ministry of Foreign Affairs declared in response to a

international law and thus indicating their intention to consider it a member of the international community.”).

- 50 12 LEAGUE OF NATIONS OFFICIAL JOURNAL 2044, 2057 (1931) (approving the Permanent Mandates Commission’s opinion of September 1931, which enumerates the following prerequisites regarding the termination of a mandate (it examined the issue in connection with Iraq’s prospective independence): (a) “settled government and an administration capable of maintaining the regular operation of essential government services”; (b) “capable of maintaining its territorial integrity and political independence”; (c) “able to maintain the public peace throughout its territory”; (d) “adequate financial resources”; and (e) “laws and a judicial organization.”).
- 51 U.S. Department of State, *Statement*, reprinted in 72 AMERICAN JOURNAL OF INTERNATIONAL LAW 337 (1978); Alison K. Eggers, *When is a State a State? The Case for the Recognition of Somaliland*, 30 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 211, 214 (2007) (contending that the U.S. practice has been “fairly consistent” in that respect).
- 52 Alice Lacourt, Legal Advisor, UK Foreign and Commonwealth Office, *The Approach of the United Kingdom*, Address at the Chatham House International Law Discussion Group Meeting: *The Approach of the United Kingdom* (Apr. 22, 2008), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il220408.pdf> (declaring the following: “When deciding whether to recognise Kosovo the United Kingdom had applied the criteria set out in 1989 by the then Parliamentary Under-Secretary for Foreign and Commonwealth Affairs, Mr. Sainsbury, in a Written Answer dated 16 November. Mr. Sainsbury had said that: “The normal criteria that we apply for recognition as a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant.”); Colin Warbrick, *Recognition of States*, 41 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 473, 473 (1992) (making the point that British practice has mostly adhered to these guidelines).

possible unilateral declaration of independence by the Palestinians after May 4, 1999:

International law has established a number of criteria for the existence of a state: effective and independent governmental control, possession of defined territory; the capacity to freely engage in foreign relations; and control over a permanent population.⁵³

Even nowadays it is still widely held that these criteria reflect the core criteria of statehood, even if some view them as not exhaustive.⁵⁴ States have consistently demonstrated a great reluctance to depart from the Montevideo criteria of statehood. Although, as the ICJ pointed out, not directly relevant to the advisory opinion requested, Japan,⁵⁵ Germany,⁵⁶

53 *May 4, 1999 – Some Frequently Asked Questions*, ISRAELI MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1999/4/May+4-+1999+-+Some+Frequently+Asked+Questions+-+19.htm.

54 Bengt Broms, *States, in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 41, 43-44 (Mohammed Bedjaoui ed., 1991); CHARLESWORTH & CHINKIN, *supra* note 12, at 125-26; Rich, *supra* note 5, at 55; DUURSMA, *supra* note 12, at 112; CRAWFORD, *supra* note 7, at 45-46 (although he does argue for some variations); Talmon, *supra* note 6, at 109-11, 125; DUGARD, *supra* note 3, at 26-27.

55 ICJ Self-Government of Kosovo, *supra* note 2; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Japan (Apr. 17, 2009), <http://www.icj-cij.org/docket/files/141/15658.pdf> (“For the formation of a State, international law generally requires that an entity shall meet the conditions of statehood, namely an entity holds an effective government which governs a permanent population within a defined territory.”).

56 ICJ Self-Government of Kosovo, *supra* note 2; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Germany (Apr. 15, 2009), <http://www.icj-cij.org/docket/files/141/15624.pdf> (“Thus, international law sets certain conditions that must be present before a newly self-declared state may be recognised by other states, viz., the three elements of statehood: a territory, a people and effective government.”).

Norway,⁵⁷ and the USA⁵⁸ used the opportunity to confirm the applicability of the traditional criteria of statehood in their written statements to the court of 2009, as did the UK in 2008.⁵⁹

Generally, there is also agreement, as far as the content of the four statehood criteria are concerned:

“**Permanent population**” refers to an undefined number of people living permanently in a specific area. In existing states, nationality makes the relevant group of people easily identifiable. However, nationals need not even form the majority within the population. There is no minimum number required, and the group of people living in the entity do not necessarily have to be bound to each other by race, religion, or culture. The population must, however, form a stable community.⁶⁰

“**Defined territory**” requires a specific area in which the entity can exercise what is commonly regarded as the functions of state to the exclusion of others. Based on state practice, it is assumed that border disputes do not

57 ICJ Self-Government of Kosovo, *supra* note 2; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Norway (Apr. 16, 2009), <http://www.icj-cij.org/docket/files/141/15650.pdf> (“Nevertheless, as regards international law, the existence of statehood is a question of fact relying on an assessment of constitutive elements including a defined territory, permanent population, effective government and legal capacity to enter into relations with the other states.”).

58 ICJ Self-Government of Kosovo, *supra* note 2; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the United States of America (Apr. 17, 2009), <http://www.icj-cij.org/docket/files/141/15640.pdf> (“Second, based on its assessment of Kosovo’s development during the period of UNMIK administration, the United States was satisfied that Kosovo’s viability as a state was not in doubt and that it met the criteria of statehood outlined in Article 1 of the 1933 Montevideo Convention Consideration of these criteria had likewise been a cornerstone of U.S. recognition of other states seeking independence in the former Yugoslavia in the early 1990s.”).

59 See *supra* text accompanying note 52.

60 DUURSMA, *supra* note 12, at 117; CHARLESWORTH & CHINKIN, *supra* note 12, at 126-28; Broms, *supra* note 54, at 44; CRAWFORD, *supra* note 7, at 52-55.

usually impair an entity's recognition as a state, but that an undisputed core of territory is required.⁶¹

"Government" is generally assumed to mean "effective government." It is widely seen as the most important and most contentious criterion. The entity's leadership must be able to enforce law and order, and guarantee a certain degree of stability within a given area. Within that territory, the entity's state organs must be able to govern effectively, if possible based on some organizational structure, without having to resort to third parties.⁶²

"Capacity to enter into relations with other states" mainly requires the entity to be able to conduct its foreign relations independently without having to take recourse to another state. State practice implies that formal independence (independence in the legal sense) is sufficient. "Real" independence, meaning economic or military independence, is not necessary.⁶³ As already pointed out, proponents of Jelinek's theory argue that a government is only "effective", if it can conduct its foreign affairs independently, so this is not a criterion which is examined separately.

Needless to say, these criteria have been heavily criticized over the years. Some have argued that the fourth criterion is contradictory, as that capacity is a consequence, not a prerequisite of being a state.⁶⁴ This is not convincing. The fourth criterion, of course, does require a prognosis when a new state emerges. There is, however, no reason why such a prognosis

61 DUURSMA, *supra* note 12, at 116-17; CHARLESWORTH & CHINKIN, *supra* note 12, at 128-32; Broms, *supra* note 54, at 44; Hilpold, *supra* note 48, at 121; CRAWFORD, *supra* note 7, at 46-52.

62 DUURSMA, *supra* note 12, at 118-20; CHARLESWORTH & CHINKIN, *supra* note 12, at 132-33; BAER, *supra* note 12, at 49-50; Broms, *supra* note 54, at 44-45; Hilpold, *supra* note 48, at 121; Danilo Türk, *The Dangers of Failed States and a Failed Peace in the Post Cold War World*, 27 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 625, 625-26 (1995); CRAWFORD, *supra* note 7, at 55-62; Talmon, *supra* note 6, at 110-11.

63 DUURSMA, *supra* note 12, at 120-27; CHARLESWORTH & CHINKIN, *supra* note 12, at 133-35; Talmon, *supra* note 6, at 111-16.

64 *See, e.g.*, Talmon, *supra* note 6, at 116-17.

should not be possible. If an entity will not be able to enter into international relations independently, it will not become a state.

c. Are There Further Criteria of Statehood?

Some have argued that “actual independence” is necessary if an entity is to obtain statehood.⁶⁵ Not only is the definition of “actual independence” highly contentious, but the notion is also not supported by state practice. Many smaller states that have been recognised as such by the international community are far from having attained anything like “actual independence.”⁶⁶ States in the Pacific, like Palau, or even in Europe, like Monaco, are completely or partly dependent on other states for their survival. Such states may be regarded as anomalies. Nevertheless, international recognition of their statehood implies that “actual” independence is not required in order to obtain statehood. Even proponents of the criterion of “actual” independence admit that the requirement is often “hollow” in practice.⁶⁷

Many, especially in recent years, have also argued that further criteria have been added to the “Montevideo list”.⁶⁸ Respect for human rights and democratic government are two of the many additional criteria that are now supposedly decisive in obtaining statehood.⁶⁹ It is, however, extremely doubtful whether *opinio juris* and, especially, state practice have been consistent enough to have led to changes in customary international law.⁷⁰ This

65 Grant, *supra* note 12, at 312; CRAWFORD, *supra* note 7, at 72-89.

66 Grant, *supra* note 42, at 438-39; Talmon, *supra* note 6, at 111-16 (providing many examples of state practice which evidence that “factual” independence is not seen as a prerequisite of statehood).

67 CRAWFORD, *supra* note 7, at 88 (admitting there are cases where the criteria of “actual independence” can have “minimal content”).

68 DUGARD, *supra* note 3, at 52-55.

69 GRANT, *supra* note 3, at 83-119; Talmon, *supra* note 6, at 121-26; Vidmar, *supra* note 10, at 704, 710-34, 743-47 (claiming that in cases of secession either the parent’s state waiver as far as its territorial integrity or a consensus between the parent state and the new state is a further requirement of statehood).

70 Certainly, it seems very doubtful that additional criteria like democracy had been established in international law by even the early 1990s. The EC’s handling of the recognition of the new states emerging from the former Soviet Union

is especially true when considering that states have always tried to impose varying conditions on new states in return for recognition without any of these criteria ever having been applied consistently.

Already in the early 19th century, the United Kingdom demanded the abolition of the slave trade as a precondition of recognizing Mexico and Brazil.⁷¹ In 1878, the Congress of Berlin made its participants' recognition of Bulgaria, Serbia, Montenegro and Romania dependent on them undertaking certain measures to protect religious minorities within their territories.⁷² The USA made its recognition of Egypt and Albania dependent on commercial concessions.⁷³ The international community's hesitation in recognizing Guinea-Bissau has been attributed to its lack of a democratically legitimized government.⁷⁴

However, the main impetus for arguing that international law now demands additional criteria of statehood was provided by the EC's reaction to the break-up of the Soviet Union and Yugoslavia. On 16 December 1991, the EC issued its "Declaration on the 'Guidelines on the recognition of New States in Eastern Europe and in the Soviet Union'".⁷⁵ While explicitly emphasizing the EC's adherence to "normal standards of international

and Yugoslavia in 1991/1992 is a case in point. Hannum, *supra* note 3, at 64, 69 (describing that "attempting to create a new rule of international law," an attempt he views as "laudable," but "having failed"); Weller, *supra* note 3, at 588 (arguing that the EC's "extensive catalogue of criteria" evidenced that "general international law" was not being applied); CRAWFORD, *supra* note 7, at 148, 150-55; Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 *INTERNATIONAL & COMPARATIVE LAW QUARTERLY* 241, 264-69 (1994) (believing that the rules governing recognition of new states emerging on the territory of the former Yugoslavia and their application in practice were based more on "political priorities" than on legal considerations); *see also supra* notes 55-58 (indicating that at least these states do not apply additional legal criteria when deciding whether to a new state); Talmon, *supra* note 6, at 121-26.

71 REIN MÜLLERSON, *INTERNATIONAL LAW, RIGHTS AND POLITICS* 134 (1994).

72 *Id.*; BAER, *supra* note 12, at 332.

73 BAER, *supra* note 12, at 332.

74 Grant, *supra* note 42, at 442. *But see* BAER, *supra* note 12, at 410-11 (arguing that delayed recognition was more likely due to the government's lack of effectiveness).

75 Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," December 16, 1991, 31 *I.L.M.* 1486-87 (1992).

practice”,⁷⁶ the guidelines seemed to impose numerous conditions on new states traditionally not viewed as preconditions for recognition. As far as the Soviet Union was concerned, new states, wishing to be recognised, had to adhere, among other things, to the UN Charter, the Final Act of Helsinki and the Treaty of Paris, “especially with regard to the rule of law, democracy and human rights”.⁷⁷ The “Declaration on Yugoslavia”⁷⁸ was even more onerous: new states had to “accept the provisions laid down in the draft Convention especially...on human rights and rights of national or ethnic groups under consideration by the Conference on Yugoslavia”, had to guarantee that “no territorial claims against a neighbouring Community State” existed, and refrain from “hostile propaganda...against a Community State”.⁷⁹

On the face of it, it would seem that a major group of states, comprising 12 members including such relatively powerful states, such as the United Kingdom, Germany, France, Italy, and Spain were indeed attempting to create new rules on recognition in international law. However, neither did the international community as a whole apply these additional criteria to the recognition of new states, nor did the EC truly attempt to implement their guidelines.

The USA recognised all of the former Soviet Republics as independent states on 25 December 1991, although refraining to establish diplomatic relations with six of them until it was satisfied they had made “commitments to...democratic principles” which seriously undermines the claim new customary international law was created. Furthermore, to describe states such as Kyrgyzstan, Tajikistan, or Uzbekistan as being at any time or in any way democratic - as understood in western states - is fanciful. Nevertheless, the EC had extended recognition to all these states by mid-January 1992. The EC itself therefore never applied any additional criteria when recognizing these states beyond demanding written assurances that were never evaluated in any way.⁸⁰ There is nothing to suggest that states such as China, Russia, India or Brazil apply any of these additional criteria

76 *Id.*

77 *Id.*

78 *Id.* at 1485-86.

79 *Id.*

80 GRANT, *supra* note 3, at 96; CHARLESWORTH & CHINKIN, *supra* note 12, at 141.

when deciding whether to recognise an entity as a new state. There is also no evidence of an in-depth assessment by the international community of Eritrea's and South Sudan's democratic credentials when extending recognition in 1993 and 2011 respectively.

Lastly, claiming that concepts such as "democratic principles" could be an additional statehood criterion is far from helpful in clarifying the law on statehood due to their extremely controversial and therefore hazy content. Rather, such theories provide states yet more excuses to interfere in other states' internal affairs. As the ICJ has explained this may well violate the principle of non-intervention:

A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones...⁸¹

It seems some states are attempting to circumvent this clear dictum by indicating that a non-democratic state is not a state at all - a far-fetched, unhistorical idea, but reminiscent of 19th century thinking, when a group of existing states claimed the privilege to decide which entity was to be admitted to the "family of nations".

In summary, based on state practice, it is safe to say that no new criteria have been established in international law when judging whether an entity has become a state.

3. PRINCIPLE OF NON-RECOGNITION

However, the international community sometimes decides not to recognise a state that meets the aforementioned criteria.⁸² State practice evidences two cases when states are regularly not recognised: (a) states where the

81 *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 205 (June 27).

82 *See* Talmon, *supra* note 6, at 101-81, for a very detailed examination of the principle of non-recognition. *See also id.* at 122-53 (believing that states thus not recognised nevertheless meet the criteria of statehood, and that their non-recognition must be viewed as "withholding from a state its legal status"); DUGARD, *supra* note 3, at 81-85.

principle of internal self-determination is violated flagrantly,⁸³ and (b) states that were created by the illegal use of force.⁸⁴ The ICJ has confirmed the legal validity of these two forms of collective non-recognition.⁸⁵

a. Non-Recognition Based on Violations of Internal Self-Determination

Not recognizing a state due to its lack of internal self-determination is a principle that has only developed into a legal obligation since WWII.⁸⁶ As pointed out by the International Court of Justice, prior to that the principle of self-determination had become a political, but not yet a legal principle.⁸⁷

It is true that US President Wilson had outlined his vision of national self-determination when he declared, in an address to the League to Enforce Peace in 1916, “that every people has a right to choose the sovereignty under which they shall live.” He emphasized his beliefs when he added that “no peace can last or ought to last which does not accept the principle that governments derive all their just powers from the consent of the governed”, and that “no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.”⁸⁸ In his address to a Joint Session of Congress in January 1918 President Wilson then announced his famous “Fourteen Points”, which he deemed to be the “only possible program” for the “world’s peace”.⁸⁹ The principle upon which his “Fourteen Points” were

83 Hillgruber, *supra* note 10, at 505-07; Talmon, *supra* note 6, at 122-24, 146-47, 171-79; DUGARD, *supra* note 3, at 28-29, 81-85.

84 O'BRIEN, *supra* note 12, at 185; Grant, *supra* note 12, at 314; Talmon, *supra* note 6, at 124, 144-46, 171-79; DUGARD, *supra* note 3, at 27-28, 81-85.

85 ICJ Self-Government of Kosovo, *supra* note 2, ¶ 81.

86 CRAWFORD, *supra* note 7, at 433.

87 ICJ Self-Government of Kosovo, *supra* note 2, ¶¶ 79, 82 (pointing out that the right of self-determination had “evolved” only in the “second half of the twentieth century”); see *Aaland Islands Question*, *supra* note 36, for a legal analysis of the situation in 1920.

88 *Self-Determination – Civil War and Imperialism*, ENCYCLOPEDIA OF THE NEW AMERICAN NATION, <http://www.americanforeignrelations.com/O-W/Self-Determination-Civil-war-and-imperialism.html>.

89 *President Wilson's Fourteen Points*, WORLD WAR I DOCUMENT ARCHIVE, http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points (last modified Feb. 28, 2008).

based was described by Wilson as “the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak”.⁹⁰ Mention must also be made of Lenin’s Decree on Peace of October 26, 1917, which was even more far-reaching as far as the concept of self-determination was concerned:

By annexation or seizure of foreign territory the government, in accordance with the legal concepts of democracy in general and of the working class in particular, understands any incorporation of a small and weak nationality by a large and powerful state without a clear, definite and voluntary expression of agreement and desire by the weak nationality, regardless of the time when such forcible incorporation took place, regardless also of how developed or how backward is the nation forcibly attached or forcibly detained within the frontiers of the [larger] state, and, finally, regardless of whether or not this large nation is located in Europe or in distant lands beyond the seas...⁹¹

Nevertheless, the 1920 statement by the International Commission of Jurists, reporting on the Aaland Island issue, remained correct until after the end of WWII:

Although the principle of self-determination of peoples plays an important role in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.⁹²

Although the jurists, in their subsequent examination of the principle, did allow for the possibility of specific exceptions to this categorical statement,⁹³ the lack of any mention of “self-determination” in the text of the Covenant

90 *Id.*

91 *The Decree on Peace, November 1917*, THE HISTORY GUIDE, <http://www.historyguide.org/europe/decree.html> (last modified April 13, 2012) (emphases added); see BILL BOWRING, *THE DEGRADATION OF THE INTERNATIONAL LEGAL ORDER?: THE REHABILITATION OF LAW AND THE POSSIBILITY OF POLITICS* 13-20, (2008); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 139 (2005).

92 *Aaland Islands Question*, *supra* note 36, at 5.

93 *Id.* at 5-6; Koskenniemi, *supra* note 70, at 246-47.

of the League of Nations proves that the jurists' conclusion was fundamentally correct.⁹⁴ The principle of self-determination was subsequently included in the Atlantic Charter of 1941⁹⁵ and in the UN Charter of 1945,⁹⁶ but this cannot obscure the fact that its legal content was still ill defined (even nowadays some dispute it has any legal content).⁹⁷

General Assembly resolutions providing definitions that were more precise were only passed in the 1960s.⁹⁸ Regarding the recognition of states there is no evidence of any state practice or *opinio juris* that had established the connection between self-determination and non-recognition by then. It had certainly not yet established itself as a rule of customary international law.⁹⁹ However, this changed during the decolonisation process. Progress in the sphere of civil and political rights and, more generally, in the field

94 It could be argued that the mandate system, introduced in art. 22 of the Covenant of the League of Nations, to some extent was a (weak) reflection of the principle of self-determination as it at least claimed to be preparing the peoples in the mandated territories for independence sometime in the future; Eugenia López-Jacoiste, *Autonomy and Self-determination in Spain: Catalonia's Claims for Independence From the Perspective of International Law*, in AUTONOMIE UND SELBSTBESTIMMUNG IN EUROPA UND IM INTERNATIONALEN VERGLEICH 218, 218 (Peter Hilpold ed., 2016).

95 See Joint Declaration by the President and the Prime Minister, U.K.-U.S., art. 2-3, Aug. 14, 1941, 55 Stat. 1603.

96 U.N. Charter art. 1, ¶ 2.

97 ICJ Self-Government of Kosovo, *supra* note 2, ¶¶ 79, 82; CRAWFORD, *supra* note 7, at 427, 433; L.C. Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, 65 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 40, 43-44 (1971) (arguing that self-determination, as understood in the Charter, only refers to "nations"); see also *id.* at 46 (writing in 1971, claiming that there was still no right of self-determination in international law); ELI MURLAKOV, DAS RECHT DER VÖLKER AUF SELBSTBESTIMMUNG IM ISRAELISCH-ARABISCHEN KONFLIKT 86 (1983); Weller, *supra* note 3, at 592 (stating that the EC Arbitration Commission on Yugoslavia even in 1991/1992 "[f]ound that in actual practice international law did not define the precise consequences of that right or its scope of application"); Hofmeister & Giupponi, *supra* note 27, at 203.

98 G.A. Res. 1514 (XV) (Dec. 14, 1960); G.A. Res. 2200 (XXI) (Dec. 16, 1966); G.A. Res. 2625 (XXV) (Oct. 24, 1970).

99 GRANT, *supra* note 3, at 92.

of human rights, was made. Many new states, which had only just joined the United Nations, were extremely anxious to safeguard their new status as independent states against any attempt at encroachment.¹⁰⁰ The principle of self-determination, included in Article 1(2) UN Charter, was the obvious anchor of any attempt to safeguard developing states' new-found independence in international law against external interference.¹⁰¹ In this struggle, the newly independent states were massively supported by the Soviet Union.

The progression of a mere *principle* of self-determination to a *right* of self-determination was confirmed by the two covenants, the ICCPR and the ICESR;¹⁰² common Article 1 states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹⁰³

This was a confirmation of the view already taken by the General Assembly in its 1960 Resolution on the Granting of Independence to Colonial Countries and Peoples.¹⁰⁴ It follows that the ICJ has repeatedly reaffirmed

100 Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRITISH YEARBOOK OF INTERNATIONAL LAW 189, 209-11, 252 (1985); John A. Perkins, *The Right of Counterintervention*, 17 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 171, 189 (1987); Michel Krauss, *Internal Conflicts and Foreign States: In Search of the State of Law*, 5 YALE STUDIES IN WORLD PUBLIC ORDER 173, 212-13 (1980).

101 Sherle R. Schwenninger, *The 1980s: New Doctrines of Intervention or New Norms of Nonintervention?*, 33 RUTGERS LAW REVIEW 423, 428-29 (1981); Josef Rohlik, *Some Remarks on Self-Defense and Intervention: A Reaction to Reading Law and Civil War in the Modern World*, 6 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 395, 406 (1976); Perkins, *supra* note 100, at 185.

102 DUGARD, *supra* note 3, at 90-94.

103 International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

104 G.A. Res. 1514 (XV) (Dec. 14, 1960); Eckart Klein, *Nationale Befreiungskämpfe und Dekolonisierungs-Politik der Vereinten Nationen: Zu einigen Völkerrechtlichen Tendenzen*, 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 618, 641 (1976).

the existence of a right of self-determination and has even conferred an *erga omnes* character on it.¹⁰⁵

This development did have its effect on customary international law governing the recognition of states. It led to the recognition of many new states during decolonisation. But it also created a bar to recognition. In 1965 the Rhodesian government, which formally was still a British colony, issued a unilateral declaration of independence (UDI) from the United Kingdom, aimed at resisting the implementation of black-majority rule, that had occurred elsewhere in Africa, including the neighbouring states of Zambia (formerly Northern Rhodesia) and Malawi (formerly Nyasaland).¹⁰⁶ Both the General Assembly and the Security Council expressed support for the liberation struggle of the black majority, affirming the right of self-determination for the Zimbabwean people, and exhorting Britain, as the administering power, to do all it could to topple the Rhodesian regime.¹⁰⁷ United Nations member states were repeatedly enjoined not to recognise the regime or to aid its survival in any way.¹⁰⁸ Although it is not seriously disputed that Rhodesia fulfilled all the necessary criteria of statehood, not one state recognised the country's independence until majority rule was established in 1980.

Similarly, Transkei, Ciskei, and other "homelands", created by the apartheid regime in South Africa for its majority black population, prob-

105 East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, ¶ 29 (June 30); Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 156 (July 4).

106 All three states having formerly been united in the Federation of Rhodesia and Nyasaland (also known as the Central African Federation), created by Britain in 1953 and dissolved, in the face of mounting internal opposition, ten years later.

107 G.A. Res. 2652 (XXV), ¶ 7 (Dec. 3, 1970) (The General Assembly urged the UK to use force to remove the UDI regime. The British government of Harold Wilson, however, although acting swiftly to impose trade and economic sanctions on Rhodesia following UDI, resiled from taking this ultimate step.).

108 S.C. Res. 216, ¶ 2 (Nov. 12, 1965) (a point made in the UN Security Council's first resolution on the matter, passed the day after the Unilateral Declaration was issued, calling on member states "not to recognise this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime"). ; *see also* S.C. Res. 217 (Nov. 20, 1965).

ably met the statehood criteria.¹⁰⁹ However, the creation of these “Bantustans” was widely seen as an attempt by South Africa to rid itself of its black majority. Thus the creation of these states was widely condemned as a violation of the right of self-determination,¹¹⁰ so that only South Africa ever recognised the “homelands” as independent states.

Since the 1960s therefore the creation of a state that amounts to a denial of self-determination demands that state’s non-recognition. However, the principle of non-recognition of states created by illegal force had already been developing prior to the Second World War and has been applied repeatedly since.

b. Non-Recognition Based on the Illegal Use of Force

Beginning in the 1930s state practice began to develop which supported the principle that changes brought about by states by illegal use of force should not be recognised.¹¹¹ This principle is often referred to as the “Stimson-Doctrine”, named after the US Secretary of State who is credited with being the first to articulate it. In response to the invasion of the Chinese province of Manchuria by Japan in violation of its treaty obligations, and the subsequent creation of the independent state of Manchukuo by the Japanese, Stimson stated in a note to the US Ambassador in Japan of January 7, 1932:

... it [the United States’ government] does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which Treaty both China and Japan, as well as the United States, are parties.¹¹²

Although the United States was not a member state, the League of Nations Assembly, on March 11, 1932, unanimously adopted a British-proposed

109 GRANT, *supra* note 3, at 92.

110 G.A. Res. 2775 (XXVI), § E (Nov. 29, 1971); G.A. Res. 3411 (XXX), § D (Nov. 28, 1975); G.A. Res. 31/6, § A (Oct. 26, 1976) (the homelands’ independence was deemed “invalid”).

111 O’BRIEN, *supra* note 12, at 185; Wright, *supra* note 12, at 548-49, 558; LAUTERPACHT, *supra* note 3, at 416-20; CRAWFORD, *supra* note 7, at 132-33.

112 UNITED STATES DEPARTMENT OF STATE, PEACE AND WAR: UNITED STATES FOREIGN POLICY 1931-1941 at 160 (1943) [hereinafter PEACE AND WAR]; UNITED

resolution, which stated: “it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.”¹¹³

Thereby the concept of non-recognition had entered international law. There is, however, some doubt whether the League of Nations’ Resolution is necessarily conclusive evidence of states’ *opinio juris* at that time, as the Lytton Commission Report for the League of Nations, which was the basis for the Resolution, concluded that Manchukuo was not independent, but rather a Japanese puppet state.¹¹⁴

Notwithstanding the fact that the *League of Nations’* decision was almost certainly based on a complex set of motives, it must nevertheless be acknowledged that the unanimous decision by the Assembly, and the American support for the notion, do evidence widespread support for viewing the principle of non-recognition as legally valid.¹¹⁵

Accordingly, Article 11 of the Montevideo Convention of 1933 stated, “[t]he contracting states definitely establish as the rule of their conduct the precise obligation not to recognise territorial acquisitions . . . which have been obtained by force”¹¹⁶

The non-recognition of the incorporation of the Baltic States into the Soviet Union on the part of the Allies, as well as the non-recognition of border changes instigated by German, Italian, and Japanese aggression

STATES DEPARTMENT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, JAPAN: 1931-1941 at 76 (1943).

113 See PEACE AND WAR, *supra* note 112, at 4.

114 LAUTERPACHT, *supra* note 3, at 417; CRAWFORD, *supra* note 7, at 75-79.

115 Lador-Lederer, *supra* note 5, at 73; J.J. Lador-Lederer, *Recognition – A Historical Stocktaking*, 27 NORDIC JOURNAL OF INTERNATIONAL LAW 117, 128, 131 (1957) (Writing in 1957, Lador-Lederer disagrees. He argues that because many states were prepared to recognise “aggressions,” the principle of non-recognition in the case of *bellum injustum* had not been established in law, but was only used as a political tool. He, however, overlooks the fact that states extending recognition always tried to justify the aggressions when recognising the results, claiming a case of *bellum justum*, thereby implying the existence of *opinio juris* in favour of assuming that a ban on recognition existed in cases of *bellum injustum*.)

116 Montevideo Convention, *supra* note 41.

during the Second World War provides further evidence for the existence of the principle.¹¹⁷

After the Second World War, the prohibition on the use of force contained in Article 2(4) of the UN Charter reinforced the principle. Indeed, there have been numerous cases since then, when the Security Council has asked member states not to recognise territorial changes achieved by the illegal use of force.¹¹⁸ Well-known examples are the non-recognition of Northern Cyprus,¹¹⁹ and the annexation of Kuwait by Iraq.¹²⁰ Some would argue that the widespread non-recognition of the incorporation of Crimea into the Russian Federation was another application of this rule of customary international law.¹²¹ The International Court of Justice has also repeatedly re-affirmed the legal validity of the principle of non-recognition.¹²²

c. Non-Recognition Based on the Unlawfulness of a Secession

Among some, however, there seems to be an inclination to presume there is a third case of mandated non-recognition: a state created by secession.

117 GRANT, *supra* note 3, at 9; Lador-Lederer, *supra* note 115, at 126-28 (Although he views these non-recognitions as more political than legal, and cites the case of Austria as an example. Having recognised the incorporation of Austria into Germany in 1938, the Allies declared that incorporation “null and void” in November 1943.).

118 DUGARD, *supra* note 3, at 27-28.

119 S.C. Res. 541 (Nov. 18, 1983); S.C. Res. 550 (May 11, 1984); *see also* S.C. Res. 787 (Nov. 16, 1992) (it was made obvious that unilaterally declared entities seceding from Bosnia would not be recognised; this was in response to the declaration of the Republic of Srpska.).

120 S.C. Res. 662 (Aug. 9, 1990).

121 Theodore Christakis, *Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea*, 75 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 75, at 96-99 (2015).

122 Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21); *see also* G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970) (requiring states not to recognise as legal any “territorial acquisition resulting from the threat or use of force,” which is generally viewed as reflective of customary international law); ICJ Armed Activities on Congo, *supra*

This is due to the belief that secessions are unlawful under international law, possibly bar rare exceptions. Many argue that there is, in the non-colonial context, no right for any group to secede from its mother country, except possibly in rare cases of “remedial secession”. Only when a minority is denied its right to “internal” self-determination by suppressive means, can it possibly lay claim to a right of “external” self-determination, i.e. secession. There being no right to secession, some argue, the principle of territorial integrity renders any secession unlawful (on occasion, there is also a reference to the *uti possidetis* principle).¹²³ ICJ Judge Koroma expressed this line of thought in *Kosovo* as follows:

A unilateral secession of a territory from an existing State without its consent, as in this case under consideration, is a matter of international law. The truth is that international law upholds the territorial integrity of a State. One of the fundamental principles of contemporary international law is that of respect for the sovereignty and territorial integrity of States. This principle entails an obligation to respect the definition, delineation and territorial integrity of an existing State. According to the principle, a State exercises sovereignty within and over its territorial domain Not even the principles of equal rights and self-determination of peoples as precepts of international law allow for the dismemberment of an existing State without its consent.¹²⁴

These arguments have implications for state recognition. There seems to be an assumption that other states may not extend recognition to a seced-

note 16, ¶ 162 (confirming the principle’s customary international law status). *See also, e.g.*, Charter of the Organization of American States art. 17, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

- 123 DUGARD, *supra* note 3, at 29, 121-32; Linda Hamid & Jan Wouters, *We the People: Self-Determination v. Sovereignty in the Case of De Facto States* 4 (Leuven Ctr. For Glob. Governance Studies, Working Paper No. 166, 2015); Marxsen, *supra* note 21, at 26; Vidmar, *supra* note 10, at 708; Clifton van der Linden, *Secession: Final Frontier for International Law or Site of Realpolitik Revival?*, 5 JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 1, 10 (2009) (claiming to discern a tendency in international law to judge a secession’s legality based on international law).
- 124 ICJ Self-Government of Kosovo, *supra* note 2, ¶¶ 20-22 (Koroma, J., dissenting); DUGARD, *supra* note 3, at 86-87 (a view already expressed by UN Secretary General U Thant in 1970).

ing entity, despite it meeting the statehood criteria, if the initial secession was unlawful, i.e. not justified at least as a remedial secession under international law. Others view all secessions in a non-colonial context as unlawful.¹²⁵ In the *Kosovo Case*, Serbia described this position as follows:

... the norm of respect for the territorial integrity of States imports an additional requirement and this is to sustain the territorial wholeness or definition or delineation of particular States. It is a duty placed on all States and relevant non-state actors that the very territorial structure and configuration of a State must be respected. . . . To put it another way, the obligation on all states is not simply to avoid trespassing across international borders, but to acknowledge and positively protect the territorial composition of other States.¹²⁶

The Islamic Republic of Iran was even more emphatic: it claimed that the principle of territorial integrity was a *jus cogens* norm, prohibiting secession even in cases of severe human rights violations.¹²⁷ These arguments are supposedly supported by state practice, the attempted secession by Katanga from the Democratic Republic of Congo,¹²⁸ and the case of Somaliland being the examples cited most often.¹²⁹

This line of reasoning is far from convincing. There is no evidence that it is unlawful to recognise a new state that is the result of an “unlawful” secession. The Canadian Supreme Court, after negating any right of Québec to secede from Canada under international law, nevertheless, concluded:

Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a *de facto* secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community

125 Hamid & Wouters, *supra* note 123, at 9-10.

126 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Serbia, ¶¶ 423-424 (Apr. 15, 2009), <http://www.icj-cij.org/docket/files/141/15642.pdf>.

127 Accordance with International law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the Islamic Republic of Iran, ¶¶ 2-4 (Apr. 17, 2009), <http://www.icj-cij.org/docket/files/141/15646.pdf>.

128 DUGARD, *supra* note 3, at 159-61.

129 DUGARD, *supra* note 3, at 138 (referring also to S.C. Res. 1766 (July 23, 2007) and S.C. Res. 1772 (Aug. 20, 2007) on Somalia); *id.* at 177-80.

Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.¹³⁰

Indeed, it would seem that a prohibition on recognizing seceding entities irrespective of whether they have achieved statehood would itself be unlawful, as it would amount to a clear violation of the principle of non-intervention in internal affairs.

I. Secessions and Territorial Integrity in International Law

International law is in fact silent as far as the lawfulness of secessions is concerned.¹³¹ As the Federal Republic of Germany explained in the *Kosovo* Case:

There is considerable authority for the proposition that a declaration of independence leading to a secession and secession itself are of an entirely factual nature and that international law in general is silent as to their legality...¹³²

There are two exceptions: when a secession is the result of the unlawful use of force (such as the Japanese intervention in China that led to Manchukuo's secession) or is an attempt to suppress the majority population, as was the case when Rhodesia seceded from the United Kingdom in 1965. Otherwise, however, international law views secession as an internal matter for the state concerned.¹³³ In 1920 already, the *International Committee of Jurists* on the Aaland Islands question stated:

On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State A dispute

130 Reference re Secession of Québec, [1998] 2 S.C.R. 217 (Can.).

131 KIRSTEN SCHMALENBACH, *CASEBOOK INTERNATIONALES RECHT* 131 (2d ed. 2014); López-Jacoiste, *supra* note 94, at 222, 232; DUGARD, *supra* note 3, at 88; Anne Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?*, 24 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 94, 98-101; Hamid & Wouters, *supra* note 123, at 6; Christakis, *supra* note 121, at 90-92.

132 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Germany, ¶ 27 (Apr. 17, 2009), <http://www.icj-cij.org/docket/files/141/15624.pdf>.

133 SCHMALENBACH, *supra* note 131, at 131.

between two States concerning such a question, under normal conditions therefore, bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned.¹³⁴

Once the secessionist movement, however, has been so successful that it can claim to fulfil all statehood criteria, international law does not prohibit recognition as a new state. Rather, this entity, that has become a new state according to customary international law, can now itself lay claim to the principle of territorial integrity.¹³⁵ The ICJ, in its advisory opinion on *Kosovo*, confirms this.¹³⁶ By stating that international law “contains no applicable prohibitions of declarations of independence”,¹³⁷ it emphasized that point.¹³⁸

The Court has been severely criticized for its reasoning, with many arguing that the court had not only missed the chance to address the

134 *Aaland Islands Question*, *supra* note 36, at 8.

135 Christakis, *supra* note 121, at 92-93; Marxsen, *supra* note 21, at 16; WHEATLEY, *supra* note 12, at 2; Vidmar, *supra* note 10, at 709, 742 (while acknowledging this view to be widespread, he doubts its correctness).

136 ICJ Self-Government of Kosovo, *supra* note 2.

137 *Id.* ¶ 84; Schmalenbach, *supra* note 131, at 129.

138 ICJ Self-Government of Kosovo, *supra* note 2, ¶¶ 2, 4-6 (separate opinion of Yusuf, J.) (some criticize the court for having only dealt with the Kosovar declaration of independence without addressing secessions); DUGARD, *supra* note 3, at 235-39; Stefan Oeter, *The Kosovo Case – An Unfortunate Precedent*, 75 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 51, 54-55 (2015) (he does not criticize the ICJ, however). Such criticism is, however, unjustified. The ICJ’s Advisory Opinion can only be interpreted as having offered a verdict on the legality of unilateral secessions. This is evidenced by the reference to those cases when unilateral declarations of independence have been condemned by the international community (Southern Rhodesia, Northern Cyprus, Republic of Srpska). All the resolutions cited by the ICJ in this context were dealing with attempted secessions, i.e. separation from the mother country, not with inconsequential declarations of independence. This can be seen most clearly in the case of Southern Rhodesia - the independence of the British colony was an official UN goal. The declaration of independence, if judged when taken out of its context, could therefore only be lawful. Yet the actual secession in 1965 was an attempt to suppress the black majority, so that the independence declaration

topic of state recognition, but that it had opened the door to chaos within the international community.¹³⁹ Actually, the ICJ did no more than apply customary international law as it stands to the case before it. A secession by a minority is basically an internal matter for the state concerned, be it a secession by an ethnic minority living within a specific territory or by a part of a possibly federal state not necessarily characterized by minority status.¹⁴⁰ This view usefully also obviates an analysis of what actually constitutes a “people” that can possibly lay claim to a right of self-determination, because the success of the secession is the only relevant criterion.

Any automatic prohibition on recognizing such a (successful) secession, on the other hand, would be a direct and unlawful intervention in the internal affairs of the other state by siding with the government of that state against an internal rebellion. Such conduct is prohibited under international law as a violation of the principle of non-intervention. The principle of non-intervention requires other states to refrain from supporting either side, because it is up to the people of the state concerned to decide on the way forward. Once that decision has resulted in the creation of a new state, it is not for other states to countermand that decision.

II. THE PRINCIPLE OF NON-INTERVENTION IN ANOTHER STATE'S INTERNAL AFFAIRS

The prohibition of any intervention in the internal affairs of another state is by now well established. According to Article 8 of the Montevideo

was seen to be unlawful. The fact the ICJ referred to this example of when such a declaration may be unlawful, strongly indicates the court was judging the legality of the Kosovar secession, not just the declaration of independence. *See also* ICJ Self-Government of Kosovo, *supra* note 2, ¶ 4 (separate opinion of Simma, J.) (his reasoning strongly indicates that he believed the court had provided an opinion on the accordance of secessions with international law); Peters, *supra* note 131, at 96, 98.

139 ICJ Self-Government of Kosovo, *supra* note 2, ¶ 6 (separate opinion of Yusuf, J.); DUGARD, *supra* note 3, at 244-45.

140 SCHMALENBACH, *supra* note 131, at 129, 131; Peter Hilpold, *Selbstbestimmung und Autonomie – Zwischen Sezession und innerer Selbstbestimmung*, in AUTONOMIE UND SELBSTBESTIMMUNG IN EUROPA UND IM INTERNATIONALEN VERGLEICH 13, AT 15 (2016).

Convention, concluded already in 1933, “no state has the right to intervene in the internal or external affairs of another.”¹⁴¹ Following WW II this rule of customary international law has repeatedly been confirmed. Article 2(7) of the UN Charter rules out any the intervention by the UN in a member state’s internal affairs. Regional treaties, also espoused this prohibition, for example Article 19 of the OAS Charter, concluded in 1948,¹⁴² or Article 8 of the 1955 Warsaw Pact.¹⁴³ Following these regional treaties a broad international consensus on the prohibition of intervention in another state’s internal affairs developed. In 1965, the General Assembly passed the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty by a 109:0:1 vote.¹⁴⁴ These sentiments were reaffirmed in the 1970 General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, which was passed without a vote: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”¹⁴⁵

Although these resolutions were not legally binding as such, the fact they were passed by consensus, with the latter explicitly referring to international law, allows the conclusion that states viewed the content of the Declaration as being reflective of their interpretation of the international legal rules. It is therefore justified to view the prohibition on intervention in the internal or external affairs of another state as a rule of customary

141 Montevideo Convention, *supra* note 41.

142 Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 47.

143 Treaty of Friendship, Cooperation and Mutual Assistance, May 14, 1955, 219 U.N.T.S. 3.

144 G.A. Res. 2131 (XX) (Dec. 21, 1965) (“1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.”).

145 G.A. Res. 2625 (XXV) (Oct. 24, 1970).

international law. In 2005, the ICJ confirmed that the Friendly Relations Resolution was “declaratory of international law”.¹⁴⁶

The ICJ itself has repeatedly stressed the legal quality of the prohibition of such interventions. As early as 1949, only shortly after the ICJ came into being, the Court expressly deemed interventions in other states’ affairs as unlawful.¹⁴⁷ In the *Nicaragua Case*, in 1986, the ICJ went into more detail by providing at least a partial definition of the prohibition on interventions:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law¹⁴⁸ A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.¹⁴⁹

Non-intervention entails not only refraining from external support of secessionist movements in other states, but also demands foregoing external support of that state’s government once conflict has erupted.¹⁵⁰ This principle of non-intervention in combination with the right of self-determination has led many, the author included,¹⁵¹ to conclude that customary international law prohibits any intervention, even in cases of civil war — civil war sometimes being the worst kind of precursor to a successful secession.¹⁵² Against this backdrop, it seems entirely consistent that the ICJ should conclude in *Kosovo* that the principle of territorial integrity is applicable

146 ICJ Armed Activities on Congo, *supra* note 16, ¶ 162.

147 Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 34-35 (Apr. 9).

148 Nicar. v. U.S., 1986 I.C.J. Rep. ¶ 202; *see also* ICJ Armed Activities on Congo, *supra* note 16, ¶¶ 161-165.

149 Nicar. v. U.S., 1986 I.C.J. Rep. ¶ 205.

150 Oeter, *supra* note 138, at 69-70.

151 Patrick C. R. Terry, *Afghanistan’s Civil War (1979-1989): Illegal and Failed Foreign Interventions*, 31 POLISH YEARBOOK OF INTERNATIONAL LAW 107 (2011).

152 *See, e.g., infra* notes 164-65 (as far as South Sudan and Eritrea are concerned); Oeter, *supra* note 138, at 69-70.

only to relations between states and not to relations between a state and a secessionist non-state actor acting within its territory.¹⁵³ Declaring the principle of territorial integrity as applicable to internal non-state actors would have otherwise sanctioned outside intervention by legalizing support for the government in an internal conflict.

III. UTI POSSIDETIS

As for the principle of *uti possidetis*, it is doubtful whether this “general principle of international law” is truly applicable outside of the colonial context.¹⁵⁴ The ICJ so far seems to have limited the principle’s application to the decolonization process:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved . . . *Uti possidetis* . . . is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.¹⁵⁵

The attempt of the EC to declare it to be a general principle of international law, applicable outside of the decolonization process, in order to safeguard Yugoslavia’s internal, administrative boundaries, has not managed to set a precedent,¹⁵⁶ as many of those and other states chose to ignore the precedent when recognizing Kosovo.¹⁵⁷ The EU itself has ignored the principle even within the decolonisation process when it admitted the island of Mayotte, as a part of France, to that organization, although it had seceded from the

153 ICJ Self-Government of Kosovo, *supra* note 2, ¶¶ 79-80; DUGARD, *supra* note 3, at 137; WHEATLEY, *supra* note 12, at 2. *But see* Marxsen, *supra* note 21, at 7-26 (especially at 13-14); Vidmar, *supra* note 10, at 708, 710-19 (claiming there is a necessity in international law of a waiver by the parent state in regard of its territorial integrity for other states to be permitted to recognise the seceding entity as a state).

154 DUGARD, *supra* note 3, at 226.

155 Frontier Dispute (Burk. v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 23 (Dec. 22).

156 DUGARD, *supra* note 3, at 129-30, 226-27.

157 *Id.* at 274.

Union of Comoros on independence in 1975.¹⁵⁸ It should also be noted that the Roman legal principle, from which *uti possidetis* derives, only stipulates that property that is disputed should be viewed as belonging to the current possessor.¹⁵⁹ A successful secession, resulting in a new state, can then of course itself lay claim to this principle.¹⁶⁰ As Dugard has explained, the principle is in any case only relevant, if at all in a non-colonial context, to the *creation* of a new state, rather than it being of a “continuing nature that comes into effect after a territory has established itself as a State”, which is an issue of territorial integrity.¹⁶¹

Any other conclusion would lead to the absurd result that other states would have been granted the explicit right to intervene in another state’s affairs: demanding collective non-recognition of a new state created by a successful secession would, in effect, result in unequivocal support for the government side in an internal conflict.

IV. STATE PRACTICE

State practice does not evidence that states view secessions in a non-colonial context as illegal. The often cited non-recognition of Katanga was

158 Geographically, the island is a part of the Union of Comoros which became independent from France in 1975. In the referendum on independence in 1974 the Island of Mayotte was the only territory within the Comoros to vote against independence. Since then the island has continued to be ruled by France, a situation the Union of Comoros refuses to recognise. Despite a large majority of the island’s inhabitants supporting French rule (in a 2009 referendum 95 % of the population voted in favour of Mayotte becoming a French “département”), the General Assembly has repeatedly reaffirmed the sovereignty of the Union of Comoros over the island. *See, e.g.*, G.A. Res. 37/65 (Dec. 3, 1982); G.A. Res. 49/18 (Nov. 28, 1994). In 1976, a draft resolution of the Security Council, recognising the sovereignty of the Union of Comoros, received 11 affirmative votes, but was vetoed by France. On 1 January 2014, the island, nevertheless, became a part of the European Union.

159 DUGARD, *supra* note 3, at 131.

160 MARTIN OTT, DAS RECHT AUF SEZESSION ALS AUSFLUSS DES SELBSTBESTIMMUNGSRECHTS DER VÖLKER 466 (2008).

161 DUGARD, *supra* note 3, at 130; OTT, *supra* note 160, 363-65.

accompanied by references to the illegality of the attempted secession;¹⁶² however, the support provided by Belgium, the former colonial power, to the secessionists, seems to have been the main motivating factor behind these condemnations.¹⁶³ Even during the decolonization period, when states emphasized the importance of retaining current borders, attempts at secession, while certainly not supported, were always referred to as an “internal matter” of the state concerned.¹⁶⁴ Besides Katanga, other examples are sometimes cited when “successful” secessions were denied recognition. A common factor of all these examples, however, is that most authors claim that the statehood criteria were met by the seceding entity for at most two years. That in itself makes it doubtful effective statehood had been truly achieved and is much more likely a sign of a situation in flux when the principle of non-intervention demands refraining from recognition.¹⁶⁵

On the other hand, there have been successful secessions, which were recognised by the international community in disregard of the principle of territorial integrity or *uti possidetis*: Bangladesh, Eritrea and South Sudan.¹⁶⁶ If the break-up of Yugoslavia is seen as a process of multiple secessions instead of dissolution, then Croatia, Slovenia, Bosnia-Herzegovina and Macedonia must be added to that list.¹⁶⁷ Some scholars dismiss these examples by going to great lengths to justify Bangladesh’s secession as

162 S.C. Res. 169 (Nov. 24, 1961).

163 *Id.*; OTT, *supra* note 161, at 223, 225; Lawrence S. Eastwood Jr., *Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 299, 305-07 (1993) (pointing out that Baluba wanted to secede from Katanga, raising doubts as to whether the majority of Katanga’s population actually supported independence).

164 Regarding Katanga, *see* S.C. Res. 161 (Feb. 21, 1961); regarding Biafra, *see* OTT, *supra* note 160, at 232.

165 Regarding Katanga, *see* OTT, *supra* note 160, at 226; regarding Biafra, *see id.* at 229-35 (Biafra was recognised by a few states); regarding Bougainville, *see id.* at 252-53; DUGARD, *supra* note 3, at 172-73.

166 Hilpold, *supra* note 140, at 15; DUGARD, *supra* note 3, at 87; Eastwood, *supra* note 163, at 310-13.

167 DUGARD, *supra* note 3, at 88, 191-96; OTT, *supra* note 160, at 313-27; Eastwood, *supra* note 163, at 300; Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia’s and Croatia’s Right*

remedial, while emphasizing the consensual nature of the secession in the other two cases, and treating Yugoslavia as a case of dissolution. However, the fact is that all these secessions were successful and most were the result of the use of force. In Bangladesh's case, secession was achieved with the military help of India;¹⁶⁸ Eritrea¹⁶⁹ and South Sudan¹⁷⁰ were both created as a result of a decades-long civil war. The fact the international community was in the end able to convince the parent states, Ethiopia and Sudan, to accept the inevitable does not make these separations "consensual".¹⁷¹

There is, however, one seemingly clear case: the case of Somaliland, where a successful secession, i.e. the creation of a new state on the territory of another state, has been met by collective non-recognition without such conduct being mandated by any international organisation. Somaliland declared its independence from Somalia in 1991. There is near consensus that since its independence, Somaliland has always met and still meets the criteria of statehood, while Somalia itself, for many years, has been judged as a "failed state." Nevertheless, Somaliland has not been recognized by other states.¹⁷² It seems that this is mainly due to political not legal considerations.¹⁷³ For instance, many fear that recognising Somaliland will unleash other states across Africa that wish to be recognised.¹⁷⁴ There are also concerns that recognition of Somaliland might spark further secessions from Somalia, leading to further conflict in the war-ravaged

to Secede, 15 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 213, 213-19 (1992).

168 OTT, *supra* note 160, at 236-44; DUGARD, *supra* note 3, at 187-91; Eastwood, *supra* note 163, at 311-12.

169 OTT, *supra* note 160, at 254-61; DUGARD, *supra* note 3, at 179-80, 196-98.

170 OTT, *supra* note 160, at 353-55; DUGARD, *supra* note 3, at 173, 198-201.

171 Nikola Pijovic, *To Be or Not to Be: Rethinking the Possible Repercussions of Somaliland's International Statehood Recognition*, 14 AFRICAN STUDIES QUARTERLY 17, 21-22 (2014). *But see* Vidmar, *supra* note 10, at 714 (regarding Ethiopia's and Sudan's agreement to Eritrea's and South Sudan's secession as decisive).

172 *See also* Eggers, *supra* note 51, at 211-22; Pijovic, *supra* note 171, at 17-36.

173 Pijovic, *supra* note 171, at 18.

174 *Id.* at 21.

country.¹⁷⁵ Many also believe that Somaliland's independence should be part of a comprehensive peace agreement, covering the whole Somalia.¹⁷⁶ On the other hand, there does seem to be a basic willingness to recognise Somaliland, as evidenced by Somaliland's "engage[ment] with the United Nations, the Arab League, the EU, and nations such as Britain, America, and Denmark."¹⁷⁷ In fact, no state has claimed that recognizing Somaliland would be illegal under international law.

That there is no rule demanding non-recognition of states created by secession is also evidenced by Article 41 of the International Law Commission's Articles on State Responsibility, generally viewed as reflective of customary international law, which demands non-recognition only of situations created by a violation of *jus cogens* norms. Contrary to Iran's view, the principle of territorial integrity is not such a *jus cogens* norm as evidenced by the successful secessions just outlined.¹⁷⁸

Having thus found no rule in customary international law that prohibits the recognition of states that have seceded (bar the two exceptions explained), the rarity of successful secessions must, nevertheless, be acknowledged. However, this is not due to customary international law, but rather to the enormous difficulties associated with establishing a new state on the territory of a parent state that is understandably resisting any such move.¹⁷⁹ Often secession will only be achieved by the use of force, with all the subsequent calamities, including foreign involvement. This will, of course, deter many would-be-secessionists. Furthermore, other states are hesitant to support secessionist movements by extending recognition, as most states are themselves faced with restive provinces demanding more autonomy or independence. Not only Russia and China, but also France and Spain are reluctant to offer any encouragement to secessionist movements lest they themselves soon be exposed to the same demands. It is therefore in the interest of most states that secessions fail.¹⁸⁰ No state

175 *Id.* at 24.

176 T.G., *supra* note 25.

177 *Id.*

178 López-Jacoiste, *supra* note 94, at 232-33.

179 *Id.* at 232.

180 Hilpold, *supra* note 140, at 46; Hofmeister & Giupponi, *supra* note 27, at 205; Eastwood, *supra* note 163, at 307-09, 314-16; Oeter, *supra* note 138, at 63.

is interested in increasing worldwide instability by admitting dozens of new states to the international community.¹⁸¹ Probably more importantly, no state wants to provide another state with an excuse for recognizing its own secessionist movement by previously generously recognizing other states' dismemberment.¹⁸²

These reactions, however, are not based on any legal principles to be found in customary international law, but are rather the result of self-interest and other motives rooted in the political sphere. Valid *political* considerations must be seen, nevertheless, as completely separate from the *legal* assessment. The fact that a new state has been created by successful secession grants other states the right to recognise it as such.¹⁸³ Whether they do so, is, as explained previously, at their own discretion.¹⁸⁴

Having examined when international law demands that a state is not recognised as such, it remains to be examined what the consequences of the opposite scenario are: the recognition of an entity as a state despite it not fulfilling those criteria. This is where customary international law on recognition of states and secessions truly overlap.

4. PREMATURE RECOGNITION AND SECESSIONS

a. Premature Recognition

Although the decision whether to recognise another state is still widely seen as being the prerogative of the individual recognizing state, there is agreement that recognizing an entity as a state before it fulfils the criteria of statehood is unlawful.¹⁸⁵ The issue of premature recognition becomes especially pertinent in cases of secession. A state that recognises a seceding entity as a state before it fulfils the criteria of statehood is guilty of inter-

181 Eastwood, *supra* note 163, at 314-16; Oeter, *supra* note 138, at 69.

182 Hofmeister & Giupponi, *supra* note 27, at 205.

183 DUGARD, *supra* note 3, at 134-35; Eastwood, *supra* note 163, at 313.

184 López-Jacoiste, *supra* note 94, at 241.

185 Briggs, *supra* note 14, at 171; Ruda, *supra* note 12, at 451; O'BRIEN, *supra* note 12, at 186-87; BAER, *supra* note 12, at 318-23; Grant, *supra* note 12, at 326; Wright, *supra* note 12, at 556.

ference in the domestic affairs of the parent state,¹⁸⁶ and therefore violates the principle of non-interference by supporting the secessionists against the other state's government. Premature recognition violates the principle of territorial integrity, which applies to the relations between states as the ICJ has again emphasized.¹⁸⁷

Long before the UN Charter came into force there was near universal agreement that premature recognition was contrary to international law.¹⁸⁸ Already in 1874, Theodore Woolsey declared that:

If the question is still one of armed strife, as between a colony and the mother country, or between a state and a revolted portion of it, to take the part of the colony or of the revolted territory by recognition is an injury and may be a ground of war¹⁸⁹

William Hall, writing in 1924, also maintained that, "Until independence is so consummated that it may reasonably be expected to be permanent, insurgents remain legally subject to the state from which they are trying to separate. Premature recognition is therefore a wrong done to the parent state; in fact it amounts to an act of intervention."¹⁹⁰

Hall goes on to describe American and British reluctance to recognise the South American "Spanish" Republics' independence from Spain between 1810 and 1825 as due to their common wish to avoid a violation of international law.¹⁹¹ A report before the Senate Foreign Affairs Commit-

186 Ruda, *supra* note 12, at 451; O'BRIEN, *supra* note 12, at 186-87; BAER, *supra* note 12, at 318-23; Grant, *supra* note 12, at 326; Wright, *supra* note 12, at 556-57 ("states can, therefore, promote their policies by recognizing facts not yet established"); LAWRENCE, *supra* note 49, at 85-86; DUGARD, *supra* note 3, at 23-26; Oeter, *supra* note 138, at 70-71. *But see* Vidmar, *supra* note 10, at 743-47 (viewing the concept of premature recognition as outdated).

187 ICJ Self-Government of Kosovo, *supra* note 2, ¶ 80.

188 LAUTERPACHT, *supra* note 3, at 9-12; LAWRENCE, *supra* note 49, at 85-86 (writing in 1923, describing premature recognition as "an act of intervention which the parent state had a right to resent, as she did, by war," thereby referring to the French recognition of American independence in 1778).

189 WOOLSEY, *supra* note 43, at 41.

190 HALL, *supra* note 13, at 105, *supported in* HERSHEY, *supra* note 13, at 208; LAWRENCE, *supra* note 49, at 85-86.

191 HALL, *supra* note 13, at 105-08.

tee on the question of their recognition stated: “[t]he political right of the United States to acknowledge the independence of the Spanish American Republics, without offending others, does not depend upon the justice but on the actual establishment of that independence.”¹⁹²

Similarly, Hersch Lauterpacht stated in 1947 “It is generally agreed that premature recognition is more than an unfriendly act; it is an act of intervention and an international delinquency.”¹⁹³

He cites—among others—the examples of French recognition of the United States in 1778, and the US recognition of Panama in 1903 as having been contrary to international law.¹⁹⁴ According to Dugard, the US later even paid Colombia reparations for prematurely recognizing Panama.¹⁹⁵ Hershey, writing in 1927, besides also citing these two examples, views the recognitions of Belgium and Greece in 1827-1830 “by the Powers”, and the recognition of Cuba in 1898 as “premature”, an “intervention in the guise of recognition”, and therefore as a “gross affront to the parent State.”¹⁹⁶

The declaratory theory of recognition supported here means that the act of recognition does not alter the facts: the entity recognised as a state does not thereby become one. Nevertheless, it is self-evident that in cases of secession premature recognition amounts to actively supporting one side in an internal conflict, thereby ignoring the parent state’s still existing sovereignty.¹⁹⁷

Such premature recognition, of course, can be an attempt by the recognizing state to legitimize subsequent intervention at the putative new state’s request.

As Lauterpacht points out, such action is, however, illegal in another respect: it ignores the criteria developed in customary international law

192 *Id.* at 106.

193 LAUTERPACHT, *supra* note 3, at 8.

194 *Id.*; *see, e.g.*, BAER, *supra* note 12, at 321; LAWRENCE, *supra* note 49, at 86 (citing French recognition of U.S. independence as an example).

195 DUGARD, *supra* note 3, at 26, 38.

196 HERSHEY, *supra* note 13, at 208.

197 BAER, *supra* note 12, at 322; LAWRENCE, *supra* note 49, at 85-86; SCHMALENBACH, *supra* note 131, at 145; Oeter, *supra* note 138, at 56; *Memorandum by the Legal Adviser (Gross) to the Under Secretary of State (Lovett), Recognition of Successor States in Palestine*, 5 FOREIGN RELATIONS OF THE UNITED STATES 960, 960 (1948).

as regards statehood, and thereby unlawfully complicates the conduct of international relations within the international community to the disadvantage of all other states. The recognizing state is forced to treat the non-state as a state in bilateral relations, while the rest of the international community rightfully does not treat it as such. Such conduct therefore amounts to an “abuse of the power of recognition”.¹⁹⁸ Besides being an intervention, premature recognition is therefore also a recipe for chaos within the international community.

Therefore a seceding entity can only be recognised as a state once it has met all statehood criteria. As long as that is not the case and the parent state could possibly still reassert its control over the rebellious part of its territory, other states are prevented from extending recognition. Premature recognition is an intervention in the internal affairs of another state and therefore unlawful.¹⁹⁹ This legal situation also contradicts what many critics of the ICJ’s advisory opinion on *Kosovo* assert: far from ushering in an era of chaos and instability, the strict application of the rules on recognition set a very high bar to achieving independence. Achieving statehood on another state’s territory against that state’s wishes is no mean achievement and, when attained, certainly evidences that the mother country has, in any case, already lost effective control.

b. “Remedial” Secession and Recognition

I. THE RIGHT OF REMEDIAL SECESSION

This relatively clear legal situation, which, as is often the case in customary international law, sometimes is obscured by varying state practice, however, may be in danger.²⁰⁰ As explained, international law does generally not take a view on the legality of secessions. Nevertheless, many argue that there is at the very least a “presumption” against secession in international law.²⁰¹ Some of those, however, allow an exception in the case of so-called

198 LAUTERPACHT, *supra* note 3, at 8.

199 SCHMALENBACH, *supra* note 131, at 145.

200 Eastwood, *supra* note 163, at 300.

201 Peters, *supra* note 131, at 98-102 (outlining this argument).

“remedial” secessions.²⁰² This claimed right to secession in extraordinary circumstances is also supported by some who agree that international law basically does not regulate secession.²⁰³

As early as 1920, the International Committee of Jurists on the Aaland Islands question thought it possible that such a right may exist. After ruling out a general right to secede under international law, the committee continued:

The Commission, in affirming these principles, does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute, arising therefrom, such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the sphere of action of the League of Nations.²⁰⁴

It seems that, almost a century later, the right of remedial secession has not made much progress.²⁰⁵ In its 2010 advisory opinion on *Kosovo*, the ICJ referred to the right of remedial secession as follows:

Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were

202 DUGARD, *supra* note 3, at 211, 217-19, 222-25; Hamid & Wouters, *supra* note 123, at 5-6; Anatoly Kapustin, *Crimea's Self-determination in the Light of Contemporary International Law*, 75 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 101 (2015) (viewing Crimea as a case of remedial secession from the Ukraine).

203 López-Jacoiste, *supra* note 94, at 222, 232; OTT, *supra* note 160, at 360-65.

204 *Aaland Islands Question*, *supra* note 36, at 8.

205 Christakis, *supra* note 121, at 88-89; van der Linden, *supra* note 123, at 3.

actually present in Kosovo. The Court considers that it is not necessary to resolve these questions in the present case.²⁰⁶

Nevertheless, some have claimed that such a right exists.²⁰⁷ As early as 1921, the Commission of Rapporteurs, again considering the Aaland Islands questions, seemed to affirm such a right of remedial secession.²⁰⁸ The starting point for the current discussion is, however, the Friendly Relations Declaration:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.²⁰⁹

While repeating states' obligation to respect other states' territorial integrity, this obligation seems to be limited to states "conducting themselves in compliance with the principle of equal rights and self-determination of peoples". A state that disregards the self-determination of its peoples and discriminates against a section of its population can therefore, it is argued, not invoke the principle of territorial integrity in order to stop other states

206 ICJ Self-Government of Kosovo, *supra* note 2, ¶¶ 82-83.

207 López-Jacoiste, *supra* note 94, at 222; OTT, *supra* note 160, at 313-27, 460-64; DUGARD, *supra* note 3, at 211, 217-19.

208 Written Statement of Finland, 7 (Apr. 16, 2009), <http://www.icj-cij.org/docket/files/141/15630.pdf>. *Report Presented by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 at 28 (1921) ("The separation of a minority from a State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort, when the State lacks either the will or the power to enact and apply just and effective guarantees.") (as quoted in the Written Statement of Finland).

209 G.A. Res. 2625 (XXV) (Oct. 24, 1970).

recognizing the secession of an oppressed people.²¹⁰ The Russian Federation thus stated in the *Kosovo Case*:

In this regard, the Russian Federation is of the view that the primary purpose of the “safeguard clause” is to serve as a guarantee of territorial integrity of States. It is also true that the clause may be construed as authorizing secession under certain conditions. However, those conditions should be limited to truly extreme circumstances ...²¹¹

Accepting a right of remedial secession necessitates a definition of what actually constitutes a people. This is controversial,²¹² but it is usually assumed that a people must have common features that distinguish it from other inhabitants of the mother country (objective criteria, such as religion, culture, ethnicity) and this group of citizens should view themselves as a distinct people (subjective criterion).²¹³ The African Commission of Human and Peoples’ Rights, in the *Katanga Case*, did certainly not rule out the possibility of such a remedial right:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination

210 SCHMALENBACH, *supra* note 131, at 131.

211 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the Russian Federation, ¶ 88 (Apr. 16, 2009), <http://www.icj-cij.org/docket/files/141/15628.pdf>.

212 *Katangese Peoples’ Congress v. Zaire*, (2000) AHRLR 72 (ACHPR 1995) (the African Commission on Human and Peoples’ Rights stated that “[a]ll peoples have a right to self-determination. There may, however, be controversy as to the definition of peoples and the content of the right.”); Hofmeister & Giupponi, *supra* note 27, at 203; López-Jacoiste, *supra* note 94, at 228-30; DUGARD, *supra* note 3, at 107-21; Oeter, *supra* note 138, at 57-58.

213 SCHMALENBACH, *supra* note 131, at 131.

that is compatible with the sovereignty and territorial integrity of Zaire.²¹⁴

Ground-breaking, however, and therefore frequently cited in this context, is the decision by the Canadian Supreme Court on a possible secession by Québec from Canada:

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all “peoples.” Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the “people” issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where “a people” is governed as part of a colonial empire; where “a people” is subject to alien subjugation, domination or exploitation; *and possibly where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.* In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state.²¹⁵

Based on these hints at a right of remedial secession, a distinction is made between “internal” and “external” self-determination. A people is basically only entitled to “internal” self-determination, i.e. within an existing state. Only when it is not/no longer possible to realize this right in any meaningful way, does international law, it is argued, confer upon such a people the right of “external” self-determination, i.e. the right to secede.²¹⁶

In line with the more recent doctrines of humanitarian intervention or the Responsibility to Protect, the recognition of states thus might be in the process of becoming a new tool in order to enforce “humanitarian” goals. Some states certainly seem to be moving from viewing secession as not governed by international law towards accepting a right of “remedial”

214 *Katangese Peoples’ Congress v. Zaire*, (2000) AHRLR 72.

215 *Reference re Secession of Quebec*, [1998] 2 S.C.R. (emphasis added).

216 López-Jacoiste, *supra* note 94, at 224; OTT, *supra* note 160, at 460-64; Hamid & Wouters, *supra* note 123, at 3; Oeter, *supra* note 138, at 61-62.

secession. In the proceedings before the ICJ in the *Kosovo Case*, Finland was unequivocal that such a right of remedial secession existed:

The acts of the FRY authorities in the relevant period demonstrated that 'the State either lacks the will or the power to enact and apply just and effective guarantees'. Kosovo could not expect to enjoy meaningful internal self-determination as part of the FRY. In view of the continuing suppression by the authorities of the FRY of the right of self-determination, and in the absence of any guarantees that such suppression would cease, the only realistic solution was to realize the right by independent statehood.²¹⁷

As pointed out the Russian Federation,²¹⁸ but also Romania, Germany, the Netherlands, Switzerland, Ireland, Poland, and others claimed there was a right of remedial secession in international law, while the USA, China, and France avoided expressing an opinion.²¹⁹ Judge Yusuf indicated some support for this position in his Separate Opinion in the *Kosovo Case*. Referring to the passage of the Friendly Relations Declaration quoted above, he stated:

This provision makes it clear that so long as a sovereign and independent State complies with the principle of equal rights and self-determination of peoples, its territorial integrity and national unity should neither be impaired nor infringed upon. It therefore primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their fragmentation or disintegration due to separatist forces. However, the saving clause in its latter part implies that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which

217 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Finland, 7 (Apr. 16, 2009), <http://www.icj-cij.org/docket/files/141/15630.pdf>.

218 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the Russian Federation, ¶ 88 (Apr. 16, 2009), <http://www.icj-cij.org/docket/files/141/15628.pdf>.

219 DUGARD, *supra* note 3, at 150.

could effectively put into question the State's territorial unity and sovereignty.²²⁰

As demonstrated, there is some support for the right of remedial secession among academics and states, It is now necessary to discuss what effects such a right might have on the law of state recognition.

II. EFFECTS ON THE LAW OF STATE RECOGNITION

Although it is at this stage still very doubtful that a right of remedial secession has really developed in customary international law²²¹ and correspondent *opinio juris* is currently still lacking, customary international law on state recognition may, nevertheless, be slowly evolving in order to accommodate remedial secessions.²²² The consequence seems to be the creation of an exception to the prohibition on premature recognition. In recent times, states, such as the Kosovo, have been recognised by many other states although they undoubtedly do not fulfil the statehood criteria. Possibly, therefore, some states are beginning to view a remedial right of secession based on humanitarian grounds as a justification for prematurely recognizing other states.²²³ Tomuschat seems to advocate such an approach which he sees as evidence of “the new thinking in the field of international law”:

Thus, it appears that the issue of premature recognition cannot completely be separated from the other question of whether “remedial secession exists” as a legal concept. Where an ethnic group may claim a right to secession on account of the massive discrimination which it has suffered thirds states can hardly be

220 ICJ Self-Government of Kosovo, *supra* note 2, ¶ 12 (separate opinion of Yusuf, J.); *see also id.* ¶¶ 182-184 (separate opinion of Cancado Trindade, J.).

221 Hilpold, *supra* note 140, at 39-41; López-Jacoiste, *supra* note 94, at 234.

222 ICJ Self-Government of Kosovo, *supra* note 2, ¶¶ 82-83 (the ICJ did not decide whether there is such a “remedial right” of secession based on the right of self-determination, but pointed out that this was a “subject on which radically different views were expressed by those taking part in the proceedings”); López-Jacoiste, *supra* note 94, at 242 (who, while doubting a right of remedial secession exists, nevertheless acknowledges that states “may be more likely to grant recognition” in such cases).

223 Vidmar, *supra* note 10, at 737, 739-40.

denied the right to recognize this legal position and to draw the requisite conclusions.²²⁴

Ott sees some evidence for this in state practice:

In the cases of Bangladesh, Croatia and Bosnia and Herzegovina, of the former constituent republics of the USSR and of Eritrea, recognition was only confirmation of statehood; a statehood that partly did not satisfy the effectiveness criterion, but that was nevertheless legitimized by the principle of self-determination and therefore legally existent.²²⁵

This position is confirmed by Wilde:

The significance of the external self-determination entitlement is that, if it is present, it can tip the balance in favour of statehood even when the entity does not meet the ordinary viability test. Examples here would be former colonial states in the period immediately following decolonization, and Bosnia and Herzegovina in the first half of the 1990s.²²⁶

Again, Finland, in its statement to the ICJ in the *Kosovo Case*, proposed exactly that:

A critical aspect of the situation at hand is the international presence established by UN Security Council resolution 1244 (1999) . . . The involvement of the international community is part of the way Kosovo resembles other situations involving UN assistance, such as East Timor, where limitation of internal self-determination, accompanied by serious human rights violations have opened the door to secession and independent statehood. In these cases, the assessment of effective control is complicated by the extensive international presence The creation of states out of long and violent struggles rarely fulfils criteria discussed in ideal theories of democratic representation Bearing in mind what has been said

224 Christian Tomuschat, *Recognition of New States – The Case of Premature Recognition*, in *KOSOVO AND INTERNATIONAL LAW, THE ICJ ADVISORY OPINION OF 22 JULY 2010*, at 31, 42-43 (Peter Hilpold ed., 2012).

225 OTT, *supra* note 160, at 465 (translation by author).

226 Ralph Wilde, *Kosovo: International Law and Recognition*, in *A SUMMARY OF THE CHATHAM HOUSE INTERNATIONAL LAW DISCUSSION GROUP MEETING HELD ON 22 APRIL 2008*, at 8, 19 (2008), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il220408.pdf>.

above about the abnormal nature of the situation, and the rationale of the self-determination principle, there seems little doubt that, if international law were to ignore or by-pass the Declaration of Independence, it would not serve one of the principal functions it has to provide for stable and lasting solutions for territorial disputes that are based on respect for fundamental rights and freedoms.²²⁷

The UK, which itself recognised Kosovo on 18 February 2008, hinted at that possibility as well, when it concluded in the *Kosovo* Case in 2009 that:

developments that have occurred *since 17 February 2008* have crystallized Kosovo's independence, *resolving any doubts and curing any deficiency that may have existed*. Of particular significance in this regard are . . . (2) the fact that the Kosovo authorities peacefully control and administer most of the territory and command the allegiance of the vast majority of the people of Kosovo . . .²²⁸

The question is whether state practice confirms these arguments. As Wilde pointed out, there have always been some tendencies to be less strict in judging whether an entity meets the statehood criteria in cases when the secession was a clear-cut expression of the right of self-determination, i.e. during the process of decolonization. Some former colonies lacked an effective government on independence as their societies were embroiled in civil conflict. Nevertheless, the overwhelming majority of states immediately recognised these former colonies as new states once they had achieved independence.²²⁹

However, it is very difficult to draw any conclusions from these events as they were characterized by the former colonial power having relinquished

227 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Finland, ¶¶ 8-10 (Apr. 16, 2009), <http://www.icj-cij.org/docket/files/141/15630.pdf>.

228 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the United Kingdom, ¶¶ 127-128 (Apr. 17, 2009), <http://www.icj-cij.org/docket/files/141/15638.pdf> (emphasis by author).

229 DUGARD, *supra* note 3, at 39-41 (certainly this was the case in respect of the Belgian Congo, which became independent on June 30, 1960, following a Belgian declaration to that effect of January 27, 1960). On June 14, 1960, the region of South Kasai had declared its independence, followed by the Katangan declaration of independence on July 11, 1960. CRAWFORD, *supra* note 7, at 57 (as far as the Congolese central government was concerned, Crawford has commented

its claim to the territory. Not recognizing these new states on independence would have meant not recognizing any kind of sovereignty – a situation some neighbouring states may well have attempted to exploit. There was no alternative to recognizing these former colonies as states, even more so as an end to colonialism was the international community's avowed goal. The international recognition of East Timor in 2002, despite its administration still being heavily dependent on the UN,²³⁰ and therefore evidently not able to provide effective government, belongs to this category.²³¹ The former Portuguese colony had been occupied and annexed by Indonesia in 1975. Following widespread human-rights abuses and international pressure, a referendum was held in 1999 when a large majority of the population opted for independence, which was formally achieved in 2002. Despite a lack of effective government, there was no other sovereign to turn to, once both Portugal and Indonesia had relinquished their claims. As there was no other state claiming sovereignty over these former colonies, recognising such states also corresponds to the Permanent Court of International Justice's view of territorial sovereignty:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.²³²

More recently, however, it seems that many states, often at the initiative of the United States and its European allies, are beginning to recognise entities

that “anything less like effective government it would be hard to imagine”). Nevertheless, the Democratic Republic of the Congo was swiftly recognised by many states and admitted to the United Nations.

230 See S.C. Res. 1410 (May 17, 2002) (As of 20 May 2002, a United Nations Mission of Support in East Timor (UNMISSET) was established. Its duties were: “(a) To provide assistance to core administrative structures critical to the viability and political stability of East Timor; (b) To provide interim law enforcement and public security and to assist in the development of a new law enforcement agency in East Timor, the East Timor Police Service (ETPS); (c) To contribute to the maintenance of the external and internal security of East Timor.”).

231 DUGARD, *supra* note 3, at 181.

232 Legal Status of East Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 5, at 46 (Apr. 1933).

not fulfilling the statehood criteria outside of any colonial context.²³³ This seems to be based on vague notions of their claim to independence being legitimate and therefore worthy of support. The widespread recognitions of Croatia, Bosnia and Herzegovina, and Kosovo, whose secessions were seen as justified in the face of Serbian aggression, seem to indicate a less stringent application of the Montevideo criteria in a non-colonial context, as these states were, and to some extent are, viable only thanks to massive international involvement in their administrations.²³⁴

Croatia declared its independence from Yugoslavia on 25 June 1991, following a referendum in May 1991, and reaffirmed this declaration on 8 October 1991. Germany recognised Croatia on 23 December 1991, on 15 January 1992 the other EC states followed suit. The USA recognised Croatia on 8 April 1992. Although disputed by some,²³⁵ there is little doubt that Croatia did not fulfil the Montevideo criteria at the time of its recognition. About one third of its territory was not under the government's control and its status as an independent state was not yet assured due to the Yugoslavian central government's military resistance.²³⁶ The Croatian war finally ended in 1995.

The situation was even clearer in the case of Bosnia and Herzegovina, which applied to the EC for recognition on 20 December 1991.²³⁷ Following a referendum held in late March 1992 (boycotted by the ethnic Serb population, around 30 % of the population), Bosnia and Herzegovina, already recognised by Turkey and Bulgaria, was recognised by the EC member states on 7 April 1992, followed by the US on 8 April 1992.²³⁸ At this stage, Bosnia and Herzegovina was nowhere near meeting the state-

233 Eastwood, *supra* note 163, at 322, 327.

234 Referring to Bosnia and Croatia, *see* Koskenniemi, *supra* note 70, at 268; Eastwood, *supra* note 163, at 327-28.

235 Weller, *supra* note 3, at 604.

236 Danilo Türk, *Recognition of States: A Comment*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 66, 69 (1993); MÜLLERSON, *supra* note 71, at 130; O'BRIEN, *supra* note 12, at 186; BAER, *supra* note 12, at 105.

237 Türk, *supra* note 236, at 74.

238 *Id.* at 69.

hood criteria.²³⁹ The government had no effective control over its territory, at times not even over the capital city, a fact acknowledged by Bosnian President Izetbegovic when -on 11 April 1992- he asked for EC, Commission on Security and Cooperation in Europe, and UN help in “prevent[ing] aggression against our peaceful country.”²⁴⁰

Bosnia and Herzegovina did not fulfil the criteria of statehood for many years and arguably does not until this day. In his dissenting opinion in the ICJ *Genocide Convention* Case, Judge Kreca pointed out that even after the 1995 Dayton Peace Accords, Bosnia’s statehood remained in doubt due to massive UN involvement in its internal administrative affairs.²⁴¹ As a result of those accords, the implementation of the peace settlement is still supervised by the High Representative for Bosnia and Herzegovina, who is selected by the Peace Implementation Council.²⁴² In August 2016, more than 24 years after Bosnia and Herzegovina was recognised as an independent state, the website of the Office of the High Representative still declares: “The OHR is working towards the point where Bosnia and Herzegovina is able to take full responsibility for its own affairs.”²⁴³

As mentioned earlier, recognition was viewed as justified, based on Yugoslav/Serbian aggression towards these former Yugoslav republics. Although the EC and many other states sought to refer to the secessions of Croatia and Bosnia-Herzegovina as a process of “dissolution” of the Yugoslav Republic into its constituent republics, that was evidently not the case.²⁴⁴ For some time afterwards Serbia and Montenegro attempted to continue the Yugoslav Republic, a move rejected by the international com-

239 *Id.*; O’BRIEN, *supra* note 12, at 186; BAER, *supra* note 12, at 114-15; Rich, *supra* note 5, at 49.

240 Weller, *supra* note 3, at 597.

241 Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Dissenting Opinion of Judge *ad hoc* Kreca, 1996 I.C.J. Rep. 595, ¶ 24 (July 11).

242 *Peace Implementation Council*, OFFICE OF THE HIGH REPRESENTATIVE, http://www.ohr.int/?page_id=1220.

243 *Id.*; *General Information*, OFFICE OF THE HIGH REPRESENTATIVE, http://www.ohr.int/?page_id=1139.

244 OTT, *supra* note 160, at 313-27; DUGARD, *supra* note 3, at 191-96; Eastwood, *supra* note 163, at 300, 328; Iglar, *supra* note 167, at 213-39.

munity as it would not have suited the version of events the EC adhered to.²⁴⁵ Furthermore, the administrative borders of the six republics constituting the Yugoslav Federation were artificially drawn and not based on historical or ethnic realities, as evidenced by the fact that the Serb minority in Croatia wanted to remain part of Yugoslavia, as did the sizeable Serb minority in Bosnia-Herzegovina. Neither Serbs, nor Croats, together forming a majority of the population there, were initially interested in creating a new state of Bosnia-Herzegovina. Despite this, there seemed to be a vague notion among western politicians that, by prematurely recognizing Croatia and then Bosnia-Herzegovina and thus “internationalising” what had been an inner-Yugoslav conflict, the international community would be enabled to counter Serbian aggression more effectively.²⁴⁶ As later developments demonstrated, this approach was a colossal failure and is seen by many as actually having aggravated the conflict.²⁴⁷

There were similar developments as far as Kosovo is concerned. Originally, Kosovo had been an autonomous Serbian province within Yugoslavia. However, as of 1990 Serbian president Milosevic successively reduced Kosovo’s status. This energized the separatist movement, which was aiming for Kosovo’s independence. Following the 1995 Dayton Accords, tensions increased and both sides resorted to military force. Many Kosovars were displaced by Serbian attacks, which led NATO to intervene in 1999 by bombing Yugoslavia. On 10 June 1999, the UN Security Council passed resolution 1244 that, while affirming Yugoslavia’s sovereignty, established UNMMIK – the UN administration for Kosovo – and authorized KFOR, a NATO-led peacekeeping force. Following years of peace negotiations and international supervision of its administration, Kosovo declared its independence on 17 February 2008. Kosovo was rapidly recognised by, among others, Germany, the UK, the US, and France. This despite the fact that Kosovo’s government was not in effective control of its territory, but rather heavily dependent on international organizations.²⁴⁸ UNMIK’s

245 Eastwood, *supra* note 163, at 328.

246 MÜLLERSON, *supra* note 71, at 130; DUGARD, *supra* note 3, at 56.

247 Hannum, *supra* note 3, at 62; MÜLLERSON, *supra* note 71, at 131-32; O’BRIEN, *supra* note 12, at 186.

248 Wilde, *supra* note 226, at 19; DUGARD, *supra* note 3, at 207-09; Oeter, *supra* note 138, at 66-67.

mission meanwhile was described as follows: “The Security Council, in its Resolution 1244 (1999), has vested in the interim civil administration authority over the territory and people of Kosovo. All legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK.”²⁴⁹

The International Civilian Office, which continued until September 2012, could veto legislative and executive actions undertaken by the Kosovo administration. The European Union Rule of Law Mission in Kosovo (EULEX) was formed, with powers of arrest and prosecution. EULEX’s mission has been extended until 14 June 2018 and includes the right to assign criminal law cases to EULEX prosecutors and to a panel with a majority of EULEX judges in “extraordinary cases”.²⁵⁰ Against this backdrop, there must be doubts as to whether Kosovo even now, more than eight years after its widespread recognition as a new state, fulfils the statehood criteria.²⁵¹ Certainly, at the time of their recognitions, some states acknowledged that much. In a press release, confirming its recognition of Kosovo, Sweden made the following statement: “A difficult and demanding process is now being started to build a Kosovan state that meets international requirements.”²⁵²

Nevertheless, major western powers rapidly recognised the putative new state, although that certainly went against the EC’s original position on the inner-Yugoslav conflicts, which had declared the internal administrative borders of the Yugoslav republics sacrosanct. Kosovo undoubtedly was a part of the Serb Republic. Furthermore, the fiction of the dissolution of Yugoslavia into its constituent republics no longer could be sustained, as Kosovo was clearly seceding from the Republic of Serbia. Despite many years having passed since Serbian troops had been guilty of atrocities

249 U.N. Secretary General, *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo*, ¶ 35, U.N. Doc. S/1999/779 (July 12, 1999).

250 *What is EULEX?*, EULEX, <http://www.eulex-kosovo.eu/?page=2,16> (last updated June 21, 2016).

251 Oeter, *supra* note 138, at 66-68.

252 Press Release, Sweden’s Ministry of Foreign Affairs, Sweden Recognises the Republic of Kosovo (Mar. 4, 2008), <http://s310226652.online.de/docs/independence/Schweden.pdf>.

against the Kosovars,²⁵³ it seems Kosovo's secession, nevertheless, was deemed justified by major powers.²⁵⁴ In order to avoid setting a precedent, most states, however, went out of their way to stress the *sui generis* situation in Kosovo.²⁵⁵

Many states were and are reluctant to follow the European and US lead in recognizing the territory as a new state, precisely due to doubts as to the new state's viability without international support and in order to avoid encouraging other secessionist movements. Russia, China, Spain, Greece, and India are among states that have not extended recognition. As of 8 July 2016, 109 of the 193 UN member states have, however, recognised Kosovo.

As was to be expected this attempt by mainly western states to use state recognition as a tool to achieve geopolitical goals, while nebulously indicating that this may have been down to humanitarian considerations, is being exploited by other states.²⁵⁶ Russia, for example, based its recog-

253 Peters, *supra* note 131, at 103; Oeter, *supra* note 138, at 64-65.

254 ICJ Self-Government of Kosovo, *supra* note 2; Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Finland, 8-10 (Apr. 16, 2009), <http://www.icj-cij.org/docket/files/141/15630.pdf>; OTT, *supra* note 160, at 313-27 (explicitly arguing that these two cases prove that a right of remedial secession exists).

255 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Japan (Apr. 17, 2009), <http://www.icj-cij.org/docket/files/141/15658.pdf>; Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Germany, 26-27 (Apr. 15, 2009), <http://www.icj-cij.org/docket/files/141/15624.pdf>; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of Norway, ¶¶ 18, 23 (Apr. 16, 2009), <http://www.icj-cij.org/docket/files/141/15650.pdf>; Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the United Kingdom, 9-15 (Apr. 17, 2009), <http://www.icj-cij.org/docket/files/141/15638.pdf>; Oeter, *supra* note 138, at 71-72.

256 Oeter, *supra* note 138, at 51, 72.

dition of Abkhazia's and Ossetia's secession from Georgia on the *Kosovo* precedent.²⁵⁷

Although clearly not a case of secession, the case of Palestine seems to be pointing in the same direction. On November 29, 2012, the UN General Assembly (GA) decided to upgrade the State of Palestine, which had been proclaimed on November 15, 1988,²⁵⁸ from an "entity" to a "non-member-state",²⁵⁹ thereby granting it "implicit recognition as a sovereign state."²⁶⁰ Israel's Representative to the UN described the decision as "affixing a seal of approval onto an entity that does not meet the basic criteria of statehood." There can be little doubt that Palestine indeed does not meet the statehood criteria. Not only does its government not exercise effective control over the claimed territory, but the extent of that territory has not been agreed either. Nevertheless, 136 states have so far recognised Palestine as a state. In addition, the parliaments of the UK, France, Spain, Ireland, and Portugal have recommended that their governments also extend recognition to the State of Palestine. This success in gaining recognition is due to the fact that many states believe the Palestinians' right to self-determination should overrule the "Montevideo criteria."

It is thus possible to discern a tendency, albeit still fledgling, to weaken the Montevideo criteria of statehood even in a non-colonial context, when a secession occurs that seems justified in the eyes of the recognizing state.²⁶¹ Whether this will develop into a customary international law right of remedial secession, which could then justify an exception to the prohibition on premature recognition of states, remains to be seen. Such premature recognition subsequently, of course, justifies the previously prohibited intervention in another state's affairs, as any intervention undertaken post-recognition is at the express wish of the new "state's" government. There

257 *Russia Recognizes Georgia's Rebels*, BBC NEWS, Aug. 26, 2008, <http://news.bbc.co.uk/2/hi/7582181.stm>; Hamid & Wouters, *supra* note 123, at 1; Kapustin, *supra* note 202, at 107; Oeter, *supra* note 138, at 73-74 (referring to Crimea).

258 THE DECLARATION OF INDEPENDENCE (Palestine 1988).

259 G.A. Res. 67/19 (Nov. 29, 2012) (passed in a 138:9:41 vote).

260 Louis Charbonneau, *Palestinians Win Implicit Recognition As Sovereign State*, REUTERS (Nov. 29, 2012, 6:46 PM), <http://www.reuters.com/article/2012/11/29/us-palestinians-statehood-idUSBRE8AR0EG20121129>.

261 OTT, *supra* note 160, at 313-27.

are many risks inherent to this approach: of course, there will always be widely differing views as to whether the ill-defined grounds for a “remedial secession” ever existed. In its most extreme form such recognition, by internationalising a previously internal conflict, may even legitimize the use of force in collective self-defence by the recognizing state against the new “state’s” parent state.²⁶² It seems that Russia is currently following that route as far as Abkhazia, Ossetia, and the Crimean situation are concerned.

5. CONCLUSION

This article has set out the current customary international law on state recognition. It has been argued that clear rules have been established during the last century. As extending recognition remains at the discretion of the individual state, there is bound to be some variance in the application of these rules. This can be due to a genuine disagreement in evaluating the facts on the ground, but is probably more often the result of contradictory geopolitical goals.

Against the general backdrop of the increasing importance of humanitarian considerations in international law, as evidenced by the contested concepts of humanitarian intervention and the Responsibility to Protect, there may, however, now be a tendency to instrumentalize state recognition to further such goals.

While customary international law does not regulate the lawfulness of secessions and the recognition of a new state is simply dependent on the secession’s success, it seems there may be some states willing to accept the concept of a right of remedial secession when a state’s government suppresses a minority. This seems to be accompanied by a weakening of the Montevideo criteria when deciding on whether to recognise the new state resulting from such a secession, possibly justifying premature recognition.

This is still very early days, as most states have not yet expressed corresponding legal views, and state practice is still isolated and inconsistent. Such a development, however, would pose serious risks. By creating ever more loopholes in international law, whether justified on humanitarian

262 *See id.* at 243 (India employed this strategy by recognizing Bangladesh in early December 1971, long before Bangladesh had truly become a state, in order to justify its military intervention there).

grounds or not, international law itself is undermined. Ill-defined criteria applied subjectively also endanger world stability: by internationalising internal conflicts -supposedly on humanitarian grounds- relatively minor conflicts can easily escalate. International law, meanwhile, is increasingly exposed to accusations of double standards: recognizing Kosovo or Bosnia and Herzegovina is justified, recognising Abkhazia or Ossetia is not – and vice versa. The last few decades have surely provided enough examples of foreign interventions, based on the claim of “new” or “emerging” norms of international law, that failed and seriously undermined international law. The law on state recognition should be preserved and not become another tool of intervention.

Far from “new thinking in the field of international law”²⁶³ as Tomuschat claims, states’ evolving approach to state recognition is reminiscent of the very traditional approach to state recognition, based on the inequality of states: an exclusive group of states decides who should become a new member of the international community. It would be preferable if states avoided turning back the clock to the 19th century when state recognition was no more than a reflection of the relative power of states.

263 *Supra* note 224, at 43.

UNCAC and Civil Society Activism Against Corruption In Bangladesh

Sumaiya Khair¹

1. INTRODUCTION

Corruption is a phenomenon that knows no social or cultural bounds and which occurs more or less in all societies and countries irrespective of their legal, socio-cultural, political and economic dynamics.² Notwithstanding, corruption is believed to predominate in contexts where public officials enjoy unfettered discretion, where governmental activities lack accountability and transparency and where the private sector and civil society institutions are weak and ineffective.³ Given the diversity of the problem in terms of causes, forms and impacts, there is no single universally agreed on definition of corruption.⁴ It is widely accepted that corruption undermines key elements of good governance that is, transparency, accountability, rule of law, participation,⁵ and integrity, and reinforces injustice, discrimina-

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2 The Context, TRANSPARENCY INTERNATIONAL BANGLADESH, <https://www.ti-bangladesh.org/beta3/index.php/en/about-us/the-context>.

3 Alan Doig & Stephen Riley, Corruption and Anti-Corruption Strategies: Issues and Case Studies from Developing Countries, in CORRUPTION & INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 45, 49 (Sahr John Kpundeh & Irène Hors eds., 1998).

4 MINISTRY OF FOREIGN AFFAIRS OF FIN., ANTI-CORRUPTION HANDBOOK FOR DEVELOPMENT PRACTITIONERS 19 (2012); *see also* Berihun Adugna Gebeye, Corruption and Human Rights: Exploring the Relationships 5 (Univ. of Denver, Working Paper No. 70, 2012), <http://www.du.edu/korbel/hrhw/workingpapers/2012/70-gebeye-2012.pdf>.

5 *See* UNITED NATIONS ECON. & SOC. COMM'N FOR ASIA & THE PAC., WHAT IS GOOD GOVERNANCE?, (2009), <http://www.unescap.org/sites/default/files/good->

tion, exclusion, and poverty. Accordingly, “[c]ombating corruption is not an end in itself” — rather it is “part of the broader goal of creating more effective, fair and efficient government,” which is why “[r]eformers are not just concerned with countering corruption per se but with reversing its negative impact on development and society as a whole.”⁶

Indeed, the range of anti-corruption instruments and conventions⁷ is a reflection of the significance that has been attached to fighting corruption worldwide. Amongst them, the United Nations Convention Against Corruption (UNCAC) “represents a[] [strong] attempt to establish universal anticorruption standards, including a common set of obligations on the part of countries around the world to cooperate in investigations and enforcement.”⁸ The UNCAC breaks new ground by stressing on state obligation “to promote multi-sectoral institutional, legal and policy reforms at . . . [the] . . . national level, as well as” *participation of society*, as fundamental “to creating a strong and sustainable basis for controlling

governance.pdf.

- 6 JEREMY POPE, *TI SOURCE BOOK 2000: CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM*, at xviii (2000).
- 7 Landmark instruments include Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-1, 78dd-2, 78m, 78ff (1977); Inter-American Convention against Corruption, Mar. 29, 1996, 35 I.L.M. 724; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1; Criminal Law Convention on Corruption, opened for signature Jan. 27, 1999, C.E.T.S. No. 173; Civil Law Convention on Corruption, opened for signature Nov. 4, 1999, C.E.T.S. No. 174; The United Nations Convention against Transnational Organised Crime, Nov. 15, 2000, 2225 U.N.T.S. 209; The African Union Convention on Preventing and Combating Corruption, July 1, 2003, 43 I.L.M. 5; The United Nations Convention Against Corruption, opened for signature Dec. 9, 2003, 2349 U.N.T.S. 41.
- 8 LUCINDA A. LOW, *THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: THE GLOBALIZATION OF ANTICORRUPTION STANDARDS 2-3* (2006) (paper presented at the International Bar Association (IBA), International Chamber of Commerce (ICC), Organization for Economic Cooperation and Development (OECD) conference on “The Awakening Giant of Anticorruption Enforcement” (London, May 4-5, 2006)), <http://www.steptoelaw.com/assets/attachments/2599.pdf>.

corruption.”⁹ While many assume, albeit incorrectly, “that traditional or classical international law . . . [is] merely state-to-state and that . . . individuals and . . . other nonstate actors [do] not have rights or duties based directly on international agreements or customary international law,” there are “vast numbers of formally recognized actors in the international legal process other than the state.”¹⁰ Civil society is essentially one such non-state actor that works with, among other things, human rights and good governance, nationally and internationally, by dint of their experience in grassroots organisation, strong advocacy, and active lobbying for reforms in law and policy.

Against the backdrop of a troubled political history, inconsistent anti-corruption efforts, and the gap between political rhetoric and actual policies, Bangladesh has witnessed the rise of non-state actors in the fight against corruption as early as the mid-1990s, prior to the advent of the UNCAC. A key feature of the anti-corruption experience in Bangladesh has been the plurality of non-state drivers, pushing for law and policy reforms and demanding public sector accountability in decision-making processes. The civil society in Bangladesh broadly comprising of NGOs, media, academia, think tanks, citizen’s groups, etc., has progressively led discussions and assessments of, *inter alia*, key governance issues of human rights, rule of law, and corruption. Engaged in challenging the top-down and state controlled close structures, the civil society has been vocal in demanding government accountability through transparency, participation, and democratic governance.

While government responsiveness to demands of the civil society and receptiveness of their recommendations was limited at the beginning, in the face of ineffective anti-corruption institutions, the role and function of the civil society in furthering public interest in good governance and corruption have gradually gained legitimacy. This paper showcases the

9 IFTEKHARUZZAMAN, THE UN CONVENTION AGAINST CORRUPTION: IMPLICATIONS FOR BANGLADESH – WHAT NEXT? 3 (2007) (paper presented at the seminar organized jointly by the Anti-Corruption Commission (ACC) and Transparency International Bangladesh (TIB) (Dhaka, Dec. 9, 2007)), <http://www.ti-bangladesh.org/oldweb/Documents/UNCAC-IACD07.pdf>.

10 Jordan J. Paust, Non-State Actor Participation in International Law and the Pretense of Exclusion, 51 VIRGINIA JOURNAL OF INTERNATIONAL LAW 977, 977 (2011).

work of Transparency International Bangladesh (TIB), accredited chapter of Berlin-based Transparency International, which has established itself as an independent, non-profit and non-partisan NGO with a mission to “catalyze and strengthen a participatory social movement to promote and develop institutions, laws and practices for combating corruption in Bangladesh, and to establish an efficient and transparent system of governance, politics and business.”¹¹ Since its inception, TIB has played a key role in addressing both the demand and supply sides of corruption in Bangladesh by engaging both the government and the public on an issue that is, at the same time, considered sensitive and a way of life. It has been instrumental in placing corruption on the political agenda and pushing for institutional reforms on the one hand and helping citizens raise their voice against the practice on the other.

This paper will first examine the core provisions of the UNCAC, the political environment of Bangladesh, conceptual issues related to good governance, corruption, human rights and civil society, and highlight how Bangladesh acceded to the UNCAC and the transformative moves it has taken thereafter pursuant to treaty obligations; then it will describe the role of TIB in the fight against corruption and illustrate its good practices.

2. THE UNCAC IN BRIEF

Corruption was a key focus in both the United Nations Declaration Against Corruption and Bribery in International Commercial Transactions 1996 and the United Nations Convention Against Transnational Organized Crime 2003.¹² Recognising the necessity of having in place an anti-corruption convention that is “universal, binding, effective and efficient” but at the same time sufficiently flexible “to take into account the legal, social, cultural, economic and political differences [among] member countries,” the United Nations (UN) established an Ad-Hoc Committee in December 2000 for negotiation of the convention.¹³ After two years of negotiations,

11 See Vision & Mission, TRANSPARENCY INTERNATIONAL BANGLADESH, <https://www.ti-bangladesh.org/beta3/index.php/en/about-us/vision-mission> (emphasis added).

12 IFTEKHARUZZAMAN, *supra* note 9, at 2.

13 *Id.*

the General Assembly adopted the UNCAC on 31 October 2003.¹⁴ As of 1 December 2015, the total number of countries that have ratified the UNCAC stood at 178 while the number of signatories amounted to 140.¹⁵

The first global legally binding and comprehensive instrument on corruption, the purpose of UNCAC as stated in Article 1 is to “a) promote and strengthen measures to prevent and combat corruption more efficiently and effectively; b) promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery; and c) promote integrity, accountability and proper management of public affairs and public property.”¹⁶ It “obliges the States Parties to implement a wide and detailed range of anti-corruption measures through their laws, institutions and practices.”¹⁷

Interestingly, the UNCAC does not explicitly define corruption but instead refers to specific acts that amount to corruption which include bribery, embezzlement, money laundering, concealment and obstruction of justice.¹⁸ Given the diversity of corruption in terms of acts and contexts, the UNCAC provides a combination of optional and mandatory provisions to enable States Parties to make informed decisions in choosing implementation options.¹⁹ Most of the provisions in the UNCAC allude to working within the principles of a State’s domestic law, which essentially

14 *Id.*

15 See United Nations Convention Against Corruption Signature and Ratification Status as of 12 December 2016, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

16 United Nations Convention Against Corruption art. 1, opened for signature Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) [hereinafter UNCAC].

17 TRANSPARENCY INT’L, UN CONVENTION AGAINST CORRUPTION (UNCAC) - SUMMARY, <http://www.multaqa.org/pdfs/UNCACSummary.pdf>.

18 Hannes Hechler, UNCAC in a Nutshell - A Quick Guide to the United Nations Convention Against Corruption for Embassy and Donor Agency Staff, U4 BRIEF, Sept. 2010, at 1, <http://www.cmi.no/publications/file/3769-uncac-in-a-nutshell.pdf>.

19 *Id.*

allows significant flexibility in interpreting the UNCAC's requirements in the context of any given country.²⁰

The UNCAC focuses on five broad parameters, namely preventive measures (Chapter II), criminalisation and law enforcement (Chapter III), international cooperation (Chapter IV), asset recovery (Chapter V) and technical assistance and information exchange (Chapter VI).

a. Preventive Measures (Articles 5-14)

The UNCAC attaches the same importance to corruption prevention as to control and sanctions and prescribes “interlinked and mutually reinforcing” measures for both the public and private sectors. With regard to the public sector, among other things, it calls for the establishment of independent and adequately resourced anti-corruption bodies and enhanced transparency in political finance.²¹ States Parties must “ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit.”²² “[P]ublic servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must . . . be promoted, and specific requirements are established for the prevention of corruption,” particularly in high risk activities, such as “the judiciary and public procurement.”²³ With regard to the private sector, the UNCAC enjoins upon States Parties to take measures to strengthen accounting and auditing standards and introduce sanctions for non-compliance.²⁴ It recommends codes of conduct, disclosure policies, and comprehensive regulatory regime to detect and prevent money laundering. Concerted efforts of all stakeholders are fundamental to effective implementation of corruption prevention measures. Accordingly, the UNCAC calls on States Parties to ensure civil society participation in anti-corruption initiatives and decision-making processes, provide public

20 *Id.* at 6.

21 Press Release, Consensus Reached on UN Convention Against Corruption, U.N. Press Release SOC/CP/270 (Oct. 2, 2003).

22 *Id.*

23 *Id.*

24 UNCAC, *supra* note 16, art. 12.

access to information and create channels to report corruption, including protection for whistleblowers.²⁵

b. Criminalisation and Law Enforcement (Articles 15-42)

The UNCAC requires States Parties to recognise as criminal offences not only corrupt acts, such as bribery and the embezzlement of public funds, if they are not so already under their domestic laws, but also the obstruction of justice, trading in influence, abuse of functions, illicit enrichment and the concealment and laundering of the proceeds of corruption.²⁶ The UNCAC goes a step further and criminalises private-to-private bribery and embezzlement, and bribery of foreign public officials and officials of public international organisations.²⁷

c. International Cooperation (Articles 43-50)

The UNCAC explicitly states, “where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption” (Article 43).²⁸ The UNCAC obliges them “to render . . . mutual legal assistance in terms of gathering and transferring evidence for use in court” and extradition of offenders. States Parties “are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.”²⁹ States may not refuse

25 *Id.* art. 13.

26 *Id.* arts. 15-25.

27 *Id.* arts. 21-23.

28 *Id.* art. 44.

29 United Nations Convention Against Corruption: Convention Highlights, UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html#International_cooperation.

assistance on the basis of bank secrecy and can involve dual criminality requirements only in limited cases.³⁰

d. Asset Recovery (Articles 51–59)

Consensus on the mechanisms to be used for asset recovery was reached after intense negotiations.³¹ This issue is particularly significant “for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments.”³² UNCAC provisions on international cooperation have a direct bearing on asset recovery processes.³³ Such cooperation may be rendered in different ways, for example:

[I]n the case of embezzlement of public funds, the confiscated property would be returned to the state requesting it; in the case of proceeds of any other offence covered by the [UNCAC], the property would be returned providing the proof of ownership or recognition of the damage caused to a requesting state; in all other cases, priority consideration would be given to the return of confiscated property to the requesting state, to the return of such property to the prior legitimate owners or to compensation of the victims.³⁴

e. Technical Assistance and Information Exchange (Articles 60–62)

The UNCAC recommends States Parties to “initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption.”³⁵ Such initiatives may include, but are not limited to:

[E]ffective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods; building capacity in the development and planning of strategic anticorruption policy; training competent authorities in the preparation

30 TRANSPARENCY INT’L, *supra* note 17, at 3.

31 United Nations Convention Against Corruption: Convention Highlights, *supra* note 29.

32 *Id.*

33 *Id.*

34 *Id.*

35 UNCAC, *supra* note 16, art. 60

of requests for mutual legal assistance that meet the requirements of this Convention; evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector.³⁶

Of particular relevance to the present paper are the UNCAC provisions in Article 13 that call on States Parties to take “appropriate measures” to “promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption” by “enhancing the transparency of and promoting the contribution of the public in decision-making processes, ensuring that the public has effective access to information; [and] respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.”³⁷ Additionally, the UNCAC urges States Parties to “develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability” (Article 5)³⁸ and to “enhance transparency in [their] public administration including with regard to its organization, functioning and decision making processes, where appropriate” by introducing systems and procedures that would enable the public access necessary information (Article 10).³⁹ Article 63 (4)(c) of the UNCAC requires States Parties to “agree upon procedures and methods of work,”⁴⁰ including “[cooperation] with relevant international and regional organizations and mechanisms and non-governmental organizations.”⁴¹ Indeed, the fact that the civil society has been included in the UNCAC

36 *Id.*

37 *Id.* art. 13.

38 *Id.* art. 5.

39 *Id.* art. 10.

40 *Id.* art. 63(4)(c).

41 *Id.*

review process not only enhances the “credibility and effectiveness of the review process” but also ensures “accountability and transparency.”⁴²

A. Bangladesh’s Accession to the UNCAC: The Country Context

Since its independence, Bangladesh has arguably been “moving away from what is considered as ‘minimalist democracy’ (transfer of power through regular, free and contested elections, fundamental freedoms, civilian control over policy and institutions) to an ‘illiberal democracy’, characterised by misuse of state power for partisan[,] personal gain and politicisation of . . . state institutions.”⁴³ Dominated by a two-party polity, the political scenario in Bangladesh has become hostage to confrontational politics and a culture in which the winner in elections takes full control over key institutions of the state and public resources and the losers are severely sidelined.⁴⁴ “Political patronage by the major parties has permeated nearly [all key] state institutions in ways that seriously undermine the accountability structures.”⁴⁵ “The prevalence of semi-authoritarian, or ‘hybrid’ regimes where the existence of formal democratic processes, such as elections, masks (often, in part, to legitimise) the reality of authoritarian domination” is believed to undermine good governance.⁴⁶

Bangladesh has seen both parliamentary and presidential forms of government and martial law regimes at different stages of its political history. Following the restoration of parliamentary form of government in 1991, successive parliamentary elections have taken place under a

42 IFTEKHAR ZAMAN ET AL., UN CONVENTION AGAINST CORRUPTION CIVIL SOCIETY REVIEW: BANGLADESH 2011 (2011).

43 INSTITUTE OF GOVERNANCE STUDIES, BRAC UNIVERSITY, THE STATE OF GOVERNANCE IN BANGLADESH 2008: CONFRONTATION, COMPETITION, ACCOUNTABILITY, at xv (2009).

44 *Id.* at 2.

45 Manzoor Hasan et al., Background Paper for the 7th Five Year Plan of the Government of Bangladesh: Governance and Justice, MINISTRY OF PLANNING BANGLADESH 81 (Feb. 21, 2015), http://www.plancomm.gov.bd/wp-content/uploads/2015/02/12_Governance-and-Justice-_Final-Draft.pdf.

46 Carl Gershman, The State of Democratic Governance: Achievements and Challenges in Democracy Rising. Assessing the Global Challenge, in DEMOCRACY RISING: ASSESSING THE GLOBAL CHALLENGES 37 (Heraldo Muñoz ed., 2006).

non-party Caretaker Government (CTG) that ensured a “re-emergence of parliamentary democracy” and a peaceful transfer of power.⁴⁷ A unique parliamentary innovation, the idea of a neutral CTG evolved in response to demands for a pragmatic means of changing governments through credible and impartial elections. The 13th amendment to the Bangladesh Constitution, passed on 26 March 1996, provided for the transfer of power to a non-partisan CTG, composed of a Chief Adviser (with status of Prime Minister) and a prescribed number of advisers (with status of ministers) at the end of a parliamentary term. Three CTGs have since held office, and the immediate past amongst them, technically fourth in line,⁴⁸ assumed responsibility on 12 January 2007, when the President declared a state of emergency in the wake of violent political agitations. One of the key priorities of this CTG was to root out corruption, given that Bangladesh was ranked at the bottom of the list of countries where corruption was perceived to be the highest for five consecutive years from 2001 to 2005 in the Corruption Perceptions Index (CPI).⁴⁹ Since January 2007, “a new governance paradigm [sic] [emerged in Bangladesh] that sought to strengthen democratic framework of the country in order to ensure that it is free from the scourge of corruption, discrimination and exploitation.”⁵⁰

During its tenure, the CTG undertook some major institutional reforms which included *inter alia* the separation of the Judiciary from the Executive, the establishment of the National Human Rights Commission,

47 TRANSPARENCY INT’L BANGL., NATIONAL INTEGRITY SYSTEMS COUNTRY STUDY REPORT: BANGLADESH 9 (2003).

48 The expiry of the BNP rule was followed by a Caretaker Government headed by the President for a brief period of time which dissolved soon after amidst much controversy and speculation.

49 The Corruption Perceptions Index (CPI) is released annually by Transparency International (TI) since 1995. It is a global survey of surveys on governance and corruption related indicators conducted by reputed international organisations. CPI provides international comparison of countries by perceived prevalence of political and administrative corruption. To date no country has yet scored 100 percent indicating that corruption exists in all countries of the world. Corruption clearly remains a global problem. See TRANSPARENCY INTERNATIONAL, <http://www.transparency.org>.

50 Human Rights Council Res. 5/1, U.N. Doc. A/HRC/WG.6/4/BGD/1, at 2 (Nov. 19, 2008).

the reconstitution of the Anti-Corruption Commission, the revamping of the Election Commission, the establishment of the Truth and Accountability Commission (TAC) and police and local government reforms.⁵¹ Legislative developments during the tenure of the CTG took place by way of Presidential Ordinances in the absence of a Parliament and largely in response to long-standing demands of civil society and human rights organisations. The laws passed at this time included: The National Human Rights Commission Ordinance 2007, The Public Procurement Rules 2008, The Truth Commission Ordinance 2008, The Voluntary Disclosure Ordinance 2008, The Government Attorney Services Ordinance 2008, The Anti-Terrorism Ordinance 2008, The Representation of the People (Amendment) Ordinance, 2008 and The Right to Information Ordinance 2008.⁵² One of the noteworthy highlights of the CTG tenure was the accession to the UNCAC in 2007. The Government of Bangladesh prepared the Compliance and Gap Analysis of “the implications of the UNCAC provisions on Bangladesh’s legislation, practices and institutional realities, including an assessment of the extent of compliance, gaps and capacity needs”⁵³ and submitted the report to the Conference of the States Parties to the UNCAC in 2008. This initiative was supported by the Institute of Governance Studies (IGS) at BRAC University Bangladesh, the German Technical Cooperation (GTZ) and the Basel Institute on Governance (BIG) in Switzerland.⁵⁴ In 2008, the Ministry of Home Affairs and the Attorney General’s Office were nominated by the Government of Bangladesh as the “Central Authorities” for providing “mutual legal assistance (MLA) under UNCAC.”⁵⁵ In 2009, the Government of Bangladesh developed an Action Plan for UNCAC Compliance, the “objective of [which] is to establish an operational guidance for relevant institutions to implement UNCAC. The

51 *Id.* at 11.

52 *Id.* at 13-14.

53 GOV’T OF THE PEOPLE’S REPUBLIC OF BANGL., UNCAC: A BANGLADESH COMPLIANCE & GAP ANALYSIS 17 (2d ed. 2008) [hereinafter COMPLIANCE & GAP ANALYSIS].

54 GOV’T OF THE PEOPLE’S REPUBLIC OF BANGL., UNCAC: A BANGLADESH ACTION PLAN FOR COMPLIANCE (2009).

55 COMPLIANCE & GAP ANALYSIS, *supra* note 53, at 14.

Plan is expected to fulfil Bangladesh's commitment to comply with UNCAC and provides a framework for monitoring of progress."⁵⁶

While the arrest and trial of celebrated politicians for corruption demonstrated the CTG's commitment to crack down on corruption and make a dent in the culture of impunity,⁵⁷ many believed that corruption did not wane during the CTG but simply changed hands and nature. This was manifest in the manner in which anti-corruption cases were handled, which raised concerns of fairness and equity. By the end of 2008, the much-hyped anti-corruption drive had begun to fizzle out on account of the "aggressive" and often "selective" measures taken by the CTG.⁵⁸ The release of "high profile" politicians including two former Prime Ministers who were in custody for alleged corruption contradicted the CTG's anti-corruption stand.⁵⁹ There were instances when a "single Bench of the High Court Division reportedly granted 298 bails in one day, averaging one order per several minutes."⁶⁰

That the CTG was unable to import qualitative changes in the governance was evident when in 2007, Bangladesh was rated very poorly by the Global Integrity Report. Despite securing a high score of 81 (strong) for its legal framework, Bangladesh scored a mere 47 (very weak) for actual implementation.⁶¹ The overall score for Bangladesh in 2007 was 64 (weak).⁶² The presence of the military and their direct involvement in government affairs largely eroded the CTG's profile. Amnesty International noted with concern the role of the armed forces in a range of functions with no clear rules of accountability and observed that the anti-corruption and

56 *Id.* at 17.

57 AIN O SALISH KENDRA, HUMAN RIGHTS IN BANGLADESH 2007, at 4 (Sara Hossain & Dina M. Siddiqi eds., 2008).

58 *Id.*

59 *Id.*

60 AIN O SALISH KENDRA, HUMAN RIGHTS IN BANGLADESH 2008: DASHED HOPES, RECEDING HORIZONS, NEW FRONTIERS (2008), http://www.askbd.org/web/wp-content/uploads/2009/01/human_rth_rpt.pdf.

61 Global Integrity Report 2007, GLOBAL INTEGRITY, <https://www.globalintegrity.org/research/reports/global-integrity-report-2007>.

62 *Id.*

anti-crime drives of the CTG were motivated and used to bring political parties to heel.⁶³

Notwithstanding the criticisms, the anti-corruption initiatives taken by the CTG may have had some positive impact as evident from Bangladesh's improved ranking in the CPI in the years immediately following the CTG regime. In 2006, 2007, 2008 and 2009, Bangladesh was ranked at number 3, 7, 10 and 13, respectively, from the bottom.⁶⁴

The newly elected political government, which assumed power in 2009, approved many of the laws that had been adopted by the CTG to ensure human rights and good governance.⁶⁵ Yet, the CPI rankings have been demonstrating an unstable trend. For example, in 2010, Bangladesh's ranking in the CPI slid to 12th from the bottom and rose again to 13th in 2011 and 2012.⁶⁶ Bangladesh's ranking improved further when it was placed 16th from the bottom in 2013, three steps higher than that in 2011 and 2012.⁶⁷ Bangladesh's score moved downward by two points, scoring 25 on a scale of 0-100 in 2014, and ranked 145th from the top and 14th from below in a list of 175 countries, indicating that corruption continues to be a major threat.⁶⁸ In 2015, Bangladesh again scored 25 points on a scale of 0-100

63 See One Year On: Human Rights in Bangladesh Under the State of Emergency, AMNESTY INTERNATIONAL (Jan. 10, 2008, 00:00 AM), <https://www.amnesty.org/en/press-releases/2008/01/one-year-human-rights-bangladesh-under-state-emergency-20080110>.

64 Iftekharuzzaman, Bangladesh in CPI 2013, TRANSPARENCY INTERNATIONAL BANGLADESH (Dec. 4, 2013, 23:05 PM), <https://www.ti-bangladesh.org/beta3/index.php/en/articles/85-articles/3904-bangladesh-in-cpi-2013.html>.

65 It may be noted that the government led by the Awami League began to seriously lobby against the system of interim caretaker government system referring to various miscarriages of rule of law and governance committed by the past caretaker government. Amidst much criticism and controversy, the Parliament passed the 15th amendment to the Bangladesh Constitution, which brought a number of changes including the abolition of the caretaker government.

66 Iftekharuzzaman, *supra* note 64.

67 *Id.*

68 Iftekharuzzaman, Corruption Perceptions Index 2015, TRANSPARENCY INTERNATIONAL BANGLADESH (Jan. 27, 2016), https://www.ti-bangladesh.org/beta3/images/2016/ppt_tir_cpi-2015_16_en.pdf.

and ranked 139th from the top and 13th from below.⁶⁹ Bangladesh's score has been consistently lower than the global average score of 43, and among the South Asian countries, Bangladesh's position remained 2nd lowest in both rank and score, ahead only of Afghanistan.⁷⁰

B. Anti-Corruption Measures Taken by the Government

Bangladesh has taken some noteworthy measures aimed at reducing corruption and promoting good governance. The most significant among these are the enactment of a number of laws and the adoption of the National Integrity Strategy. The laws include The Anti-Corruption Commission Act 2004, The Public Procurement Act 2006, and Public Procurement Rules 2008, The Prevention of Money Laundering Act 2009, The Right to Information Act 2009, The Public Finance and Budget Management Act 2009, The National Human Rights Commission Act 2009, The Chartered Secretaries Act, 2010, The Disclosure of Public Interest Information (Protection) Act 2011 and Rules 2016 (which is basically a whistle-blowers' protection law), The Prevention of Money Laundering Act 2012, and The Competition Act 2012. A new Audit Act is in the offing. All of these laws have direct or indirect implications for the fight against corruption.

The Government of Bangladesh adopted the National Integrity Strategy (NIS) in 2012.⁷¹ "The NIS has a comprehensive set of goals, strategies and action plans aimed at increasing the level of independence, accountability, efficiency, transparency and effectiveness of the state and non-state institutions to improve governance and reduce corruption in a holistic manner."⁷² In order to implement the NIS, a National Integrity Implementation Unit (NIIU), National Integrity Advisory Council (NIAC) and Executive Committee of the National Integrity Advisory Council (ECNIAC) have

69 *Id.*

70 *Id.*

71 GOV'T OF THE PEOPLE'S REPUBLIC OF BANGL. CABINET DIV., AN INDEPENDENT REVIEW OF THE NATIONAL INTEGRITY STRATEGY ¶ 2 (May 2013), http://cabinet.portal.gov.bd/sites/default/files/files/cabinet.portal.gov.bd/publications/90749cbc_ee7d_4a08_9acc_ce795235dc6e/CD_SPEC_GOVT_POLIC_bn_2_210.pdf.

72 *Id.* ¶ 20.

been formed; additionally, “Ethics Committees” have been set up in every ministry or department of the government for internalising the core principles promoted by the NIS.⁷³ The establishment of the Human Rights Commission and the Information Commission in 2009 for the promotion and protection of human rights and right to information is yet another example of the government’s willingness to live up to its commitment to good governance. The use of Citizen’s Charters in government offices and major service delivery outlets is an indicator of proactive disclosure of available public services citizens.

Efforts have been invested to strengthen the capacity of the police force to render effective, user-friendly services and pro-people services. Under the Police Reform Programme (PRP), the police publicly discloses its strategic plan, annual reports, work plans, and progress reports on its website. Besides, “performance data collected is also reported publicly.”⁷⁴ The introduction of e-procurement by public agencies has reduced the scope of corruption and other irregularities by “improving the transparency and integrity in public service such as tendering, sourcing, ordering, and auctioning.”⁷⁵

Despite the encouraging developments, Bangladesh continues to face challenges in effective implementation of the UNCAC. The government’s lack of political will to deliver on UNCAC commitments is exacerbated by partisan political influence in decision-making processes of key institutions of accountability, e.g. the executive, legislative, and judiciary, provision for “whitening black money” (legalising illicit funds), and a culture

73 *Id.* ¶ 9.

74 NORAD, JOINT EVALUATION OF SUPPORT TO ANTI-CORRUPTION EFFORTS: BANGLADESH COUNTY REPORT 39 (2011), <https://www.oecd.org/countries/tanzania/48912863.pdf>.

75 ARJUN NEUPANE ET AL., Role of the Public E-Procurement Technology to Reduce Corruption in Government Procurement, PROCEEDINGS OF THE 5TH INTERNATIONAL PUBLIC PROCUREMENT CONFERENCE 304, 310 (2012).

of impunity that together undermine the value of the anti-corruption initiatives measures.

3. CORRUPTION AND GOOD GOVERNANCE: CONCEPTUAL ISSUES

Given the complexities that typify the phenomenon, there is no one definition of corruption. Consequently, corruption has been defined varyingly, depending on the context and type. According to Oxford Advanced Learner's Dictionary, the literal meaning of corruption is: "dishonest or illegal behaviour, especially of people in authority;" and the corrupt are "(people) willing to do dishonest or illegal things in return for money or to get an advantage."⁷⁶ In the legal context, corruption implies a "wrongful design to acquire or cause some pecuniary or other advantage."⁷⁷ Moreover, American courts⁷⁸ have referred to corruption as an "[i]llegality; a vicious and fraudulent intention to evade the prohibitions of the law. The act of an official or fiduciary person who *unlawfully* and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others."⁷⁹

The approaches taken by different organisations in defining corruption are likewise diverse. One of the United Nations Development Programme (UNDP) discussion papers on corruption and good governance observes, "corruption is a symptom of something gone wrong in the management of the state."⁸⁰ This definition essentially views corruption from the perspective of governance failure. In like manner, the World Bank defines

76 Corruption, OXFORD LEARNER'S DICTIONARY, <http://www.oxfordlearnersdictionaries.com/definition/english/corruption?q=corruption>.

77 Corruption, US LEGAL, <http://definitions.uslegal.com/c/corruption>.

78 U.S. v. Johnson, 20 F. 682, 683 (C.C.S.D. Ga. 1885); State v. Ragsdale, 59 Mo. App. 590, 603 (1894); Wight v. Rindskopf, 43 Wis. 344, 351 (1877); Worsham v. Murchison, 66 Ga. 715, 719 (1881); U.S. v. Edwards, 43 F. 67, 67 (C.C.S.D. Ala. 1890).

79 Corruption, THE LAW DICTIONARY, <http://thelawdictionary.org/corruption/> (emphasis added).

80 MGMT. DEV. AND GOVERNANCE DIV. BUREAU FOR POLICY AND PROGRAMME SUPPORT UNITED NATIONS DEV. PROGRAMME, CORRUPTION AND GOOD GOVERNANCE: DISCUSSION PAPER 3, at vii (1997) [hereinafter CORRUPTION AND GOOD GOVERNANCE].

corruption as “the abuse of public office for private gain.”⁸¹ This approach covers “various forms of interaction between public sector officials and other agents,”⁸² but precludes corruption among private sector actors. Transparency International goes a step beyond and defines corruption as “the misuse of entrusted power for private gain.”⁸³ This definition recognises that corruption can also occur amongst both public and private sector actors. TIB, an accredited chapter of Transparency International and the focal point of this paper, defines corruption as “abuse of power for personal benefits”⁸⁴ — TIB believes that, power need not always be “entrusted” and therefore has chosen to drop the term from its definition. TIB also recognises that gains from corruption can be purely “personal” as opposed to “private” — the latter is often interpreted to refer to group interest. “Power” is used here in economic, social or political terms in the public as well as the private sector.

The diversity in the definitions of corruption is an indicator of the many forms through which corruption may occur. In its narrowest sense, bribery is recognised as the most common form of corruption. “In its wider sense however, corruption refers to bribery, extortion, fraud, cartels, abuse of power, embezzlement, and money laundering — activities that will normally constitute criminal offences in most jurisdictions although the precise definition of the offence may differ.”⁸⁵ Other forms include, but are not limited to, fraud, collusion, kickbacks, state capture, facilitation payments, favoritism, gift giving, nepotism, clienteles, conflict of interest and patronage. Indeed, the forms in which corruption occur are guided by

81 Odd-Helge Fjeldstad & Jan Isaksen, Background Paper to Public Sector Reform: What Works and Why? An IEG Evaluation of World Bank Support, ANTI-CORRUPTION REFORMS: CHALLENGES, EFFECTS AND LIMITS OF WORLD BANK SUPPORT 5 (2008), <http://www.cmi.no/publications/file/3134-anti-corruption-reforms-challenges.pdf>.

82 *Id.*

83 FAQs on Corruption, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/whoware/organisation/faqs_on_corruption.

84 The Context, TRANSPARENCY INTERNATIONAL BANGLADESH, <http://www.ti-bangladesh.org/beta3/index.php/en/about-us/the-context>.

85 Corruption Information: What is Corruption, GLOBAL INFRASTRUCTURE ANTI-CORRUPTION CENTRE, http://www.giacentre.org/what_is_corruption.php (last updated Nov. 6, 2014).

certain key elements, for example, “the participants involved in the corrupt act, the types of norms the act violates, the nature of the transaction, the broader context within which the act occurs and the purpose, outcome or motive of the act.”⁸⁶ As Doig and Riley point out:

Corruption is [sic] infinitely varied in its character in [terms of] regimes, institutions and groups across developing economies and is often subject to differing approaches and attention depending on its political significance or its societal impact; for example, ‘grand’ or high-level corruption versus low-level corruption; judicial, administrative and legislative corruption; or corruption in various public services.⁸⁷

While it is important to distinguish between these factors for a better understanding of corruption, understanding the relationship amongst the different classes of corruption, “their determinants and their consequences continues to confront both theoretical and methodological challenges.”⁸⁸ Despite the numerous typologies of corruption, there is still no universally acceptable tool to measure the different classes of corruption.⁸⁹ To date, Transparency International’s Corruption Perception Index operates as the standardised measure for exploring the level of corruption in countries across the globe.⁹⁰ This method, however, is debated on account of the fact that it is perception-based and one-dimensional as it does not differentiate amongst different forms of corruption.⁹¹

It is important to recognise that good governance is fundamental to fighting corruption in key sectors and institutions. In essence, the UN General Assembly resolution 51/59, passed on 12 December 1996 at the 82nd Plenary Meeting, set the ground for recognising corruption prevention as an integral part of governance reform initiatives.⁹² Resolution 51/59 states that corruption may “endanger the stability and security of societies, undermine the values of democracy and morality and jeopardize social, eco-

86 Stephen D. Morris, *Forms of Corruption*, 9(2) CESIFO DICE REPORT 10, 10 (2011).

87 Doig & Riley, *supra* note 3, at 34.

88 Morris, *supra* note 86, at 13.

89 *Id.*

90 *Id.*

91 *Id.*

92 See G.A. Res. 51/59, ¶ 1 (Dec. 12, 1996).

conomic and political development.”⁹³ It underlined the International Code of Conduct for Public Officials, which states that “the ultimate loyalty of public officials shall be to the public interests of their country as expressed through the democratic institutions of government” and shall also “ensure that they perform their duties and functions efficiently, effectively and with integrity, in accordance with laws or administrative policies,” without discrimination against any group or individual, or without abusing the power and authority vested in them.⁹⁴

While governance has been defined varyingly, involving context specific indicators, the most appropriate definition in the context of this paper would be:

[H]ow democracy functions — how citizens participate in society; how they are represented in government through elections; how they participate in decision-making; how checks and balances protect individuals from state power; and how local, regional, developed governments provide greater opportunities for the state to respond to the needs of the citizens.⁹⁵

Put simply, governance essentially “comprises of mechanisms, processes and institutions through which citizens articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.”⁹⁶ As such, “governance includes the performance of state institutions, as well as interactions among the government, the private business sector and civil society, including non-profit organisations and volunteer groups.”⁹⁷

It therefore follows that “governance” is simply not about structured organs of a state. More significantly, it is about the *quality* of governance, which expresses itself through traits of accountability, transparency,

93 *Id.*

94 *Id.* ¶¶ 21-23.

95 Maria Dakolias, Are We There Yet? Measuring Success of Constitutional Reform, 39 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1117, 1134-35 (2006).

96 C. RAJ KUMAR, Corruption in Japan-Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance, 10 NEW ENGLAND JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 1, 10 (2004).

97 Corruption and Good Governance, *supra* note 80, at xii.

integrity, independence, efficiency, responsiveness, participation, rule of law, equity and justice. The main requisites for good governance include:

- (i) political legitimacy for the state through democratic elections and transfer of power, and an effective political opposition and representative government; (ii) accountability and transparency in the sharing of information; (iii) separation of powers; (iv) effective internal and external audit; (v) effective means of combating corruption and nepotism; (vi) competence of public servants; (vii) impartial and accessible justice systems; and (viii) the absence of arbitrary government power.⁹⁸

“Since the attributes of good governance are the outcome of the institutional behaviour of various organs, any analysis of the qualitative aspects of good governance has to cover the functions of all the organs in different contexts.”⁹⁹ It is believed that democratic governance is crucial for protecting rights of citizens to the extent they can hold the government accountable for its policies, corruption and abuse of power, challenge inequities of autocratic regimes, deter criminal negligence by the government and demand rule of law enforced with fairness and justice. These principles essentially engender a society in which people are free to make choices, are free from poverty, deprivation, fear and violence, and are free to set priorities that ensure equity, justice and fair play.

A. Causes, Costs and Effects of Corruption

“The causes of corruption are always contextual, rooted in a country’s policies, bureaucratic traditions, political development, and social history.”¹⁰⁰ Nevertheless, “corruption perceivably flourishes when institutions of accountability have weak governance and lack integrity.”¹⁰¹ However, it is

98 Doig & Riley, *supra* note 3, at 46.

99 Hasnat Abdul Hye, *Good Governance: A Social Contract for the New Millennium*, GOVERNANCE: SOUTH ASIAN PERSPECTIVES 7 (2000).

100 THE WORLD BANK, *HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK* 12 (1997), <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf>.

101 SALAHUDDIN M. AMINUZZAMAN & SUMAIYA KHAIR, *NATIONAL INTEGRITY SYSTEM ASSESSMENT BANGLADESH* 29 (2014), http://www.ti-bangladesh.org/beta3/images/2014/fr_nis_NICSA_14_en.pdf.

acknowledged that weak governance alone does not cause corruption, as there are other factors that also contribute to the phenomenon. Chr. Michelsen Institute (CMI), a development research institute, identifies four conditions that facilitate corruption:

1. Imperatives and incentives that encourage someone to engage in corrupt transactions, for example, low salaries of public officials, cultural norms that encourage favouritism and patronisation and political pressure, to name a few.¹⁰²
2. Availability of multiple opportunities for personal enrichment, for example, economic environments that are more conducive to corruption, in particular mineral and oil rich environments and discretionary powers over the allocation of public resources.¹⁰³
3. Access to and control over the means of corruption, for example, control over administrative processes, such as tendering or having access to offshore accounts and the techniques of money laundering.¹⁰⁴
4. Limited risks of exposure and punishment, for example, lack of policing, detection and prosecution, weak internal controls, such as financial management, auditing, and human resource systems, controlled media and civil society.¹⁰⁵

“In Bangladesh, the impact of corruption is often manifested through political intolerance, lack of accountability and transparency, low level of democratic culture, absence of consultation, dialogue and participation, rent seeking and patronage.”¹⁰⁶ Although “systemic corruption may co-exist with strong economic performance, experience suggests that corruption is one of the most severe impediments to development and

102 The Basics of Anti-Corruption, U4 ANTI-CORRUPTION RESOURCE CENTRE, <http://www.u4.no/articles/the-basics-of-anti-corruption>.

103 *Id.*

104 *Id.*

105 *Id.*

106 AMINUZZAMAN & KHAIR, *supra* note 101, at 29.

growth in emerging and transition[ing] economies.”¹⁰⁷ According to the CMI, this is because:

[C]itizens are compelled to pay for services that should be free; state budgets are pillaged by corrupt politicians; public spending is distorted as decision-makers focus spending on activities likely to yield large bribes like major public works; foreign investment is stymied as businesses are reluctant to invest in uncertain environments; efforts to tackle climate change can be undermined as bribes are paid to ignore environmental protection rules in the pursuit of quick profits; and economies suffer.¹⁰⁸

The effect of corruption is multi-dimensional, commonly ranging from social, cultural, political factors to economic factors. Seen holistically, “corruption affects the quality and composition of public investment, thereby restricting access to essential goods, services, assets, and opportunities and ultimately undermining efforts at poverty reduction and human development.”¹⁰⁹ Moreover, corruption is believed to restrict investment, retard economic growth, ruin institutional capacity to provide basic services to citizens and reinforce poverty. Corruption “can significantly affect the efficiency, fairness and legitimacy of state activities.”¹¹⁰ “In [the] political sphere, corruption impedes democracy and the rule of law.”¹¹¹ For instance, public sector institutions suffer from an image crisis and lose credibility when, and if, they misuse or abuse their power for private interest or as a result of political influence.¹¹² On a national scale, “[a]cts of bribery, embezzlement, nepotism or state capture” raise “costs of business and undermine clean government,”¹¹³ which in turn, “lead[] to [the]

107 THE WORLD BANK, *supra* note 100, at 8.

108 The Basics of Anti-Corruption, *supra* note 102

109 HAIDY EAR-DUPUY & OLIVIER SERRAT, FIGHTING CORRUPTION WITH ICT: STRENGTHENING CIVIL SOCIETY’S ROLE 4 (2014), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1413&context=intl>.

110 Susan Rose-Ackerman, The Political Economy of Corruption, in CORRUPTION AND THE GLOBAL ECONOMY 31, 32 (Kimberly Ann Elliot ed., 1996).

111 K. JEYAMOHAN, Combating the Omnipresence of Corruption, 5 BONFRING INTERNATIONAL JOURNAL OF INDUSTRIAL ENGINEERING AND MANAGEMENT SCIENCE 24, 26 (2015).

112 *Id.*

113 OECD, TOOLKIT FOR INTEGRITY MARCH 2014, at 5 (2014), <http://www.oecd.org/cleangovbiz/CGB-Toolkit-2014.pdf>.

depletion of national wealth.”¹¹⁴ In 2000, the World Bank estimated that “if Bangladesh could reduce its corruption level to those prevailing in countries with highest reputation for honest dealing it could add between 2.1% and 2.9% to annual per capita GDP growth. This would contribute to a sustainable reduction in poverty.”¹¹⁵ The National Household Survey of 2012 conducted by TIB showed that 63.7% of the surveyed households experienced corruption in one or the other selected sector of service delivery.¹¹⁶ “Most important service delivery sectors affecting people’s lives such as law enforcement, land administration, justice, health, education and local government,” were gravely affected by corruption.¹¹⁷ Measured in terms of bribery in the surveyed sectors, cost of corruption in 2010 was estimated at 1.4% of the Gross Domestic Product (GDP) or 8.7% of the annual national budget, which rose in 2012 to 2.4% of the GDP and 13.4% of the annual national budget.¹¹⁸ The overall cost of petty corruption was estimated to be 4.8% of the average annual household expenditure.¹¹⁹ For households with the lowest range of expenditures, the rate of loss is much higher at 5.5% compared to higher spending households for whom it is 1.3%.¹²⁰

Corruption impedes human rights and justice by undermining equal treatment by the law and access to justice. As mentioned in the UNCAC 2003, “[c]orruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign

114 Kay H. Farmer, What is Corruption?, A.P.E.S. PORTAL (2011), <http://apesportal.eva.mpg.de/status/topic/threats/indirect/corruption>.

115 Corruption in Bangladesh: Costs and Cures (unpublished manuscript) (on file with The World Bank).

116 See Iftekhazzaman, Corruption-Good News in a Depressing Context, THE DAILY STAR (Dec. 29, 2012, 12:00 AM), <http://www.thedailystar.net/news-detail-262981>.

117 *Id.*

118 *Id.*

119 *Id.*

120 See TRANSPARENCY INT’L BANGL., CORRUPTION IN SERVICE SECTORS: NATIONAL HOUSEHOLD SURVEY 2012, at 4 (2012), <http://www.ti-bangladesh.org/files/HHSurvey-ExecSum-Eng-fin.pdf>.

aid and investment. [It] is a key element in economic underperformance and a major obstacle to poverty alleviation and development.”¹²¹

Given that corruption has a distinct bias against the poor and socially excluded groups, such as women, indigenous communities, or minorities, “they are most adversely affected by malpractices in basic human rights in terms of accessing public services like education, health, justice, utilities and personal safety, as well as the delivery of services of standard quality, all of which are subject to unauthorised payments.”¹²² Furthermore, corruption leads to violation of civil and political rights as it discriminates in favour of the moneyed and powerful and violates law and policy with impunity.

B. Good Governance and Human Rights: Exploring the Connection

Anti-corruption conventions do not allude to corruption as a rights violation, just as human rights instruments do not mention corruption. The UNCAC avoids taking a position on the relationship between corruption and human rights, but it does make brief references to distinct issues that are potentially linked to human rights.¹²³ For instance, the right to information in relation to the participation of civil-society in anti-corruption measures (Article 13); property ownership rights in relation to money laundering (Article 23), the return and disposal of stolen assets (Article 57); protecting the defendant’s due process rights during a corruption-related prosecution (Articles 30-32) or extradition (Article 44); ownership rights over frozen assets (Article 31); and “other rights acquired by third parties” (Articles 34 and 55).¹²⁴ From a human rights perspective, corruption leads to not only misappropriation of money or abuse of power

121 Kofi A. Annan, Foreword to The United Nations Convention Against Corruption, U.N. OFFICE OF DRUGS AND CRIMES (2004), http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

122 TRANSPARENCY INT’L BANGL., BUILDING INTEGRITY BLOCKS FOR EFFECTIVE CHANGE 2014-2019, at 29 (2014), https://www.ti-bangladesh.org/beta3/images/2014/project_proposal_bibec_14_en.pdf.

123 See Matthew Murray & Andrew Spalding, Freedom from Official Corruption as a Human Right, GOVERNANCE STUDIES AT BROOKINGS, Jan. 2015, at 7, https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding_v06.pdf.

124 *Id.*

but also deleterious effects on citizens, which can result in breaches of human rights.¹²⁵ For example, citizens' rights to food, water, education, health and due process are violated when, and if, they have to pay a bribe to access these basic rights. It therefore follows that the concepts of good governance and human rights are mutually reinforcing, both being based on core principles of participation, accountability, transparency and State responsibility.¹²⁶

Inclusion and participation within a human rights framework implies an active, free and meaningful engagement of citizens in development initiatives and/or governance processes. It is said that rights-based participation is about "*shifting the frame from assessing the needs of beneficiaries [sic] to foster citizens to recognise and claim their rights and obligation-holders to honour their responsibilities.*"¹²⁷ Indeed, participation is often viewed as both a measure to secure sustainable results and a goal in itself, which makes people aware that "they have the right to demand change and social justice."¹²⁸ This is particularly relevant for contexts where the poor and the marginalised are hard to reach or are excluded due to structural impediments and their lack of knowledge.

It is recognised that "participation" is an over-used term, often divested of the requisite political will or even the capacity to translate it into action. While physical participation of citizens in policy development and

125 Zoe Pearson, An International Human Rights Approach to Corruption, in CORRUPTION & ANTI-CORRUPTION 30, 59 (Peter Larmour & Nick Wolanin eds., 2013).

126 OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION 10 (2006), <http://www.ohchr.org/Documents/Publications/FAQen.pdf>.

127 Andrea Cornwall & Celestine Nyamu-Musembi, Putting the 'Rights-Based Approach' to Development into Perspective, 25 THIRD WORLD QUARTERLY 1415, 1424 (2004).

128 SWEDISH MINISTRY OF FOREIGN AFFAIRS, CHANGE FOR FREEDOM: POLICY FOR DEMOCRATIC DEVELOPMENT AND HUMAN RIGHTS IN SWEDISH DEVELOPMENT COOPERATION, 2010–2014, at 13 (2010), <http://www.government.se/49b74d/contentassets/91e0ff64644745aea025d1f2928beb1b/change-for-freedom-policy-for-democratic-development-and-human-rights-in-swedish-development-cooperation-2010-2014>.

implementation might not always be tenable, there are alternative ways of ensuring citizens' inclusion in the said processes. Existing scholarship identify various participation models — instrumental (extracting information from the participants), consultative (creating opportunities for receiving participants' opinions and positions on an issue), engaged (participants directly engaging in negotiation and decision-making) and empowerment (participants developing skills and abilities to influence decision-making and achieve high level of satisfaction of demands).¹²⁹ While no one model may be considered appropriate, there are simple ways of securing citizens' participation. For example, the practice of making public information readily available in simple format and language,¹³⁰ engaging with civil society organisations and using them as a conduit to reach local communities, developing channels for people to engage with service providers or duty bearers and capacitating the latter to hold them accountable for their services; in addition, people's ability to organise freely and to express their opinions freely are but some examples of citizens' participation.¹³¹

Concepts of accountability and integrity are pivotal to human rights based policy development, just as they are important for good governance. This approach emphasises on establishing a link between human rights “demand and supply sides through the lens of rights holders, duty bearers and citizenship.”¹³² While international human rights law does not refer directly to the concept of accountability, human rights treaties impose on states, as “duty holders,” an obligation to protect the rights of individuals and provide recourse and justice if their rights are violated. States that fail to do so are answerable for any acts or omissions with respect to this duty.¹³³

129 See generally CHRISTIAN GRUENBERG & VICTORIA PEREYRA IRAOLA, PARTICIPATION, TRANSPARENCY AND ACCOUNTABILITY IN TARGETED SOCIAL PROGRAMS: CASE STUDY HANDBOOK (2007).

130 See UNITED NATIONS DEV. PROGRAMME, MAINSTREAMING HUMAN RIGHTS IN DEVELOPMENT POLICIES AND PROGRAMMING: UNDP EXPERIENCES (2012).

131 *Id.*

132 OECD & THE WORLD BANK, INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT: DONOR APPROACHES, EXPERIENCES, AND CHALLENGES 74 (Sebastian Bartsch ed., 2d ed. 2013).

133 CHRISTIAN GRUENBERG, ICHRP, INTEGRATING HUMAN RIGHTS IN THE ANTI-CORRUPTION AGENDA: CHALLENGES, POSSIBILITIES AND OPPORTUNITIES 26

Against this backdrop, states have an obligation to provide institutional arrangements that allow *all* persons — including disadvantaged groups — access to accountability mechanisms. Similarly, states have an obligation not to block any person's access to such mechanisms.¹³⁴ Corruption by way of bribes to key officials of the state tips the accountability principle in favour of the moneyed and powerful. This practice disproportionately affects disadvantaged groups, such as the poor, women and minorities. While all forms of accountability are important to the integrity and quality of decision-making, the bottom-up, social accountability, whereby the behavior and conduct of public officials are monitored from below by *inter alia* independent institutions, a free media, and an active civil society perhaps best supplements the human rights framework.¹³⁵

While the term “transparency” does not appear in any of the international human rights instruments, its significance becomes explicit when it is read together with people's right of access to public information. Right of access to information essentially complements the freedom of expression, because information can transform citizens' expressions into informed opinions on public interest issues.¹³⁶ Access to information is also essential for human rights in general because effective access to public information is a pre-condition for enjoying and demanding other civil, political, economic, social and cultural rights, such as the freedom of expression, participation, education and health.¹³⁷ Not only do governments have a duty to respect the right of access to information, but they also have to ensure that mechanisms exist to ensure that it can be exercised in practice.¹³⁸ Moreover, the application of human rights principles plays a key role in making transparency policies more inclusive by guaranteeing access to

(2010).

134 *Id.*

135 *Id.*

136 *Id.* at 16-17.

137 *Id.* at 5.

138 See *Claude-Reyes v. Chile*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 12.108, ¶ 7 (Nov. 24, 2008).

information for all, irrespective of ethnicity, gender, religion, economic and political status.

As observed by the UN Office of the High Commissioner for Human Rights, corruption prevents the Government from taking steps to the maximum of its available resources to progressively realising the rights recognised in the International Covenant on Economic, Social and Cultural Rights; creates discrimination in access to public services in favour of those able to influence the authorities to act in their personal interest, including by offering bribes; and leads to a loss of public support for democratic institutions, when they fail to function in the interests of the society.¹³⁹ The existence of appropriate regulations, procedures and institutions essentially guide the actions of a state, which in turn create an enabling environment for the enjoyment of human rights by citizens. Governments are under a minimum obligation to establish a regulatory and policy framework that ensures access to essential services of acceptable quality without discrimination, and to see to it that no citizen is deprived of such services.¹⁴⁰

4. CIVIL SOCIETY AND ITS ROLE IN FIGHTING CORRUPTION

Civil society is often regarded as a “key player in a meta-system of checks and balances in a polity, a countervailing force to the power of the state.”¹⁴¹ Increasingly, key actors in international development have begun to recognise civil society as a vital constituent of the broader effort to hold governments accountable for corruption. It is said that civil society is neither organised for power, which is the basic characteristic of a state, nor for profit, which is a key consideration of business organisations; in essence,

139 See generally United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights, UNITED NATIONS HUMAN RIGHTS OFFICE OF HIGH COMMISSIONER (Nov. 8-9, 2006), <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/WarsawConferenceDocuments.aspx>.

140 OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, *supra* note 126, at 11.

141 Marcia Grimes, *The Conditions of Successful Civil Society Involvement in Combating Corruption: A Survey of Case Study Evidence 1* (OoG, Working Paper No. 2008:22, 2008).

civil society is the sum total of individual and collective initiatives for achieving a desired common public good.¹⁴²

The term “civil society” evokes many meanings in modern times — a mediating realm between the individual and the state, the world of non-profit associations and philanthropy, the network of international NGOs, social relations of mutual respect, and, many others; common to all of these meanings are two central ideas: pluralism and social benefit.¹⁴³ The World Bank defines civil society as the wide array of non-governmental and nonprofit organisations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. On the other hand, Fatton defines civil society as the “private sphere of material, cultural and political activities resisting the incursions of the state.”¹⁴⁴ For Osaghae, three key elements are important in the definition or conceptualisation of civil society: autonomy from the state, public character (setting a normative order for the state), and furtherance of a common good.¹⁴⁵ Osaghae maintains that:

Civil society refers to formal and informal organizations, including social movements, which occupy the nonstate sphere of the public realm and function in one or more of the following ways: articulating and promoting the interests of diverse groups within society with a view to devising ways in which conflicting interests and differences can be accommodated and resolved; defending individual and collective rights as well as popular sovereignty against intrusions by the state and other powerful groups, including foreign interests; mediating relations between state and the larger society; setting the rules or norms governing the state and society, and upholding accountability of those in government; serving as the ultimate check to state power and its abuse, which sometimes leads its constituents

142 Amit Dholakia, *Civil Society and the Regeneration of India’s Democracy: Potential and Limits*, in *TOWARDS FREEDOM IN SOUTH ASIA: DEMOCRATIZATION, PEACE AND REGIONAL COOPERATION* 87 (V.A. Pai Panandiker & Rahul Tripathi eds., 2008).

143 Bruce Sievers, *What is Civil Society?*, *GRANTMAKERS IN THE ARTS*, <http://www.giarts.org/article/what-civil-society>.

144 ROBERT FATTON, *PREDATORY RULE: STATE AND CIVIL SOCIETY IN AFRICA* 4-5 (1992).

145 Patrick Ukase & Bem Audu, *The Role of Civil Society in the Fight Against Corruption in Nigeria’s Fourth Republic: Problems, Prospects and the Way Forward*, 11 *EUROPEAN SCIENTIFIC JOURNAL* 171, 174 (2015).

to seeking to capture state power; serving as the engine room of private and local capital; and performing shadow state functions.¹⁴⁶

The key features of successful civil societies that emerge from various definitions can be summarised to include the following: separation from the state and the market; formed by people who have common needs, interests, and values like tolerance, inclusion, cooperation, and equality; and development through a fundamentally endogenous and autonomous process, which cannot easily be controlled from outside.

That civil society has a significant role in fighting corruption has been underpinned by international and regional conventions. Civil society activism against corruption is clearly endorsed by the UNCAC 2003, which states in its Preamble that:

the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective[.]¹⁴⁷

Article 13 of the UNCAC also urges States Parties to:

take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.¹⁴⁸

Regional conventions take a similar stand. For example, the African Union Convention on Preventing and Combating Corruption (AUCPCC) 2003 provides in Article 12 that parties work with civil society at large to popularise the AUCPCC, ensure and provide for the participation of civil society in the monitoring process and consult civil society in the convention's

146 EGHOSA E. OSAGHAE, STRUCTURAL ADJUSTMENT, CIVIL SOCIETY AND NATIONAL COHESION IN AFRICA 21 (1998).

147 UNCAC pmbl., opened for signature Dec. 9, 2003, 2349 U.N.T.S. 41 (emphasis added).

148 *Id.* art. 13 (emphasis added).

implementation.¹⁴⁹ Article III(11) of the Organization of American States (OAS) Inter-American Convention Against Corruption 1996 encourages State Parties to consider the applicability of “[m]echanisms to encourage participation by civil society and non-governmental organizations in efforts to prevent corruption” within their own legal systems.¹⁵⁰ Similarly, Article 4(1)(i) of the Southern African Development Community (SADC) Protocol Against Corruption 2001 requires parties to adopt mechanisms to encourage participation by the media, civil society, and non-governmental organisations in efforts to prevent corruption.¹⁵¹

Whilst the anti-corruption conventions expect non-governmental organizations (NGOs) to play a role in the prevention of and the fight against corruption and in raising public awareness, they do not spell out how these tasks can be performed to achieve maximum impact. Indeed, the omission might have been intentional, owing to the diversity amongst NGOs in terms of size, knowledge of local conditions, capacity, expertise and more importantly, the level of freedom to carry out the activities in the country of operation.¹⁵² Therefore, quite understandably, methods that work in one context might not necessarily be as effective in another.

Effective engagement of the civil society in the fight against corruption depends on three key factors: (i) the existence of a legal framework that enables civil society organisations (CSOs) to work without political and legal restrictions, (ii) the willingness of the state to engage constructively with the civil society, and (iii) the effective engagement of CSOs in the fight against corruption.¹⁵³ In other words, CSOs must acquire a legal personality through formal registration in accordance with the laws of the land in order to function. However, CSOs that are reliant on public sector funding cannot operate freely, as they may potentially be subjected to pressure from the state; therefore, in order for CSOs to play the role of

149 Indira Carr & Opi Outhwaite, *The Role of Non-Governmental Organizations, (NGOs) in Combating Corruption: Theory and Practice*, XLIV SUFFOLK UNIVERSITY LAW REVIEW 615, 617 (2011).

150 *Id.* at 621.

151 Southern African Development Community, *Protocol Against Corruption* art. 4(1)(i), Aug. 14, 2001.

152 Carr & Outhwaite, *supra* note 149, at 621.

153 THE WORLD BANK, *supra* note 100, at 39.

an anti-corruption watchdog, they have to be structurally and financially independent from the government.

Government recognition of CSOs' legitimacy and credibility is critical for effective anti-corruption advocacy. Such recognition is manifest in, for example, the openness and responsiveness of the government in its interaction with CSOs, inclusion of CSOs in policy-making processes, and reflection of CSO recommendations in reform initiatives. Indeed, the true success of civil society activism lies in the operational strategies that CSOs use to challenge corruption, such as the generation of anti-corruption knowledge and awareness and the mobilisation of citizens to raise anti-corruption demands, promotion of good practices, lobbying, advocacy and monitoring. Additionally, free flow of information, shared spaces for dialogue and collaboration and long-term support and resources¹⁵⁴ are some of the other vital elements that are essential for strengthening the capacity of civil society actors to sustain their fight against corruption.

In short, civil society is widely recognised as an essential and an increasingly important agent for furthering good governance in many diverse ways — first, by policy analysis and advocacy; second, by monitoring state performance and the action and behavior of public officials; third, by building social capital and enabling citizens to identify and articulate their values, beliefs, civic norms and democratic practices; fourth, by mobilising particular constituencies, particularly the vulnerable and marginalised sections of masses, to participate more fully in politics and public affairs; and fifth, by development work to improve the wellbeing of their own and other communities.¹⁵⁵ The challenge is to avoid using civil society to help the

154 OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *A PRACTICAL GUIDE FOR CIVIL SOCIETY: CIVIL SOCIETY SPACE AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM* 9 (2014).

155 AISHA GHAUS-PASHA, *ROLE OF CIVIL SOCIETY ORGANIZATIONS IN GOVERNANCE* 3 (2004).

government dodge its responsibilities but rather to enable social mobilisation to induce the government to operate more efficiently and effectively.¹⁵⁶

A. Civil Society Actors in Bangladesh

While the political economy in the post-independence era in Bangladesh was primarily dominated by three major urban-based actors, namely, the bureaucracy, the military, and the political leadership, newer elements soon emerged as additional players in what now constitutes “civil society” in the form of organised, autonomous groups trying to influence the state. Civil society in Bangladesh broadly includes everything from local level citizens’ initiatives and activist groups to institutionalised, non-government organisations, business associations, academia, and other interest groups.

In common parlance, there is no distinction between NGOs and civil society, as both are known to advance the interest of universal issues (e.g. discrimination), the interests of particular groups (e.g. the poor and marginalised) or humanity at large. The strategies that NGOs adopt vary, dependent on the causes promoted and the local conditions, and range from the confrontational to the collaborative. Diverse both in terms of mandate and function, NGOs are amongst the most visible civil society actors in Bangladesh. It is believed that the NGO sector owes much of its prominence in national anti-corruption efforts to its capacity to pull together substantial analytical resources and international donor support and to effectively communicate with the media. Civil society partnership with the media has led to a notable rise in reporting and coverage of corruption and human rights violations. Undoubtedly, the media rely on civil society for assessments of the scope of corruption, as well as for information on people’s perceptions and attitudes — the level of trust achieved between the media and NGOs in the context of anti-corruption critique of governments is an important step toward reinforcing civil society. Likewise, international donors, bilateral agencies and development partners have

156 John M. Ackerman, Rethinking the International Anti-Corruption Agenda: Civil Society, Human Rights and Democracy, 29 *AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW* 293, 333 (2014).

persistently pushed the agenda for good governance in Bangladesh and have provided significant support to mobilise anti-corruption reforms.

5. INTRODUCING TIB'S SOCIAL MOVEMENT AGAINST CORRUPTION

Good governance in Bangladesh has been dogged by corruption, poverty, lack of representation, inequality, discrimination and violence — all of which are elements the rooting out of which require concerted efforts by the government, civil society and the general public. In order to effectively address these elements, there is a need for information that provides citizens, politicians and policy-makers with a common premise from which to engage in informed dialogue and decision-making. This process demands pluralism and respect for difference of opinion, consensus-building techniques that allow citizens to identify and agree on common goals for democratic governance at the local and national level, and transparency and accountability in government activity to ensure that these shared visions are being implemented by public officials.¹⁵⁷

Recognising that mobilisation of citizens is imperative for inducing change in people's attitudes, behavior and capacity in resisting corruption, TIB has embarked on a social movement against corruption that encompasses the core elements underpinned above. It is generally agreed that social movements are organisations, groups of people, and individuals, who act together to bring about transformation in society.¹⁵⁸ TIB's idea of anti-corruption social movement stems from the recognition that most citizens regard corruption as an integral part of their lives. The real challenge then lies in changing people's attitude and behavior toward corruption, so that they no longer regard corruption as an unavoidable aspect of their life. Indeed, social movements rise and fall as their success depends both on the movements' capacity to mobilise and on the responsiveness of authori-

157 CANADIAN FOUNDATION FOR THE AMERICAS, *CIVIL SOCIETY IN THE PROMOTION AND STRENGTHENING OF DEMOCRACY IN THE AMERICAS: A VISION FOR THE FUTURE* 6 (2006), http://pdba.georgetown.edu/Misc/Groups/Conference_Report_English.pdf.

158 Mary Kaldor, *Civil Society and Accountability*, 4 *JOURNAL OF HUMAN DEVELOPMENT AND CAPABILITIES* 5, 12 (2003).

ties.¹⁵⁹ While the primary responsibility of tackling corruption essentially lies with the government, TIB recognises that the people are the ultimate repository of power for raising demand for good governance. As a result, public engagement can create a shared responsibility for service delivery and a shared role for enhancing integrity; in particular, the involvement of internal and external stakeholders in the development of anti-corruption initiatives contributes not only to improving public awareness about the importance of integrity standards, but also facilitates its implementation.

TIB works against corruption, not against the government of the day nor any particular public sector department — TIB's task is to create a demand for effective policy reform and institutional change conducive to the reduction in corruption.¹⁶⁰ As such, TIB has been growing a social movement, which empowers people to take responsibility for tackling the worst excesses of corruption by channelling bottom-up efforts into a positive force for change in Bangladesh.¹⁶¹ To this end, TIB has established 45 citizens' volunteer groups, which form the Committees of Concerned Citizens (CCCs) in 45 locations, and 60 Youth Engagement and Support (YES) groups throughout the country to catalyse anti-corruption social movement.¹⁶²

CCCs are groups of non-partisan volunteers from amongst the citizens with high degree of credibility, integrity, social acceptability, and leadership capacity to inform, motivate and mobilise citizens in challenging corruption and promoting transparency and integrity in service delivery at the local levels.¹⁶³ CCC members, at least 30 percent of whom are women, are drawn largely from professional groups such as teachers, lawyers, journal-

159 *Id.*

160 Colin Knox, *Dealing with Sectoral Corruption in Bangladesh: Developing Citizen Involvement*, 29 *PUBLIC ADMINISTRATION AND DEVELOPMENT* 117, 122-23 (2009).

161 *Id.* at 123.

162 Committees of Concerned Citizens (CCCs), *TRANSPARENCY INTERNATIONAL BANGLADESH*, <https://www.ti-bangladesh.org/beta3/index.php/en/about-us/what-we-do/engaging-people/committee-of-concerned-citizens> (last visited Mar. 13, 2017).

163 *TRANSPARENCY INT'L BANGL.*, *BIBEC: BUILDING INTEGRITY BLOCKS FOR EFFECTIVE CHANGE, 2014-2019*, at 9 (2014), https://www.ti-bangladesh.org/beta3/images/2014/project_proposal_bibec_14_en.pdf.

ists, doctors, social workers and NGO workers. The primary objective of CCCs is to function as community watchdog forums for creating anti-corruption awareness, mobilising citizens to take part in anti-corruption initiatives and helping to create accountable governance at local levels. YES groups comprise of young people between the age of 15 to 27, who are attached with CCCs and participate in various programmes, for example, debating competitions, publications, anti-corruption campaigns, cycle rallies, human chains against corruption and cartoon exhibitions. The aim of YES is to instil in young people the core values of volunteerism and prepare them to take the lead in anti-corruption social movement in the future. Members of both CCC and YES are selected on the basis of set criteria. The work of CCC and YES is supplemented by auxiliary groups made up of individuals who do not or no longer qualify for CCC or YES membership, but want to be part of TIB's movement. TIB believes that the leadership skills of CCCs, the energy and exuberance of youth groups and support of the auxiliary members will together contribute to the development of ownership and sustainability of the anti-corruption movement in Bangladesh.¹⁶⁴

A. Showcasing TIB's Good Practices

Essentially a research-based advocacy organisation, TIB undertakes activities at local and national levels that “support democratic values and promote pluralism, consensus building and accountability.”¹⁶⁵ TIB works to further good governance through research and policy analysis and advocacy by monitoring performance of key institutions of accountability and service delivery sectors and enabling citizens, including vulnerable and marginalised groups, to raise their voices against corruption and participate in politics and public affairs.

I. GENERATING EVIDENCE-BASED ANTI-CORRUPTION KNOWLEDGE

Research provides important insights into corruption trends and their impact on good governance. Accordingly, TIB conducts research at both the local and national levels with the aim of creating knowledge and garnering

164 *Id.* at 10.

165 CANADIAN FOUNDATION FOR THE AMERICAS, *supra* note 157, at 6.

support through public discourses by involving the media, the public and other stakeholders. At the local level, TIB periodically conducts *Citizens Report Cards* (to determine the quality, satisfaction and accountability in service delivery in key areas, e.g. education, health, local government, land, and climate finance) and national household surveys (to gauge people's experiences of corruption in selected sectors of public service) in addition to other need based or demand driven studies. At the national level, TIB undertakes diagnostic and other studies to identify governance challenges in selected sectors (e.g. health, education, etc.); institutions of accountability (e.g. parliament, judiciary, public administration, law enforcement, election commission, anti-corruption commission, etc.); and gaps inhering in related laws and policies. The findings from TIB's studies, in turn, inform and reinforce TIB's advocacy for and engagement and communication activities with key stakeholders or institutions. With respect to TIB's research methods, TIB follows established principles and techniques of social science research when conducting its studies.

Another aim of TIB's research is to catalyse changes in practices, processes and policies that have a direct bearing on transparency, accountability, integrity, rule of law and effective and responsive governance. Consequently, TIB's research findings are shared through press conferences in the presence of both print and electronic media. This has proved to be an effective medium for mass dissemination of information on corruption and the flagging of irregularities and governance challenges in select institutions. When the media breaks news with TIB's research findings, it attracts substantial reaction from the government and the public. However, TIB tries to off-set such reactions by sharing the research findings with concerned stakeholders and/or institutions for validation before the formal launch of the study. TIB also practices proactive disclosure of salient information pertaining to the concerned research through a comprehensive *Frequently Asked Questions (FAQs)* sheet at the time of the report release.

II. RAISING AWARENESS ON INTEGRITY

Raising awareness on the nature, forms and incidence of corruption is fundamental to corruption prevention. Appropriately, TIB undertakes multi-dimensional activities to raise awareness against corruption and promote democratic governance. Issue based rallies, cartoon competitions, essay competitions, debates, folk songs, human chains, and youth conventions

are some of the mediums through which TIB's anti-corruption messages and information are conveyed to different sections of the public. Offering training programmes to different stakeholders (e.g. media, students, etc.) also constitute an important part of TIB's awareness raising initiatives. One of the most successful example of TIB's training programmes is the hands-on orientation of the public on how to fill out an application asking for information in the exercise of the Right to Information law. Observance of special days, for example, International Anti-Corruption Day (9 December) and the Right to Know Day (28 September) are also marked by special programmes. In addition, diverse promotional materials like newsletters, flyers, posters, stickers, festoons, leaflets, and brochures are used for mass dissemination of anti-corruption messages. Social and New Media, including, but not limited to, TV, radio, community and net radio, websites, social networks, documentaries, public service announcements by TV or radio, or short message services, also form an integral part of TIB's outreach and communication activities.

In addition, TIB makes use of the People's Theatre, which is a successful platform for communicating anti-corruption messages. Performed at the local level, this platform is used to inform the common people about the dimensions, processes of and actors in corruption and implications thereof, while at the same time motivating people to reject and resist corruption. TIB mentors YES volunteers with acting skills to perform on stage, but the volunteers develop scripts based on their own experiences with corruption. The People's Theatre normally hold shows in public spaces — schools, hospitals, local government institutions, or market places — and often combine shows with other activities such as Advice and Information Desks (AI-Desks), mothers' gatherings, Face the Public (FtP), or special day observances.

III. PROMOTING TRANSPARENCY AND ACCOUNTABILITY

TIB recognises that access to information and transparency are key tools for fighting corruption and ensuring good governance. As such, TIB invests in creating an informed and active citizenry and helping them raise demands for good governance by putting pressure on state institutions to be accountable for and responsive to citizens' needs and priorities. TIB undertakes diverse activities to promote transparency in key service sectors by providing basic information to users in local communities and

by assisting them to access information where information is not offered proactively. Steered by TIB's youth volunteers, AI-Desks set up in TIB's offices at the local level and satellite AI-Desks set up at schools, hospitals and local government offices provide service recipients with information regarding their rights and entitlements, range of available services and costs thereof, where applicable, and grievance mechanisms so as to help recipients avoid becoming victims of corruption. Building on the experience of AI-Desks, TIB has introduced Advocacy and Legal Advice Centers (ALAC) to provide legal advice and counseling to people who are victims or witnesses of corruption. ALACs function by receiving complaints of corruption from victims and witnesses of corruption, scrutinising the complaints and imparting advice on the basis of merit. ALAC also makes referrals to legal aid and anti-corruption agencies.

TIB popularises the Right to Information (RTI) law and the Protection of Whistleblowers law through RTI Fairs organised every year to mark the Right to Know Day on 28 September. Participants at the RTI Fair include both government and non-government agencies that showcase their work, including the services and/or support they offer. These RTI Fairs open up opportunities for interaction between service providers and service recipients in a conducive environment. Demand for RTI Fairs has risen since it was first introduced and there is a marked rise in the interest of government agencies to participate in these fairs.

The government is increasingly working with TIB to deliver "targeted" transparency, i.e. the increased availability of and access to socially useful and focused information to the public. This is evident from the practice by institutions to post relevant information on Information Boards and Citizens' Charters for public consumption. Also, information can be made available on processes that are vulnerable to corruption in order to enable public scrutiny, e.g. e-procurement, which enables all stakeholders to scrutinise the contract management or amendments to the contract.

IV. ADVANCING PARTICIPATORY GOVERNANCE

Participatory governance is a means of deterring corruption by increasing transparency and public oversight. Participatory accountability paves the way for citizens' continuous involvement in policy discourse, formulation and implementation to reduce the discretionary power of public officials. In addition, participatory accountability increases the transparency and

accountability of public officials and/or service providers. Three simple examples from TIB's work to illustrate this increasing transparency. "Choose the Right Candidate" is an initiative that helps citizens make informed decisions regarding who to vote into office in both local and national elections. TIB introduces the aspiring candidates to the public in an open forum and provides background information on each of the candidates. Aspiring candidates are then invited to the stage to explain to the public why they should vote for him/her and what s/he plans to do if voted into office. This forum gives voters the opportunity to interact with aspiring political candidates up front and to form an opinion about each candidate. Moreover, this activity paves the way for unseating corrupt political leaders from elections. FtP is another effective social accountability tool used by TIB to help citizens hold public representatives accountable. Organised in collaboration with local government representatives, FtP brings public representatives, government officials and other service providers face-to-face with local communities. This process enables people to directly ask questions to public representatives, government officials or service providers with respect to the commitments they made as well as the content and quality of the services rendered by the elected institution. Depending on the institution, FtPs vary in modes, processes and participation; for example, in schools, mothers are the key participants in the forum called "Mothers' Gathering" where they hold school authorities and school management committees accountable for the quality of education and related services, whereas in the local government body, the stakeholders who participate are primarily members of the general public.¹⁶⁶

The "Integrity Pledge" (IP) is yet another social accountability process introduced by TIB to promote participatory and accountable governance at the level of service delivery by voluntary engagement of local level public representatives, officials, and service providers with the service recipients and other citizens to promote transparency and accountability at the delivery of services in vital sectors such as education, health, land, and local government.¹⁶⁷ The IP involves a written but a legally non-binding voluntary

166 TRANSPARENCY INT'L BANGL., INTEGRITY PLEDGE: PARTICIPATORY GOVERNANCE THROUGH SOCIAL ACCOUNTABILITY, 4 (2012), http://www.ti-bangladesh.org/beta3/images/max_file/pub_Booklet_ccc-yes_IP_August%2012.pdf.

167 *Id.* at 3.

commitment signed by concerned stakeholders — public representatives, officials, and other service providers, service recipients, and citizens' committees — where all parties pledge to work together and help each other to:

prevent and control abuse of power for private gain; eliminate all forms of unauthorized payments, including bribery for services rendered; ensure and promote participation of service recipients in decisions that affect the content and quality of services provided; ensure transparency in public contracts and in implementing work under such contracts; and promote disclosure and transparency to ensure accountability in all related actions.¹⁶⁸

Involving the people as stakeholders — in design, delivery, monitoring, and assessment of the quality of services — effectively reinforces and strengthens the conventional accountability systems. This approach treats the people as proactive stakeholders rather than as simple beneficiaries or service recipients, so that their voices and demands are counted.¹⁶⁹

V. SUSTAINED ADVOCACY FOR GOOD GOVERNANCE

Another important role played by TIB is its sustained advocacy in support of anti-corruption efforts at both the national and local levels. An activity undertaken under any one programme head often also impacts activities of another programme head. For example, research results are likely to reinforce advocacy and monitoring activities and also serve to raise awareness of anti-corruption issues. TIB's national level advocacy is premised on key findings of its research in select sectors or institutions, which are collated to produce policy briefs containing pragmatic policy recommendations for lobbying with policy makers and actors in governance, creating knowledge and garnering support through public discourses at the local and national levels by involving the media, the public and other stakeholders. TIB believes that no anti-corruption movement can succeed without active support and participation of the government, including the highest political authority. As such, a key method used by TIB to engage with the government is to organise meetings and dialogues with policy-makers and senior officials of the government, including ministers and key decision-makers. TIB implements both quiet and public advocacy campaigns to secure necessary political support for the implementation of

168 *Id.*

169 *Id.*

its anti-corruption work. For the quiet and judicious advocacy, measures such as direct one-to-one meetings, briefing notes, power-point presentations and focused-group discussions are undertaken with anti-corruption “champions” within the political leadership and the government. As for public advocacy, pressures are created through public statements, press conferences, roundtables, seminars, media op-eds and talk shows to create public opinion in favour of TIB’s anti-corruption and reforms initiatives.

Advocacy at the local level is carried out through civic engagement on the basis of TIB’s research findings in selected sectors or institutions and other demand-driven issues with the aim of sensitising citizens and concerned authorities about their rights and duties, helping change their mindset and attitudes, and capacitating citizens to challenge and address corruption. Periodic meetings are held with designated authorities of concerned sectors and institutions to update them on CCC’s current events and also to follow up on previous events. Engagements amongst different stakeholder groups strengthen anti-corruption efforts as they focus on collaboration rather than confrontation; besides, they help exchange of information about successful strategies, research, and future directions for improvement.¹⁷⁰

At the national level, TIB has collaborated with the government on many fronts to help improve governance in selected areas. For example, its collaboration with the Ministry of Public Administration has led to the development and successful implementation of a participatory second-generation Citizens’ Charter in selected public service delivery institutions. Following the publication of a report on Local Government Engineering Department (LGED), the country’s lead agency for developing the rural infrastructure, TIB has been assigned by LGED, with support from the Asian Development Bank, to help identify governance and fiduciary risks within LGED and to develop a road map to ensure good governance in its operations. TIB has closely worked with the Cabinet Division in the drafting process of the National Integrity Strategy. It has collaborated with the Bangladesh government in the implementation and review of UNCAC. The Ministry of Law, Justice and Parliamentary Affairs of Bangladesh also supported TIB in producing an independent civil society review report on the status of UNCAC implementation in Bangladesh. In response to a

170 Carr & Outhwaite, *supra* note 149, at 624.

government request, TIB played a pivotal role in drafting a law to assist the Bangladesh government's efforts to improve NGO governance.

B. Impact of TIB's Activities: Some Examples

A review of TIB's work both at the national and the local level reveals significant outcomes in terms of challenging corruption and driving changes that positively impact citizens, in particular the poor and the marginalised. TIB's interventions in health, education and local government sectors at the local level through CCCs, YES groups and AI-Desks have helped minimise the harassment that ordinary citizens normally had to face earlier in their attempts to seek services from these institutions. In schools for example, TIB's anti-corruption advocacy and communication have contributed to the reduction of illicit payments in schools (examination fees, books), marked improvement in teachers' attendance and performance, increased transparency in the distribution of scholarships, reformation and activation of the School Management Committees, positive change in the outlook, attitude, and response of concerned school authorities, involvement and interest of mothers/guardians in their children's education, distribution of free text books, reduction in school drop-out, and rise in school enrolment. TIB's IP tool and CCC interventions have raised the rank of Alokdia Government Primary School in Modhupur Upazila of Tangail district from C to A. This success inspired other schools in adjoining areas to seek replication of the IP model. The success of Alokdia is prominently featured in a global report by Transparency International: *Global Corruption Report: Education*.¹⁷¹

Similar results are visible in the health sector. For example, doctors who were previously preoccupied with private practice have started to attend their hospital duties on time, patients have begun to raise questions about undue payments, hospital cleanliness and hygiene have improved, authorities have become more supportive of reforms, list of medicines and doctors and nurses on duty have been openly displayed, unauthorised payment for ambulance and other services has reduced, and patient referrals to private clinics have dropped.¹⁷²

TIB's work with the local government has increased transparency and fairness in the distribution of vulnerable group feeding (VGF) and vul-

171 TRANSPARENCY INT'L BANGL., *supra* note 163, at 12.

172 *Id.*

nerable group development (VGD) cards and has led to the introduction of the practice of open budgets in local government. Local government representatives have been brought face-to-face with the public for responding to questions and demands for democratic and transparent governance. Citizens at the local level have been capacitated to choose local government electoral candidates on the basis of commitment, integrity and honesty. A number of roads in a bad state of disrepair have been fixed; new tube wells have been set up in some areas and the water is now arsenic free. Tax collection has increased and the number of social benefits improved for the disabled, free-fighters, the elderly and widows. Extra money that used to be paid to obtain a trade license has been stopped.

The degree of volunteerism associated with these changes is significant. This and the fact that various developments have contributed to the overall improvement in public sector governance have been aptly captured in the words of an evaluation mission after assessing the work of TIB:

[Impact] areas in significant areas are: increased tax collection which, in turn, allows investment in public services; savings to hospital users on pathology services in hospitals; an increase in the number of patients seen by doctors; a reduction in the fees paid for outdoor tickets in hospitals and reinvestment in welfare funds; availability, transparency and distribution of medicines in hospitals; and an increase in student attendance at primary schools. Given the centrality of these services to the quality of peoples' lives in Bangladesh, these changes represent significant public sector improvements and are important outcomes from the work of CCCs.¹⁷³

At the policy level the impact of TIB's work is manifest in various anti-corruption reforms and legislative developments. TIB played a pivotal role in making corruption a punishable offence and in the enactment of The Anti-Corruption Act 2004, The Right to Information Act 2009, The Public Interest Related Information Disclosure (Protection) Act 2011 (whistle-blower's protection law). TIB developed a Code of Conduct on Members of the Parliament, which has been placed as a private member's Bill and has been positively considered by the Standing Committee, and is now

173 COLIN KNOX & TAHERA YASMIN, TRANSPARENCY INTERNATIONAL BANGLADESH IMPACT ASSESSMENT 20 (2007).

awaiting enactment. TIB's advocacy campaigns culminated in Bangladesh's accession to UNCAC in 2007.¹⁷⁴

Findings from TIB's diagnostic studies on key institutions in the national integrity system produce high impact at the policy level. Many recommendations arising from these studies have been implemented in different government institutions, resulting in improved organisational policies and practices contributing to increased accountability, transparency, and better governance. Reforms have taken place *inter alia* in the Bangladesh Parliament, Bangladesh Election Commission, the Office of the Comptroller General of Audit, Bangladesh Passport and Immigration Office, Public Service Commission, Bangladesh Road Transport Authority (BRTA), and Chittagong Port, following publication of TIB's research findings on these institutions. The government has implemented many of TIB's recommendations on improving governance in the readymade garments industry in the wake of the Rana Plaza tragedy that had resulted in the death and injury of hundreds of garment factory workers.¹⁷⁵

The most significant example of TIB's work that has had a direct and indirect impact on policy and institutional reform is its contribution to reforming the Anti-Corruption Commission of Bangladesh. Findings of TIB's diagnostic study on the erstwhile Bureau of Anti-Corruption demonstrated the weaknesses and ineffectiveness of this body and the lack of public trust in it. Based on these findings, TIB advocated for a new and impartial anti-graft body and to this end developed a draft law prescribing the modality for the establishment of an independent Anti-Corruption Commission for the consideration of the government. Pursuant to these initiatives the Anti-Corruption Act was enacted in 2004 and the proposed Anti-Corruption Commission (ACC) was set up. However, the ACC was subjected to financial and administrative limits placed by the government. In addition, the selection of the ACC's Commissioners under political limits had eroded public confidence in the ACC's work. Despite its initial

174 TRANSPARENCY INT'L BANGL., *supra* note 163, at 15.

175 *Id.* at 13-14.

set-backs, through TIB's advocacy, the ACC was reconstituted in February 2007 with much greater capacity and judicial clout.¹⁷⁶

6. CONCLUSION: CHALLENGES AND LESSONS

TIB's activism at the macro level has been very influential in tackling some of the worst cases of institutional corruption and in building relationships with organisations that can drive change (e.g. the ACC); similarly, TIB's social movement on the ground has more immediate impacts on people facing day-to-day corrupt practices as part of their daily lives.¹⁷⁷ Despite the achievements, TIB's journey has been far from easy. Programmatically, it is difficult to produce evidence of tangible impacts of anti-corruption interventions as this often involves entrenched practices and processes which, in turn, are linked to the attitudes and mindset of relevant stakeholders. Any attempt at inducing change in these aspects is usually confronted by a number of factors, principal amongst which are institutional deficits in terms of integrity, resource, capacity, and more importantly, political will. At the same time, years of passive submission to corruption have caused citizens to believe that corruption is a way of life, a norm, and not an exception. In these circumstances, it is difficult to set verifiable indicators of change as good governance involves changes in the mindset and conduct of both actors in governance, as well as that of the citizens. The political context in which TIB works is not hassle-free either. The lack of commitment amongst actors in governance, non-cooperation by concerned authorities or institutions, reactive actions or statements by the government in the wake of TIB's interventions, changes (whether by way of transfer or promotion) in institutional management or arrangement, restricted access to information, and political instability are some of the external risks TIB faces almost on a daily basis.

Notwithstanding, TIB believes that its work is a means to an end and as such, will bring incremental changes within institutions or sectors and amongst stakeholders with which it engages. TIB also recognises that in order for anti-corruption initiatives to work, the initiatives need to be backed by a strong political will of actors in governance. Indeed, TIB's ex-

176 KNOX & YASMIN, *supra* note 173, at 28-30.

177 *Id.* at 25.

periences suggest that there are risks and challenges in the anti-corruption movement just as there are opportunities. Fighting corruption is a collective responsibility in which all levels of society and all actors from the government to civil society and communities must be engaged in order to challenge the status quo and build integrity for effective change.¹⁷⁸ These opportunities and the popular support for TIB's work are key sources of inspiration for TIB to continue its daunting task of mobilising support against corruption in Bangladesh.

178 JOY SAUNDERS, INTEGRITY ACTION, IS FIGHTING CORRUPTION A COLLECTIVE RESPONSIBILITY? 12 (2014), http://integrityaction.org/sites/default/files/publication/files/Fighting_Corruption_Paper_r2.pdf.

China's Suspended Death Sentence with a Two-Year Reprieve: Humanitarian Reprieve or Cruel, Inhuman and Degrading Punishment?

Matthew Seet¹

1. INTRODUCTION

An especially fascinating feature of China's domestic criminal law is the suspended death sentence, the *sihuan zhidu*, where a two-year reprieve may be pronounced simultaneously with an imposition of the death sentence if immediate execution is not deemed "necessary."² At the end of the two-year reprieve, the death sentence may be commuted to life imprisonment if the convict has not committed an "intentional crime" during the two-year reprieve, or to a fixed-term imprisonment of 25 years if the convict has performed "great meritorious service."³ This idea of a death sentence with a stay of execution was briefly mentioned by Sir Thomas More in his work,

1 Sheridan Fellow, Faculty of Law, National University of Singapore. The author would like to thank Michelle Miao, Margaret Lewis, and Marcellene Hearn for the helpful discussions which have contributed to this Article. All views expressed and all errors in this Article are entirely the author's own.

2 *Zhonghua Renmin Gongheguo Xing Fa (1997 Xiuding)* (中华人民共和国刑法 (1997修订)) [Criminal Law of the People's Republic of China (97 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amended Mar. 14, 1997, effective Dec. 25, 1999), art. 50, CLI.1.17010(EN) (Lawinfochina) [hereinafter 1997 Criminal Law].

3 *Zhonghua Renmin Gongheguo Xing Fa Xiuzhengan (Ba)* (中华人民共和国刑法修正案(八)) [Eighth Amendment to the Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011,

Utopia,⁴ in the sixteenth century, but was never developed into a concept, much less a reality.⁵

Chinese officials consider the suspended death sentence an “original creation”⁶ of China, and scholars consider it a “uniquely Chinese contribution to the global panoply of penalties.”⁷ This legal innovation which is unique to China must be differentiated from the pardon or clemency procedures of other states which have retained the use of capital punishment (in practice or only in their law books)⁸ as required under international human rights

effective May 1, 2011), art. 4, CLI.1.145719(EN) (Lawinfochina) [hereinafter 2011 Amendment VIII].

- 4 THOMAS MOORE, *UTOPIA* 41 (R. Robinson trans., Wordsworth Editions Ltd. 1997) (“But when the sentence of death is given, if then the king should command execution to be deferred and spared, and would prove this order and fashion, taking away the privileges of all centuries, if then the proof should declare the thing to be good and profitable, then it were well done that it were established; else the condemned and reprieved persons may as well and as justly be put to death after this proof, as when they were first cast. Neither any jeopardy can in the mean space grow hereof.”).
- 5 Zhao Zuojun, *The Suspension-of-Execution System and Limiting the Application of the Death Sentence*, 36 CONTEMPORARY CHINESE THOUGHT 53, 74 n.1 (2005).
- 6 Info. Office of the State Council of the China, *Guarantee of Human Rights In China’s Judicial Work*, in *Human Rights in China*, WHITE PAPERS GOV’T, (Nov. 1991), <http://www.china.org.cn/e-white/7/7-IV.htm>.
- 7 Michael Palmer, *The People’s Republic of China*, in 2 CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS 105, 120 (Peter Hodgkinson & Andrew Rutherford eds., 1996).
- 8 These terms are used interchangeably to refer to the substitution of the death sentence with a lesser penalty than death. ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 258 (4th ed. 2008). China does not have an effective clemency procedure, or any other form of pardon or amnesty apart from the suspended death sentence. *Id.* The Chinese Constitution confers power on the President to order special pardons (Article 80) and this must be approved by the Standing Committee of the National People’s Congress. XIANFA art. 80 (1982) (China). However, this is a dead letter as no Chinese prisoner has been pardoned since 1975. According to the National People’s Congress Standing Committee, special pardons have been granted on the following occasions: September 17, 1959; November 19, 1960; December 16, 1961; March 30, 1963; December 12, 1964; March 29, 1966 and March 17, 1975. Nicola MacBean, *The*

standards.⁹ Unlike in pardon and clemency procedures in other retentionist states, the commutation of the suspended death sentence to life or fixed-term imprisonment is initiated by the criminal justice system itself and the convict does not have the right to apply for such commutation.¹⁰ The suspended death sentence has developed into one of the most important kinds of penalties used by Chinese courts particularly in the 1980s,¹¹ but until recently, little has been written about the suspended death sentence.¹² It perhaps only gained worldwide attention in 2012 when Gu Kailai, the wife of Politburo member Bo Xilai, was convicted of murdering Neil Heywood and was sentenced to death with a two-year reprieve but was not executed.¹³

While the suspended death sentence has been praised for being “humane” and respecting the right to life by reducing the total number of executions in China (which currently conducts the largest number of executions in the world today),¹⁴ it has also been criticised for being “cruel” and “inhuman,” given that the convict may remain uncertain and anxious as to his fate at the end of the two-year reprieve. Thus, this Article aims to address the question of whether the suspended death sentence violates the prohibition against cruel, inhuman, and degrading punishment in

Death Penalty in China: A Baseline Document 29 n.47 (The Rights Practice, 2003), http://www.ecba.org/extdocserv/DP_Baseline.pdf.

- 9 International Covenant on Civil and Political Rights art. 6(4), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR] states “[a]nyone sentenced to death shall have the right to seek pardon, or commutation of sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases of capital punishment.”
- 10 MacBean, *supra* note 8.
- 11 Palmer, *supra* note 7.
- 12 Zhang Ning, *The Debate Over the Death Penalty in Today's China*, 62 CHINA PERSPECTIVES 1, 6 (2005) (many studies done on this subject are of theoretical character and what is lacking is precise data).
- 13 See Tania Branigan, *Gu Kailai Given Suspended Death Sentence Over “Despicable” Murder*, GUARDIAN (Aug. 20, 2012), <http://www.theguardian.com/world/2012/aug/20/gu-kailai-suspended-death-sentence>.
- 14 *Death Sentences and Executions 2014*, AMNESTY INT’L (Mar. 31, 2015), <http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2014> (“[C]hina again carried out more executions than the rest of the world put together.”).

international law. After providing the background of the suspended death sentence and discussing the criticisms of it according to human rights standards (Part 2), this Article then examines international, regional and domestic jurisprudence on the “death row phenomenon” and argues that the suspended death sentence does not amount to cruel, inhuman and degrading punishment under international human rights law (Part 3). Finally, this Article concludes by exploring the potential implications of this issue for other States, especially those which have ratified the International Covenant on Civil and Political Rights (ICCPR) (Part 4).

2. THE SUSPENDED DEATH SENTENCE AND INTERNATIONAL HUMAN RIGHTS LAW

a. The 1979 Criminal Law and 1997 Criminal Law (as amended in 2011 and 2015)

Although the suspended death sentence has had a long history in China,¹⁵ it was only in 1979 that China’s criminal law included the suspended death

15 DAVID JOHNSON & FRANKLIN ZIMRING, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* 256 n.33 (2009) (“death sentence with a two-year reprieve has many precursors in Chinese history, but the modern version was created by Mao.”). Prior to the Mao era, some scholars claim that the earliest form of the suspended death sentence may be traced to the Han Dynasty, where death row inmates were given the opportunity for meritorious service and sufficient reform during the two-year suspension, so that their lives would be spared. HONG LU & TERENCE D. MIETHE, *CHINA’S DEATH PENALTY: HISTORY, LAW AND CONTEMPORARY PRACTICES* 66 (2007). Others note how, in the Ming and Qing Dynasties, the Emperor issued the suspended death sentence in some cases which were subsequently reviewed two years later by the special high court in autumn. DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH’ING DYNASTY CASES, WITH HISTORICAL, SOCIAL, AND JURIDICAL COMMENTARIES* 138 (1967); Zhang Ning, *supra* note 12, at 11. At the height of the first Movement to Suppress Counterrevolutionaries in May 1951, according to Mao, the counter-revolutionaries who should be subject to immediate execution were those who incurred “blood debts” or committed extremely serious harm to the national interest, while those who “may be saved” through the death sentence with a two-year reprieve who those whose harm on the national interest had not “reached an extreme” or where the masses were not direct

sentence.¹⁶ After stating that only criminals who have committed the most “heinous crimes” were to be sentenced to death, the 1979 Criminal Law provided that a two-year reprieve was to be pronounced simultaneously with the death sentence if immediate execution was “not deemed necessary,” and the criminal was to undergo reform through labour during the two-year reprieve.¹⁷ There were three possible outcomes at the end of the two-year reprieve. One, if the convict had shown “true repentance” during the reprieve, the death sentence was to be commuted to life imprisonment.¹⁸ Two, if the convict had not only shown “true repentance” but had also performed “meritorious service,” the death sentence was to be reduced to a fixed-term imprisonment of 15 to 20 years.¹⁹ Three, if the convict had “resisted reform in a flagrant manner,” the convict was to be “executed by means of shooting,”²⁰ subject to the approval of the Supreme People’s Court.²¹ Resisting reform in itself did not necessarily lead to execution;

victims. Mao Tsetung, *Strike Surely, Accurately and Relentlessly in Suppressing Counter-Revolutionaries*, in 5 SELECTED WORKS OF MAO TSETUNG 53, 54-55 (1977). Sparing their lives would prevent the masses (who were not direct victims) from being confused as to the execution, maintain a “large pool of labor power” and avoid potential wrongful executions. *Id.* According to Mao, 10-20 percent should be executed immediately, while the remaining 80-90 percent should be saved through the reprieve. *Id.*

16 HONG LU & TERENCE D. MIETHE, *supra* note 15, at 66.

17 Zhonghua Renmin Gongheguo Xing Fa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1979, effective Jan. 1, 1980), art. 44, CLI.1.556(EN) (Lawinfochina) (although the death penalty shall not be imposed on persons who had not reached the age of 18 at the time the crime was committed, persons above the age of 16 but below the age of 18 may be sentenced to death with a two-year suspension if the crime committed was particularly serious).

18 *Id.* art. 46.

19 *Id.*

20 *Id.* art. 45.

21 *Id.* art. 46. According to MacBean, this emphasis on the re-education and reform of offenders reflects the historical and political “heritage” of the suspended death sentence as having been used extensively against political opponents. MacBean, *supra* note 8, at 23.

the convict had to have “refuse[d] in a particularly serious manner to mend [his or her] ways.”²²

As per the 1997 Criminal Law which has replaced the 1979 Criminal Law, the death penalty shall apply only to criminals who have committed “extremely serious” crimes; a two-year stay of execution may be pronounced simultaneously with the imposition of the death sentence if immediate execution is not deemed necessary.²³ Technically, the suspended death sentence is not an “alternative” sentence in a category separate from immediate execution; rather, it is another way of implementing the death penalty,²⁴ with the two-year reprieve as an “appendage.”²⁵ The 1997 Criminal Law is silent on exactly when a crime is to be deemed “serious” and is “extremely” so, and also on exactly when immediate execution is to be deemed to be “necessary.”²⁶ The convict may be executed during or at the end of the two-year reprieve if he or she committed an “intentional crime” under “heinous circumstances” during the two-year reprieve, subject to the Supreme People’s Court’s approval.²⁷ If he or she committed an “intentional

22 A National People’s Congress Legal Affairs Commission official, Sha Qianli, stated after the adoption of the 1979 Criminal Law that “[g]enerally speaking, those receiving the reprieve will not be executed as long as they do not refuse in a particularly serious manner to mend their ways.” AMNESTY INT’L, CHINA: VIOLATIONS OF HUMAN RIGHTS: PRISONERS OF CONSCIENCE AND THE DEATH PENALTY IN THE PEOPLE’S REPUBLIC OF CHINA 63 (1984). For example, Jiang Qing and Zhang Chunqiao, two former members of the Gang of Four, had their sentences commuted at the end of the two-year reprieve because the Supreme People’s Court found that “the two criminals had not resisted reform in a flagrant way.” *Id.* at 64.

23 1997 Criminal Law, *supra* note 2, art. 48.

24 MacBean, *supra* note 8, at 22.

25 Zhao Zuojun, *supra* note 5, at 75. However, in practice, judges have regarded the suspended death sentence as an “independent category of punishment” or another “level of custodial punishment.” SUSAN TREVASKES, THE DEATH PENALTY IN CONTEMPORARY CHINA 120 (2012).

26 Susan Trevaskes, China’s Death Penalty: The Supreme People’s Court, the Suspended Death Sentence and the Politics of Penal Reform, 53 BRITISH JOURNAL OF CRIMINOLOGY 482, 488 (2013).

27 Zhonghua Renmin Gongheguo Xing Fa Xiuzhengan (Jiu) (中华人民共和国刑法修正案(九)) [Ninth Amendment to the Criminal Law of the People’s Republic of

crime” not under such “heinous circumstances,” the start date of his or her two-year reprieve is reset.²⁸ There are three possible outcomes at the end of the two-year reprieve for the convict who did not commit an “intentional crime.” One, the death sentence is commuted to life imprisonment²⁹ which may be further commuted to a fixed-term imprisonment of at least 25 years.³⁰ Two, if the convict performed “great meritorious service,”³¹ the convict’s death sentence may be commuted to a fixed-term imprisonment of 25 years³² which may be further commuted to a term of at least 20 years,³³ with the courts retaining the power to modify the length of fixed-term imprisonment based on the circumstances of the crime, for “recidivists” or persons who have committed the following crimes: “intentional homicide, rape, robbery, kidnap[ing], arson, explosion, throw[ing] dangerous substance[s] or organized violent crime.”³⁴ Three, if a convict was given the suspended death sentence after having been found guilty of corruption, specifically for embezzling an “especially large” amount of money, at the end of the two-year reprieve, his

China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 2015, effective Nov. 1, 2015), art. 2, CLI.1.145719(EN) (Lawinfochina) [hereinafter 2015 Amendment VIII].

28 *Id.*

29 1997 Criminal Law, *supra* note 2, art. 50.

30 2011 Amendment VIII, *supra* note 3, art. 15(3)

31 1997 Criminal Law, *supra* note 2, art. 50. Article 78 defines “meritorious service” as including the following: “preventing another person from conducting major criminal activities;” “informing against major criminal activities conducted inside or outside prison and verified through investigation;” “having inventions or important technical innovations to one’s credit;” “coming to the rescue of another in everyday life and production at the risk of losing one’s own life;” “performing remarkable services in fighting against natural disasters or curbing major accidents;” and “making other major contributions to the country and society.” *Id.* art. 78.

32 2011 Amendment VIII, *supra* note 3, art. 4.

33 *Id.* art. 15(3).

34 *Id.* art. 4.

or her suspended death sentence may be commuted to life imprisonment without the possibility of parole or commutation.³⁵

b. Critique of the Suspended Death Sentence with Regard to International Human Rights Law

The suspended death sentence has been praised for protecting human lives,³⁶ because its use has effectively reduced executions in China,³⁷ while it still remains an attractive “substitute sanction that carries something close to the symbolic weight of a death sentence.”³⁸ A human rights non-governmental organisation has even encouraged China to increase its use of the suspended death sentence for this very reason.³⁹ However, the suspended death sentence has also been criticised for violating other human rights. First, China’s application of the suspended death sentence may run “counter to the principle of the presumption of innocence”⁴⁰ which is well-

35 2015 Amendment VIII, *supra* note 27, art. 44.

36 TREVASKES, *supra* note 25, at 16.

37 According to a mid-2000s study, there was an approximately 50% decline in the number of executions in the mid-2000s from the mid-1990s, which was brought about by the suspended death sentence in two ways. HONG LU & TERENCE D. MIETHE, *supra* note 15, at 75. First, it was extremely rare for the Procuratorate (the Chinese-equivalent of a Western legal system’s state prosecutor) to protest a ruling of suspended death sentence to the high court for a heavier sentence, which is immediate execution. *Id.* Second, Chinese courts increasingly preferred to use the suspended death sentence. *Id.* Eventually, in October 2006, the Organic Law of the People’s Court was amended to return to the SPC its exclusive authority to review and approve all death sentences from 1 January 2007. Trevaskes, *supra* note 26, at 486. In 2007, the SPC announced that the annual number of suspended death sentences exceeded the number of death sentences with immediate execution and the number of executions in China in 2007 had decreased by a massive 33%. *Id.*

38 Franklin Zimring & David Johnson, Public Opinion and Death Penalty Reform in the People’s Republic of China, 3 CITY UNIVERSITY OF HONG KONG LAW REVIEW 189, 195 (2012) (where the authors term the suspended death sentence a “natural consolation prize” for prosecutors and victims’ families).

39 Promoting Increased Transparency in China’s Criminal Justice System, DUI HUA ¶ 11 (Feb. 2009), http://duihua.org/wp/?page_id=2536.

40 JOHNSON & ZIMRING, *supra* note 15, at 283 n.67.

established in international law.⁴¹ The suspended death sentence has often been employed by Chinese courts as an alternative to immediate execution in order to serve as a compromise between judges' differing opinions, and to "leave some leeway" in cases where the evidence is incomplete such that the court has doubts as to whether the accused is guilty.⁴² Rather than act on the basis of "if in doubt, declare not guilty" as the presumption of innocence requires, judges often act on the basis of "if in doubt, reduce the sentence".⁴³

Second, China's application of the suspended death sentence raises issues of equality before the law, which is provided for under international human rights law.⁴⁴ Suspended death sentences are "increasingly associated with selective enforcement along socio-economic and political-power

41 The right to the presumption of innocence is well established in international law. Article 11(1) of the Universal Declaration of Human Rights states, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law." G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 11 (Dec. 10, 1948) [hereinafter UDHR]. Similarly, Article 14(2) of the ICCPR states, "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." ICCPR, *supra* note 9, art. 14(2). Specifically with regard to the standard of proof in death penalty cases, the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty states, "Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts." Economic and Social Council Res. 1996/15, art. 4 (July 23, 1996).

42 TREVASKES, *supra* note 25, at 109, 129.

43 *Id.* at 112.

44 Both the UDHR and ICCPR state, "All are equal before the law and are entitled without any discrimination to equal protection of the law." UDHR, *supra* note 41, art. 7; ICCPR, *supra* note 9, art. 26.

lines,⁴⁵ and more frequently used in cases of corruption,⁴⁶ economic crimes,⁴⁷ and when monetary compensation has been paid to victims' families.⁴⁸ The suspended death sentence is thus increasingly perceived as a "get-out-of-death card available to wealthy and powerful defendants"⁴⁹ while "regular death sentences" where the convict is immediately executed "tend to be disproportionately imposed on those with little education and social standing."⁵⁰

The third criticism of the suspended death sentence, which this article shall focus on, is that it constitutes cruel, inhuman and degrading punishment under international law. According to critics, the suspended death sentence is "inhuman" because the convict who faces one of two outcomes at the end of the two-year reprieve – imprisonment or execution⁵¹ – is placed on "tenterhooks" and is forced to undergo the "enormous psychological burden"⁵² of being in a state of anxiety and suspense for such a long time as

45 Margaret Lewis, *Leniency and Severity in China's Death Penalty Debate*, 24 COLUMBIA JOURNAL OF ASIAN LAW 303, 325 (2011). A Chinese writer in a Hong Kong-based, pro-PRC journal criticised Chinese authorities for their inability to reconcile their commitment to the principle of "equality before the law" with their conduct of routinely executing embezzlers and rapists while sparing the life of Jiang Qing who persecuted thousands of people and caused the death of many during the Cultural Revolution." SHAOCHUAN LENG & HONGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS 106 (1985).

46 Lewis, *supra* note 45, at 307.

47 Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 CHINESE JOURNAL OF INTERNATIONAL LAW 445, 464 (2007) (the suspended death sentence is "a legitimate safety valve the courts can use for economic crimes, such as tax evasion, which attract the death penalty as the ultimate sanction.").

48 Lewis, *supra* note 45, at 309 n.24.

49 *Id.* at 325-26 (further noting how these sentiments are expressed in Chinese phrases like "*tan guan mian si* (corrupt officials are exempted from death)" and "*mian si pai* (death exemption card)").

50 Meaghan Sunderland, *Criminal Law Reform in the People's Republic of China: Any Hope for those facing the Death Penalty?*, 8 APPEAL: REVIEW OF CURRENT LAW AND LAW REFORM 18, 27 (2002).

51 Zhao Zuojun, *supra* note 5, at 75 n.15.

52 *Id.* at 58.

to whether he or she will eventually face execution.⁵³ When China described the suspended death sentence while presenting its initial report to the United Nations Committee Against Torture in 1990, a committee member found the suspended death sentence “particularly cruel”⁵⁴ and another committee member agreed, stating that the suspended death sentence “amounted to inhuman and degrading treatment.”⁵⁵ Chinese officials have historically been sensitive to such criticism, extolling the suspended death sentence to be of the “greatest humaneness” and embodying the spirit of “revolutionary humanism.”⁵⁶ This controversy of whether the suspended death sentence is “humane” or whether it amounts to “cruel, inhuman and degrading punishment” shall now be explored.⁵⁷

3. THE SUSPENDED DEATH SENTENCE AND THE PROHIBITION OF CRUEL, INHUMAN AND DEGRADING PUNISHMENT

In order to address the question of whether the suspended death sentence constitutes cruel, inhuman and degrading punishment, it is crucial to examine the jurisprudence of international and domestic courts regarding the “death row phenomenon.”⁵⁸ The “death row phenomenon” was defined

53 See Zhang Ning, *supra* note 12, at 5 (“[T]his sentence can scarcely be regarded as humane, since it puts the condemned in a state of anxiety for the two years of their reprieve.”).

54 U.N. Comm. Against Torture, Initial Report of China, ¶ 37, U.N. Doc. CAT/C/SR.51 (May 4, 1990).

55 *Id.* ¶ 41.

56 The Chinese have maintained that the spirit of “revolutionary humanism” in the Chinese criminal law is embodied in the suspended death sentence. JEROME COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949-1963* 537 (1968). The Minister of Public Security, Lo Jui-ch’ing, stated in 1959: “Imperialists have denounced [the suspended death sentence] as the greatest cruelty. We say that this is the greatest humaneness. The criminals themselves understand this. Sentencing them to death and suspending execution of their sentence gives to these persons, allowed to live on under the sword of the people’s government, a last opportunity to reform . . . Where was there ever in ancient or modern times, in China or abroad, so great an innovation? Where could one find in the capitalist world so humane a law?” *Id.* at 539.

57 Zhao Zuojun, *supra* note 5, at 75 n.15.

58 Soering v. United Kingdom, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) (1989).

in the landmark European Court of Human Rights (ECtHR) case of *Soering v. United Kingdom*⁵⁹ as the “combination of circumstances to which [a prisoner] would be exposed if . . . he [or she] were sentenced to death,”⁶⁰ “with the ever present and mounting anguish of awaiting execution of the death penalty.”⁶¹ In that case, the ECtHR held that extradition of an individual from the United Kingdom to the United States to face charges for a first-degree murder charge, without assurances from the United States government that the death penalty would not be carried out, violates the prohibition against “torture . . . and inhuman and degrading treatment or punishment” in Article 3 of the European Convention of Human Rights (ECHR).⁶² It was not the death penalty itself which the ECtHR found to be offensive to Article 3 of the ECHR,⁶³ but the death row phenomenon.⁶⁴

59 *Id.*

60 *Id.* ¶ 81.

61 *Id.* ¶ 111.

62 *Id.* European Convention on Human Rights, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter ECHR] states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

63 The majority concluded that recognition of the death penalty in article 2(1) of the Convention as a limitation on the right to life ruled out such a dynamic interpretation. *Soering* App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) ¶¶ 102-103. Furthermore, the majority considered that the adoption of an optional protocol to the Convention abolishing the death penalty in time of peace was further evidence that the Convention itself should not be given an abolitionist mission. *Id.*

64 *Id.* ¶ 111.

Soering is thus an especially important decision which “broke new ground, providing a basis for other courts to embrace the death row phenomenon.”⁶⁵

The death row phenomenon (which should be differentiated from the death row syndrome⁶⁶) is a relatively new legal doctrine used by abolitionists as an “alternative”⁶⁷ and “collateral”⁶⁸ attack on the death penalty in the judicial forum. In such instances, it is not the death sentence which is directly challenged⁶⁹ (which would be problematic at both international and domestic levels, given the international human rights instruments’

65 Patrick Hudson, Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 833, 842-43 (2000). On the significance of the *Soering* decision, see Richard Lillich, Note and Comment, The *Soering* Case, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 128, 128-49 (1991); Susan Marks, Yes, Virginia, Extradition May Breach the European Convention on Human Rights, 49 CAMBRIDGE LAW JOURNAL 194, 194-97 (1990); Christine van den Wyngaert, Applying the European Convention on Human Rights to Extradition: Opening Pandora’s Box?, 39 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 757, 757-79 (1990).

66 David Sadoff, International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon, 17 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 77, 84-85 (2008) (“The death row phenomenon must not be conflated with the similarly sounding term, ‘death row syndrome’. Both terms denote a degree of mental trauma in connection with the death row experience and both potentially can justify reprieve from execution, but their commonality essentially ends there. The phenomenon relates to the circumstances on death row, including the duration and isolation of detention, as well as the uncertainty as to the time of execution that can be tantamount to a form of psychological maltreatment, while the syndrome pertains strictly to the mental effects themselves that derive from prolonged death row detention, such as incapacitated judgment, mental illness, or suicidal tendencies. It follows that the phenomenon, unlike the syndrome, does not per se require demonstrable proof of mental suffering. In addition, the two concepts are implicated in distinct contexts: while the phenomenon alone can arise under an extradition scenario, only the syndrome is germane when mental competency claims are raised.”).

67 Kealeboga Bojosi, The Death Row Phenomenon and the Prohibition Against Torture and Cruel, Inhuman or Degrading Treatment, 4 AFRICAN HUMAN RIGHTS LAW JOURNAL 303, 305 (2004).

68 Hudson, *supra* note 65, at 833.

69 *Id.*

and domestic constitutions' explicit recognition of the death penalty as an exception to the right to life⁷⁰). Rather, what is challenged is the "years-long wait for the scaffold under gruesome conditions, both physical and psychological."⁷¹ Given that China's suspended death sentence with a two-year reprieve also involves a delay of the execution for a period of time, an examination of international and domestic jurisprudence on the death row phenomenon is necessary to address the question of whether the suspended death sentence constitutes cruel, inhuman and degrading treatment.

In such an examination of the death row phenomenon jurisprudence, it is important to recognize that different international and domestic courts use different conventions and constitutions as the source of law, which, in turn, employ different terminology: the International Covenant on Civil and Political Rights prohibits "cruel, inhuman or degrading treatment or punishment"⁷² and the ECHR prohibits "inhuman or degrading treatment or punishment."⁷³ While the terminologies are different, the underlying concept is similar, given that each provision was "adopted to protect persons from unnecessary and undue suffering."⁷⁴ Hence, the phrase "cruel, inhuman and degrading punishment" will be used throughout this article for purposes of uniformity.

a. Is There a Real Risk of the Death Sentence being Carried Out?

According to the death row phenomenon jurisprudence, in order for any detention on death row with delayed execution to constitute cruel, inhuman and degrading punishment, the threshold requirement of a "genuine risk

70 See ICCPR, *supra* note 9, art. 6(2); ECHR, *supra* note 62, art. 2(1); American Convention on Human Rights, art. 4, Nov. 21, 1969, 1144 U.N.T.S. 143; cf. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 which is silent on the issue of the death penalty. Further, CONSTITUTION OF JAMAICA Aug. 6, 1962, art. 14(1) provides, "[n]o person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

71 William Schabas, International Law and Abolition of the Death Penalty, 55 WASHINGTON AND LEE LAW REVIEW 797, 809 (1998).

72 ICCPR, *supra* note 9, art. 7.

73 ECHR, *supra* note 61, art. 3.

74 Hudson, *supra* note 65, at 837.

that the death penalty will be implemented”⁷⁵ must be met. The ECtHR in *Soering* maintained that:

[T]he inquiry must concentrate firstly on whether Mr. Soering runs a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the ‘death row phenomenon’, lies in the imposition of the death penalty. Only in the event of an affirmative answer to this question need the court examine whether exposure to the ‘death row phenomenon’ in the circumstances of the applicant’s case would involve treatment or punishment incompatible with Article 3.⁷⁶

After *Soering*, the ECtHR and European Commission on Human Rights subsequently rejected claims of cruel, inhuman and degrading punishment by detainees on death row in instances where there was a moratorium on executions or a legislative decision to defer executions in force, even though capital punishment technically remained a part of the law and current practice could be reversed.⁷⁷ For example, the ECtHR in *Iorgov v. Bulgaria*⁷⁸ was unsympathetic to the applicant’s claim “that he suffered immensely at the thought of his possible execution and that it was inhuman to keep him in such uncertainty for many years.”⁷⁹ According to the ECtHR, there was a Parliamentary moratorium on executions in place and not a single violation of the moratorium had occurred,⁸⁰ such that the applicant’s “feelings of fear and anxiety must have diminished as time went on and as the moratorium continued in force.”⁸¹ Similarly, the European Commission on Human Rights held in *Çinar v. Turkey (Çinar)*⁸² that the applicant’s detention on death row was not particularly inhuman or degrading in violation of Article 3 because any threat of execution was illusory, given that Turkey had a longstanding moratorium on executions

75 Sadoff, *supra* note 66, at 82-83.

76 *Soering*, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) ¶ 92.

77 Sadoff, *supra* note 66, at 83.

78 *Iorgov v. Bulgaria*, App. No. 40653/98 (2004).

79 *Id.* ¶ 75.

80 *Id.* ¶¶ 76, 78.

81 *Id.* ¶ 79.

82 *Çinar v. Turkey*, App. No. 17864/91 (1994).

in place, such that everyone knew Turkey was no longer executing prisoners.⁸³ The ECtHR's subsequent deviation from *Çinar* in *Öcalan v Turkey*⁸⁴, where the Grand Chamber found it "not possible to rule out the possibility that the risk that the [death] sentence would be implemented was a real one" notwithstanding Turkey's longstanding moratorium on executions, must be regarded as restricted to the "special circumstances" of that case, specifically the applicant's special status as "Turkey's most wanted person" who "had been convicted of the most serious crimes existing in the Turkish Criminal Code", and the "general political controversy in Turkey" "surrounding the question of whether he should be executed."⁸⁵

China's suspended death sentence does not meet this threshold requirement for a finding of cruel, inhuman and degrading punishment because there is no real risk of the convict being executed. Granted, the suspended death sentence "has the potential to be amended, at any time within the two-year period, to a sentence of immediate death if the criminal reoffends in prison."⁸⁶ After all, the unique feature of the suspended death sentence is the indeterminacy of the outcome at the end of the two-year reprieve, compared to other punishments like life imprisonment where the nature and implications of the punishment are made clear to the offender at the outset.⁸⁷ However, according to Chinese practice, the convict is virtually never executed at the end of the two-year reprieve. This was the case prior

83 *Id.* at 8.

84 *Öcalan v. Turkey*, App. No. 46221/99, 37 Eur. H.R. Rep. 238 (2005).

85 *Id.* ¶ 172.

86 Trevaskes, *supra* note 25, at 121.

87 Zhao Zuojun, *supra* note 5, at 75 n.15.

to the enactment of the 1979 Criminal Law,⁸⁸ under the 1979 Criminal Law,⁸⁹ and under the current 1997 Criminal Law.⁹⁰

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- 88 According to several scholars, “most” suspended death sentences before the enactment of the 1979 Criminal Law were commuted to a life or fixed-term imprisonment. COHEN, *supra* note 56, at 537; Hungdah Chiu, *Criminal Punishment in Mainland China: A Study of Some Yunnan Province Documents*, 68 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 374, 390 n.38 (1977) (noting how, according to PRC officials, only a few criminals sentenced to a suspended death penalty are actually executed at the end of the two-year period.); SHAOCHUAN LENG & HONGDAH CHIU, *supra* note 45, at 157 n.23 (noting how the warden of the Shanghai Municipal Prison told a group of visiting American legal scholars in 1981 that no prisoners in the institution with suspended death sentences had ever been executed).
- 89 This may have been the intention of the National People’s Congress when the 1979 Criminal Law was enacted. A National People’s Congress official stated in 1979 that “[g]enerally speaking,” those receiving the reprieve will not be executed. AMNESTY INT’L, *supra* note 22, at 63. Lepp and Davis both claim that the “majority” of suspended death sentences were commuted. Alan W. Lepp, *The Death Penalty in Late Imperial, Modern, and Post-Tiananmen China*, 11 MICHIGAN JOURNAL OF INTERNATIONAL LAW 987, 1034 (1990); Stephen B. Davis, *The Death Penalty and Legal Reform in the PRC*, 1 JOURNAL OF CHINESE LAW 303, 314 (1987). According to Scobell, executions were “rarely” carried out at the end of the two-year reprieve. Andrew Scobell, *Strung Up or Shot Down: The Death Penalty in Hong Kong and China and Implications for Post-1997*, 20 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 147, 159 (1988).
- 90 One scholar claims that, in practice, “99%” of suspended death sentences are commuted to life or fixed-term imprisonment. Michelle Miao, *Examining China’s Responses to the Global Campaign Against the Death Penalty*, in CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS AND PUBLIC OPINION 46, 49-50 (Roger Hood & Surya Deva eds. 2013). Another scholar even terms the “suspended death sentence” the “reprieved death sentence” because the “increasingly common pattern” is that the sentence is “seldom actually carried out once the two-year period expires.” Lewis, *supra* note 45, at 307 n.13. However, Amnesty International reported in 2009 that, of the many sentenced to death in the Xinjiang Uighur Autonomous Region, some who had been given suspended death sentences were executed in 2008.” AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2009: THE STATE OF THE WORLD’S HUMAN RIGHTS 109 (2009), http://www.amnesty.org.au/images/uploads/about/ai_report_09.pdf.

b. Does the Two-Year Reprieve Amount to Cruel, Inhuman and Degrading Punishment?

Even if we accept that there is still a real risk of the convict being executed at the end of the two-year reprieve, there still remains the question of whether the two-year reprieve constitutes cruel, inhuman and degrading punishment. Addressing this question would require an analysis of two contrasting approaches in the jurisprudence of domestic and international courts which are divided as to when the death row phenomenon is present⁹¹ (assuming these courts have accepted the doctrine in the first place⁹²).

The first approach in the death row phenomenon jurisprudence holds that delay of execution *per se* is a sufficient supervening event which on its own constitutes cruel, inhuman and degrading punishment. This is the position adopted by courts in the Commonwealth jurisdictions like

91 Sadoff, *supra* note 66, at 79 (“Soering has spawned a body of international and domestic case law, most-but not all-of which recognizes the validity of the death row phenomenon. But even among those courts adopting it in principle, its application has been far from uniform.”); Bojosi, *supra* note 67, at 305 (“Legal scholars, psychologists and judges appear to be unanimous about the existence of the death row phenomenon. However, the jurisprudence of national courts and international courts and/or tribunals is sharply divided about its precise contours”).

92 The United States judiciary has refused to accept the death row phenomenon doctrine. The United States Supreme Court rejected petitions for a writ of certiorari in cases where prisoners claimed that the delay in their executions violated the Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishments.” U.S. CONST. amend. VIII. The cases where the Supreme Court has denied such petitions include *Foster v. Florida*, 537 U.S. 990 (2002); *Knight v. Florida*, 528 U.S. 990 (1999); *Elledge v. Florida*, 525 U.S. 944 (1998); *Lackey v. Texas*, 514 U.S. 1045 (1995).

South Africa,⁹³ India⁹⁴ and Zimbabwe,⁹⁵ and most significantly, the Judicial Committee of the Privy Council (the highest court of appeal for many Caribbean States). The momentous case of *Pratt and Morgan v Jamaica* (*Pratt*)⁹⁶ marked the first time the Privy Council accepted the death row phenomenon. In *Pratt*, the Privy Council held that delay in itself was sufficient to constitute cruel or inhuman punishment, noting that:

[T]here is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only

93 The Constitutional Court of South Africa determined in 1995 that “prolonged delay in the execution of a death sentence may in itself be cause for the invalidation of a sentence of death that was lawfully imposed.” *State v. Makwanyane* 1995 (3) SA 391 (CC) at 3 para. 6 n.3 (S. Afr.).

94 The Indian Supreme Court found the issue of „prolonged delay“ relevant to the implementation of a death sentence, and has commuted such sentences to terms of life imprisonment in instances of lengthy “delays.” *Singh v. Punjab*, (1983) 2 SCR 582 (India); *Vatheeswaran v. Tamil Nadu*, (1983) 2 SCR 348 (India); *Mehta v. Union of India*, (1989) 3 SCR 774, 777 (India).

95 In 1993, the Supreme Court of Zimbabwe found that the mental grief suffered by four prisoners was sufficient to justify commuting their death sentences to life imprisonment on constitutional grounds. *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney Gen.* (1993) 1 ZLR 242 (S), 4 SA 239 (ZSC) (Zim.). These prisoners who had been on death row for four to six years each, had contemplated suicide, and had suffered the constancy of their upcoming executions. *Id.* This Supreme Court ruling was based on section 15(1) of the Zimbabwean Declaration of Rights, which reads almost identically to article 3 of the ECHR. *Id.* Gubbay C.J. referred to the approach he adopted in this case as more “progressive” and “compassionate.” *Id.* at 333.

96 *Pratt & Morgan v. Jamaica* [1993] 4 All ER 769 (PC) (appeal taken from Jam.). The case arose when two death row prisoners claimed that, after 14 years, carrying out the death sentence would violate Jamaica Constitution, which provides, “[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment.” CONSTITUTION OF JAMAICA Aug. 6, 1962, art. 17(1).

be our humanity: we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.⁹⁷

Taking into account the fact that Jamaican appeals process should be completed within two years, and that appeals to international tribunals should be completed within 18 months, the Privy Council in *Pratt* held that “in any case in which execution is to take place *more than five years* after sentence there will be strong grounds for believing the delay [is a violation].”⁹⁸ Subsequently, the five-year threshold established in *Pratt* was not consistently followed by the Privy Council in death row appeal cases, resulting in much confusion⁹⁹ and scholarly criticism for its arbitrariness and rigidity.¹⁰⁰ Applying the Privy Council’s rule in *Pratt* to China’s suspended death sentence, the two-year period falls far short of the five-year guideline (or even the three-and-a-half-year guideline, assuming the prisoner does not appeal to international tribunals as was the case in *Henfield*). Therefore, the suspended death sentence does not constitute cruel, inhuman and degrading punishment under this first approach.

The second, narrower approach in the death row phenomenon jurisprudence – which this article considers to be the preferable approach – holds that delay of execution *per se* does not, in itself, constitute cruel, inhuman

97 *Pratt & Morgan*, [1993] 4 All ER at 783.

98 *Id.* at 788.

99 In *Guerra v. Baptiste* [1996] 1 AC 397, 414 (PC) (appeal taken from Trin. & Tobago), the Privy Council found a four-year-and-ten-month delay unacceptable, stating that the five-year limit enunciated in *Pratt & Morgan* “was not intended to provide a limit, or a yardstick.” Months later, in a change of course, the Privy Council held that five years needed to be reached before a violation could occur, and if the delay was caused by a stay issued so that the prisoner could argue points of mercy, this would extend the five-year period. *Reckley v. Minister of Pub. Safety & Immigration* (No. 2) [1996] 1 AC 527 (PC) (appeal taken from Bah.). Subsequently in *Henfield v. AG of the Commonwealth of the Bahamas* [1996] 3 WLR 1079, 1088 (PC) (appeal taken from Bah.), the Privy Council held that three and a half years was the appropriate time limit where the prisoner does not pursue appeals to international organisations (because the Privy Council in *Pratt & Morgan* had earlier held that the estimated time for appeals to international tribunals was eighteen months) such that eighteen months was to be subtracted from the five-year guideline.

100 Hudson, *supra* note 65, at 852; Sadoff, *supra* note 66, at 99-100.

and degrading punishment; rather, the conditions of detention on death row must be extremely harsh and dehumanising. This is the approach adopted by the United Nations Human Rights Committee (HRC). Made up of 18 independent experts, the HRC determines individual communications on alleged violations of the ICCPR in states that are parties to the Optional Protocol to the ICCPR,¹⁰¹ and according to the International Court of Justice, the HRC “has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications” and “great weight” should be ascribed to the HRC’s interpretation of the ICCPR.¹⁰² Further, as Gandhi noted,

[T]he Human Rights Committee stands on an entirely different footing to domestic courts and, indeed, the European Court of Human Rights which is only a regional as opposed to a universal instance. Nevertheless, the Human Rights Committee does not operate in a legal vacuum. It will take note of the jurisprudence of other national and regional jurisdictions: sometimes this is by way of direct or indirect reference to the case law of these jurisdictions. More commonly, this may be by way of briefing papers of a comparative nature on specific legal issues requested by Committee members.¹⁰³

The HRC stated its position on the death row phenomenon clearly in *Pratt and Morgan v. Jamaica*,¹⁰⁴ that “[i]n principle prolonged judicial proceedings do not *per se* constitute cruel, inhuman, or degrading treatment even if they can be a source of mental strain for the convicted prisoners.”¹⁰⁵ The reasons for the HRC’s refusal to accept delay of execution in itself as cruel, inhuman and degrading punishment in violation of Article 7 of the

101 Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

102 Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, Judgment, 2010 I.C.J. Rep. 664, ¶ 66 (Nov. 30).

103 P. R. Gandhi, *The Human Rights Committee and the Death Row Phenomenon*, 43 INDIAN JOURNAL OF INTERNATIONAL LAW 1, 60 (2003).

104 *Pratt & Morgan v. Jamaica*, (Nos. 210/1986 and 225/19870, U.N. Doc. A/44/40 (1989).

105 *Id.* ¶ 13.6.

ICCPR were set out clearly in *Johnson v. Jamaica (Johnson)*.¹⁰⁶ According to the HRC, it did not want to convey a message that would encourage States to expedite implementation of the death penalty within a specified time frame because “[l]ife on death row, harsh as it may be, is preferable to death.”¹⁰⁷ This view is supported by academics¹⁰⁸ and the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰⁹

Further, the HRC in *Johnson* held that allowing delay in execution *per se* to constitute a violation of the ICCPR would conflict with the ICCPR’s object and purpose which was to promote the reduction of the death penalty.¹¹⁰; it would be inconsistent to hold that states which fail to execute a convict by delaying his execution have violated the ICCPR while also holding that states which execute convicts rapidly have adhered to the ICCPR.¹¹¹ In subsequent cases the HRC has maintained the position that delay alone

106 *Johnson v. Jamaica*, (No. 588/1994), U.N. Doc. CCPR/C/56/D/588/1994 (1996).

107 *Id.* ¶ 8.4.

108 Hudson finds it “unusual” that a prisoner who would prefer to be executed than to cling on to hopes of having his or her life spared, and how some prisoners actually prove their innocence on appeal and a state may save an innocent life. Hudson, *supra* note 65, at 847. In a similar vein, Sadoff notes “the value inherent in the appeals process itself. The fact is that those petitioning for habeas corpus relief from death row, at least in the United States, have been remarkably successful in obtaining reversals on their death sentences.” Sadoff, *supra* note 66, at 101. See *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995) (“By and large, the delay in carrying out death sentences has been of benefit to death row inmates, allowing them to extend their lives, obtain commutation or reversal of their sentences or, in rare cases, secure complete exoneration.”).

109 U.N. Human Rights Council, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 47, U.N. Doc. A/67/279 (Aug. 9, 2012).

110 *Johnson*, (No. 588/1994), ¶¶ 8.2-.3, U.N. Doc. CCPR/C/56/D/588/1994.

111 Hudson, *supra* note 65, at 847 (also noting that “if the Committee finds a violation based on delay, the remedy is to commute the sentence to life imprisonment rather than impose a speedy execution. Therefore, finding a violation spares a prisoner’s life, consistent with the Convention.”).

is insufficient to constitute cruel, inhuman and degrading punishment,¹¹² and although it has shown some willingness to reconsider its position, it has not gone so far as to change it entirely.¹¹³

With delay *per se* being insufficient for a finding of cruel, inhuman and degrading punishment “in the absence of other compelling circumstances,”¹¹⁴ the HRC requires the presence of extremely harsh and dehumanising conditions of detention. Each case is to be examined on a fact-specific basis.¹¹⁵ While the HRC’s jurisprudence is not altogether clear on exactly what would satisfy this requirement,¹¹⁶ it appears that the HRC has set a very high threshold in cases where it has accepted the death row phenomenon.¹¹⁷ In *Francis v Jamaica*,¹¹⁸ the fact that the convict was regularly beaten and ridiculed by prison officers and subjected to round-the-block surveillance in a special “death cell” adjacent to the gallows was a reason for the HRC’s finding of an Article 7 violation.¹¹⁹ And in *Edwards v. Jamaica*, the “deplorable conditions of detention” where the convict had been detained for ten years “alone in a cell measuring six feet by 14 feet, let out only for three and half hours a day, [and] was provided with no recreational facilities and received no books” led the HRC to declare such detention conditions as constituting “not only a violation of article

112 See *Spence v. Jamaica*, (No. 599/1994), U.N. Doc. CCPR/C/57/D/599/1994 (1996); *Sterling v. Jamaica*, (No. 598/1994), U.N. Doc. CCPR/C/57/D/598/1994 (1996).

113 The HRC has also indicated that it “would be prepared to consider that the prolonged detention of the author on death row constitutes a violation of article 7. *Persaud & Rampersaud v. Guyana*, (No. 812/1998), U.N. Doc. CCPR/C/86/D/812/1998 (2006). However, having also found a violation of article 6, paragraph 1, it does not consider it necessary in the present case to review and reconsider its jurisprudence that prolonged detention on death row, in itself and in the absence of other compelling circumstances, does not constitute a violation of article 7.” *Id.* ¶ 7.3.

114 *Id.*

115 *Williams v. Jamaica*, (No. 609/1995), ¶ 4.4, U.N. Doc. CCPR/C/61/D/609/1995 (1997) (“[E]ach case must be examined on its own merits.”).

116 *Bojosi*, *supra* note 67, at 320.

117 *Sadoff*, *supra* note 66, at 92; *Hudson*, *supra* note 65, at 846.

118 *Francis v. Jamaica*, (No. 606/1994), U.N. Doc. CCPR/C/54/D/606/1994 (1995).

119 *Id.* ¶ 9.2.

10, paragraph 1, but, because of the length of time in which the author was kept in these conditions . . . also a violation of article 7.”¹²⁰ The HRC may deem evidence of the convict’s actual mental deterioration to be a “compelling circumstance” justifying a finding of an Article 7 violation¹²¹ but such evidence is not strictly required; the extremely harsh and dehumanising conditions of detention may suffice.¹²²

Such a high threshold set by the HRC regarding conditions of detention would make it extremely difficult to prove a violation of Article 7 of the ICCPR,¹²³ and, correspondingly, to prove that China’s suspended death sentence constitutes cruel, inhuman and degrading punishment. While the conditions on death row in China are extremely harsh, with the “use of shackles for 24 hours” probably “amounting to cruel, inhuman or degrading treatment” as the United Nations Committee Against Torture has contended,¹²⁴ convicts who have received the suspended death sentence are not placed on death row together with persons sentenced to immediate execution without any reprieve: they are normally held in prison with convicts sentenced to life and fixed-term imprisonment of over 10 years,¹²⁵ and are usually required to participate in “labour reform.”¹²⁶ Such labour

120 *Edwards v. Jamaica*, (No. 529/1993), ¶ 8.3, U.N. Doc. CCPR/C/60/D/529/1993 (1993). Article 10(1) of the ICCPR states, “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” ICCPR, *supra* note 9, art. 10(1).

121 *Francis*, (No. 606/1994), ¶ 9.2, U.N. Doc. CCPR/C/54/D/606/1994; *Williams*, (No. 609/1995), ¶ 6.5, U.N. Doc. CCPR/C/61/D/609/1995.

122 *Sadoff*, *supra* note 66, at 92.

123 *Hudson*, *supra* note 65, at 846.

124 Commission on Human Rights, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Mission to China*, ¶ 34, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006).

125 *MacBean*, *supra* note 8, at 23.

126 The sample decision for the approval of a *sihuan* which reads “核准××××中级人民法院(××××)×刑初字第××号以××罪判处被告人×××死刑, 缓期二年执行, 劳动改造, 以观后效, 剥夺政治权利终身的刑事判决。” (which means: suspension of sentence for two years, labour reform), Higher People’s Court, CRIM. PROCEDURAL L., <http://course.sdu.edu.cn/G2S/Template/View.aspx?courseId=1&courseId=220&topMenuId=123682&menuType=1&action=view&type=&name=&linkpageID=124704> (last visited May 4, 2016). Further, Article 213 of

reform that convicts who have received the suspended death sentence are subjected to has been defended by the Chinese government to be “a good way to make criminals turn over a new leaf . . . educat[e] law offenders [and] help them . . . transform themselves ideologically.”¹²⁷ While this has been criticised by commentators for entailing the “agony of self-reform”¹²⁸ and for the “undeniable danger” of its “strong brainwashing consequences,”¹²⁹ the suspended death sentence is unlikely to satisfy the extremely high threshold set by the HRC in determining the presence of extremely harsh

the Criminal Procedure Law provides that criminals issued the suspended death sentence – together with those sentenced to life or fixed-term imprisonment – are to be transferred to the prison by the public security (police) authorities. Criminal Procedure Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People of Cong., July 1, 1979, amended Mar. 17, 1996, effective Jan. 1, 1997), art. 213. Article 46 of the 1997 Criminal Law, provides that persons sentenced to life or fixed-term imprisonment who have the ability to labour should participate in labour and accept education and reform. 1997 Criminal Law, *supra* note 2, art. 46. While Article 46 does not expressly state that persons issued the suspended death sentence would have to do the same, given that they are imprisoned together with those sentences to life and fixed-term imprisonment, and given that there remains the possibility of a commutation of sentence to life or even fixed-term imprisonment, by deduction, persons issued the suspended death sentence should also be deemed to “participate in labour” and “accept education and reform.” *Id.*

127 AMNESTY INT’L, *supra* note 22, at 64.

128 An American writer, Edgar Snow, interviewed a political offender in 1962 who was issued the suspended death sentence, and observed that this convict “seemed thoroughly humbled and remorseful,” with “deep tension was written on his face. COHEN, *supra* note 56. One needed little imagination to share some of the awareness that must have filled his days that one bad mistake might be his last. *Id.* To know with reasonable certainty that salvation depended entirely on his own repentance and reform must in some ways have placed far heavier burdens on him than would be on a condemned man in an American prison. *Id.* Realizing that nothing he can do by way of inner awakening can alter matters, the latter need not undergo the agony of self-reform but can hold society or his lawyers at least partly responsible for his fate.” *Id.* at 539.

129 SHIGEMITSU DANDO, THE CRIMINAL LAW OF JAPAN: THE GENERAL PART 291 n.22 (B. J. George trans., 1997).

and dehumanising conditions of detention necessary for a finding of cruel, inhuman and degrading punishment.

4. CONCLUSION

The issue of whether China's suspended death sentence constitutes cruel, inhuman and degrading punishment is an important one with far-ranging implications. This issue arose before the Federal Court of Canada in 2007. In *Lai v. Canada (Minister of Citizenship and Immigration)*,¹³⁰ two Chinese nationals who allegedly committed offences of bribery and smuggling claimed refugee status in Canada. After the pre-removal risk-assessment (PRRA) officer rejected their application, they sought judicial review of this decision, and one of their arguments was that China's suspended death sentence (which the applicants could face if deported to China) constitutes cruel and unusual punishment, even if the applicants would not be executed.¹³¹ This issue may arise once again in the future in such asylum cases involving the return of Chinese nationals to China to face prosecution and risk being sentenced to death with a two-year reprieve. This may be of especial relevance in states parties to the ICCPR, given that states parties "must not expose individuals to the danger of . . . cruel, inhuman or degrading treatment or penalty upon return to another country by way of their extradition, expulsion or *refoulement*."¹³²

Moreover, other states have considered introducing the suspended death sentence into their respective criminal justice systems. When revising its criminal law in the 1980s, Japan considered adopting China's death sentence

130 *Lai Cheong Sing v. Minister of Citizenship & Immigration*, [2007] F.C. 361 (Can.).

131 *Id.* ¶ 83. The Court did not address the question of whether China's suspended death sentence *per se* constitutes cruel and unusual punishment, but rejected the applicants' argument on the basis that the diplomatic assurances made by the Chinese government to the Canadian government in regards to the applicants precluded the imposition of a suspended death sentence and, given that the likelihood of any death sentence was foreclosed altogether, there was no possibility of the applicants' experiencing psychological trauma associated with awaiting an execution which may or may not arrive. *Id.* at ¶ 100.

132 Human Rights Committee, General Comment No. 20: Article 7, Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 9, U.N. Doc. HRI/Gen/Rev.1, 30 (1994).

with a two-year suspension.¹³³ However, this proposal never made it to the Diet.¹³⁴ Further, in 2006, Taiwan's Ministry of Justice seriously considered the suspended death sentence as a reform measure.¹³⁵ However, this suggestion encountered some resistance,¹³⁶ and eventually failed to materialise.¹³⁷ A

133 Zhao Zuojun, *supra* note 5, at 55.

134 JOHNSON & ZIMRING, *supra* note 15, at 34.

135 Minister of Justice, Morley Shih, was quoted as saying that the Ministry was studying the possibility of following China's example to issue the death sentence with a two-year suspension to give criminals the chance to repent. MOJ Turns to PRC for Inspiration on Cutting Executions, Taipei Times (Jan. 1, 2006), <http://www.taipeitimes.com/News/taiwan/archives/2006/01/01/2003286887>.

136 The Taiwan Alliance to End the Death Penalty opposed the ministry's plan, pointing out how it contradicted President Chen Shui-bian's 2000 inauguration promise to abolish the death penalty. *Id.* According to a member of the Alliance, "[u]nder the measure of 'death penalty with two years,' only those who have behaved well are eligible for having their death penalty converted to a life sentence. We demand a moratorium on all executions and the eventual abolition of the death penalty." *Id.* And according to Associate Professor Wu Chih-kuang, "[a]dopting this system, however, would be taking a step backward, instead of moving along the correct path toward eventually abolishing the death penalty. China delays the execution of death sentences, but the death penalty remains in place. In other words, courts still have absolute power to deliver final judgment. This would not be the case if capital punishment was replaced by a full-fledged moratorium. Delaying the execution of a death sentence does not cut down on abuse of capital punishment, nor will it reduce criticism from the outside world. The ministry's plan to introduce China's system for commuting death sentences to life imprisonment without actually abolishing capital punishment will not stop courts from issuing the death penalty, nor does it move the nation closer to abolishing the death penalty. Even if the ministry is determined to delay the execution of every death sentence, we feel that retaining the possibility of executing a death sentence goes against the global trend toward abolishing capital punishment." Wu Chih-kuang, *Justice Ministry on the Wrong Path*, TAIPEI TIMES (Jan. 19, 2006), <http://www.taipeitimes.com/News/editorials/archives/2006/01/19/2003289715>.

137 However, as recent as in 2013, there was a call for the revival of this proposal by the Chairman of the non-governmental organisation, the Chinese Association for Human Rights. Su Yiu-chen, *Respecting Life While Bringing Justice*, Taipei Times (Aug. 13, 2013), <http://www.taipeitimes.com/News/editorials/archives/2013/08/13/2003569564>.

couple of death penalty experts have also suggested that the suspended death sentence is a useful model for other States to emulate.¹³⁸ Clarifying that the suspended death sentence does not amount to cruel, inhuman and degrading punishment, as this article has aimed to do, may assist other States (especially states parties to the ICCPR) to better decide whether to introduce the suspended death sentence into their respective criminal justice systems, given that the prohibition against cruel, inhuman and degrading punishment is a non-derogable human right under the ICCPR¹³⁹ and thus of great importance.

138 JOHNSON & ZIMRING, *supra* note 15, at 219 n.34 (stating that “[t]here is also at least one way Taiwan might emulate China: by enacting a reform that would allow a death sentence to be suspended for two years while the behavior and attitude of the condemned is assessed.”); Zimring & Johnson, *supra* note 37, at 195 (stating that in regard to the suspended death sentence, China is “miles ahead of other nations.”).

139 Article 4(1) of the ICCPR states, “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin” ICCPR, *supra* note 9, at art. 4(1). Article 4(2) states, “[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” *Id.* art. 4(2).

LEGAL MATERIALS

Participation In Multilateral Treaties¹

EDITORIAL INTRODUCTION

This section records the participation of Asian states in open multilateral law-making treaties which mostly aim at world-wide adherence. It updates the treaty sections of earlier Volumes until 31 December 2014. New data are preceded by a reference to the most recent previous entry in the multilateral treaties section of the *Asian Yearbook of International Law*. In case no new data are available, the title of the treaty is listed with a reference to the last Volume containing data on the treaty involved. 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.

NOTE:

- Where no other reference to specific sources is made, data were derived from *Multilateral Treaties Deposited with the Secretary-General*, <https://treaties.un.org/pages/ParticipationStatus.aspx>
- Where reference is made to the Hague Conference on Private International Law (Hcch), data were derived from <https://www.hcch.net/en/instruments/conventions>
- Where reference is made to the International Atomic Energy Agency (IAEA), data were derived from <http://ola.iaea.org/ola/treaties/multi.html>
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from <http://www.icao.int/Secretariat/Legal/Pages/TreatyCollection.aspx>
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from <https://www.icrc.org/applic/ihl/ihl.nsf/>
- Where reference is made to the International Labour Organization (ILO), data were derived from <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0>
- Where reference is made to the International Maritime Organization (IMO), data were derived from <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>

1 Compiled by Dr. Karin Arts, Professor of International Law and Development at the International Institute of Social Studies of Erasmus University Rotterdam (ISS), based in The Hague, The Netherlands.

- Where reference is made to the Secretariat of the Antarctic Treaty, data were derived from http://www.ats.aq/devAS/ats_parties.aspx?lang=e
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html
- Where reference is made to WIPO, data were derived from <http://www.wipo.int/treaties/en>
- Reservations and declarations made upon signature or ratification are not included.
- Sig. = Signature; Cons. = Consent to be bound; Eff. date = Effective date; E.i.f. = Entry into force; Min. age spec. = Minimum age specified; Rat. = Ratification or accession

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ANTARCTICA

Antarctic Treaty, Washington, 1959: see Vol. 6 p. 234.

COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (Continued from Vol. 19 p. 178)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan		25 Sep 2014

CULTURAL MATTERS

Agreement for Facilitating the International Circulation of Visual and
Auditory Materials of an Educational, Scientific and
Cultural Character, 1949: see Vol. 7 pp. 322-323.

Agreement on the Importation of Educational, Scientific and
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Convention concerning the International Exchange of
Publications, 1958: see Vol. 6 p. 235.

Convention concerning the Exchange of Official Publications and
Government Documents between States, 1958: see Vol. 6 p. 235.

International Agreement for the Establishment of the
University for Peace, 1980: see Vol. 16 p. 157.

Regional Convention on the Recognition of Studies, Diploma's and De-
grees in Higher Education in Asia and the Pacific, 1983:
see Vol. 14 p. 227.

**Revised Asia-Pacific Regional Convention on the
Recognition of Qualifications in Higher Education, 2011**

Tokyo, 26 November 2011

Entry into force: not yet

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	26 Nov 2011	
Cambodia	26 Nov 2011	
China	26 Nov 2011	17 Jul 2014
Korea (Rep.)	26 Nov 2011	
Laos	26 Nov 2011	
Timor Leste	26 Nov 2011	

CULTURAL PROPERTY

Convention for the Protection of Cultural Property in the Event of
Armed Conflict, 1954: see Vol. 13 p. 263.

Protocol for the Protection of Cultural Property in the Event of Armed
Conflict, 1954: see Vol. 13 p. 263.

Convention on the Means of Prohibiting and Preventing the
Illicit Import, Export and Transfer of Ownership of
Cultural Property, 1970: see Vol. 19 p. 178.

Convention concerning the Protection of the World Cultural and
Natural Heritage, 1972: see Vol. 18 p. 100.

Second Protocol for the Protection of Cultural Property in the
Event of Armed Conflict, 1999: see Vol. 19 p. 178.

Convention on the Protection and Promotion of the
Diversity of Cultural Expressions, 2005: see Vol. 18 p. 100.

**Convention for the Safeguarding of the
Intangible Cultural Heritage, 2003**

(Continued from Vol. 19 p. 179)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons</i>
Myanmar		7 May 2014

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre, 1982:
see Vol. 7 pp. 323-324.

Agreement to Establish the South Centre, 1994: see Vol. 7 p. 324.

Amendments to the Charter of the Asian and Pacific
Development Centre, 1998: see Vol. 10 p. 267.

Multilateral Agreement for the Establishment of an
International Think Tank for Landlocked Developing
Countries, 2010: see Vol. 19 p. 101.

DISPUTE SETTLEMENT

Convention on the Settlement of Investment Disputes between
States and Nationals of Other States, 1965: see Vol. 11 p. 245.

Declarations Recognizing as Compulsory the Jurisdiction of the
International Court of Justice under Article 36, paragraph 2, of the
Statute of the Court: see Vol. 18 p. 101.

ENVIRONMENT, FAUNA AND FLORA

International Convention for the Prevention of Pollution of the
Sea by Oil, as amended, 1954: see Vol. 6 p. 238.

International Convention on Civil Liability for Oil Pollution Damage,
1969: see Vol. 15 p. 215.

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969: see Vol. 9 p. 284.

Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971: see Vol. 18 p. 103.

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971: see Vol. 12 p. 237.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, as amended: see Vol. 7 p. 325.

Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil, 1973: see Vol. 6 p. 239.

Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1976: see Vol. 10 p. 269.

Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships 1978, as amended: see Vol. 15 p. 225.

Protocol to amend the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1982: see Vol. 13 p. 265.

Convention for the Protection of the Ozone Layer, 1985: see Vol. 15 p. 215.

Protocol on Substances that Deplete the Ozone Layer, 1987: see Vol. 16 p. 161.

Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987: see Vol. 13 p. 266.

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989: see Vol. 19 p. 181.

Amendment to the Montreal Protocol, 1990: see Vol. 15 p. 216.

Amendment to the Montreal Protocol, 1992: see Vol. 18 p. 103.

Framework Convention on Climate Change, 1992: see Vol. 13 p. 266.

Convention on Biological Diversity, 1992: see Vol. 14 p. 229.

Protocol to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1992: see Vol. 16 p. 161.

Protocol to Amend the 1972 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992: see Vol. 19 p. 181.

UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994: see Vol. 11 p. 247.

Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995:
see Vol. 12 p. 238.

Amendment to the Montreal Protocol, 1997: see Vol. 19 p. 182.

Protocol to the Framework Convention on Climate Change, 1997:
see Vol. 19 p. 182.

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998: see Vol. 19 p. 182.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000: see Vol. 19 p. 183.

Stockholm Convention on Persistent Organic Pollutants, 2001:
see Vol. 19 pp. 183.

**International Convention on Oil Pollution Preparedness,
Response, and Cooperation, 1990**

(Continued from Vol. 12 p. 237)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Philippines	6 Feb 2014	6 May 2014

Amendment to the Montreal Protocol, 1999

(Continued from Vol. 19 p. 182)

<i>State</i>	<i>Cons.</i>
Kazakhstan	19 Sep 2014

**International Convention on Civil Liability for
Bunker Oil Pollution Damage, 2001**

(Continued from Vol. 18 p. 104)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Indonesia	11 Sep 2014	11 Dec 2014

**International Convention on the Control of Harmful
Anti-Fouling Systems on Ships, 2001**

(Continued from Vol. 19 p.183)

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Indonesia	11 Sep 2014	11 Dec 2014

**International Convention for the Control and Management of
Ships' Ballast Water and Sediments, 2004**

(Continued from Vol. 19 p. 183)

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Japan	10 Oct 2014	

FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956:
see Vol. 11 p. 249.

Convention on the Law Applicable to Maintenance Obligations
Towards Children, 1956: see Vol.6 p. 244.

Convention on the Conflicts of Law Relating to the Form of
Testamentary Dispositions, 1961: see Vol. 7 p. 327.

Convention on Consent to Marriage, Minimum Age for Marriage and
Registration of Marriages, 1962: see Vol. 8 p. 178.

Convention on the Law Applicable to Maintenance Obligations, 1973:
see Vol. 6 p. 244.

Convention on Protection of Children and Co-operation in
Respect of Intercountry Adoption, 1993: see Vol. 19 p. 184.

FINANCE

Agreement Establishing the Asian Development Bank, 1965:
see Vol. 7 p. 327.

Convention Establishing the Multilateral Investment Guarantee Agency, 1988

(Continued from Vol. 19 p. 184)

(Status as provided by the World Bank)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan		21 Oct 2014

HEALTH

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Publique, 1946: see Vol. 6 p. 245.

World Health Organization Framework Convention on
Tobacco Control, 2003: see Vol. 19 p. 185.

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

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Convention on the Nationality of Married Women, 1957:
see Vol. 10 p. 274.

Convention against Discrimination in Education, 1960:
see Vol. 16 p. 164.

International Covenant on Economic, Social and Cultural Rights, 1966:
see Vol. 14 p. 231.

International Covenant on Civil and Political Rights, 1966:
see Vol. 16 p. 165.

International Convention on the Elimination of All Forms of Racial
Discrimination, 1966: see Vol. 8 p. 179.

Optional Protocol to the International Covenant on Civil and Political
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Convention on the Elimination of All Forms of
Discrimination against Women, 1979: see Vol. 11 p. 250.

Convention Against Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment, 1984: see Vol. 19 p. 186.

International Convention against Apartheid in Sports, 1985:
see Vol. 6 p. 248.

Convention on the Rights of the Child, 1989: see Vol. 11 p. 251.

Second Optional Protocol to the International Covenant on Civil and
Political Rights, Aiming at the Abolition of the Death Penalty, 1989: see
Vol. 18 p. 106.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990:
see Vol. 18 p. 106.

Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1992,
see Vol. 12 p. 242.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000:
see Vol. 18 p. 106.

Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002:
see Vol. 19 p. 186.

Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008: see Vol. 18 p. 107.

International Convention for the Protection of All Persons from Enforced Disappearance, 2010: see Vol. 19 p. 187.

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999

(Continued from Vol. 17 p. 170)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Tajikistan	17 Sep 2000	22 Jul 2014

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. 18 p. 106)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (DPR)	9 Sep 2014	10 Nov 2014

Convention on the Rights of Persons with Disabilities, 2008

(Continued from Vol. 19 p. 187).

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan	28 Sep 2007	20 Jan 2014

HUMANITARIAN LAW IN ARMED CONFLICT

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Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, see: Vol. 18 p. 107.

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, see: Vol. 12 p. 244.

Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 2005: see Vol. 17 p. 171.

INTELLECTUAL PROPERTY

Convention for the Protection of Industrial Property, 1883
as amended 1979: see Vol. 12 p. 244.

Convention for the Protection of Literary and Artistic Works, 1886
as amended 1979: see Vol. 18 p. 108.

Madrid Union Concerning the International Registration of Marks, including the Madrid Agreement 1891 as amended in 1979, and the Madrid Protocol 1989: see Vol. 16 p. 168.

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.

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as amended in 1979: see Vol. 13 p. 271.

International Convention for the Protection of Performers,
Producers of Phonograms and Broadcasting Organizations, 1961:
see Vol. 18 p. 109.

Convention Establishing the World Intellectual Property
Organization, 1967: see Vol. 12 p. 245.

Patent Cooperation Treaty, 1970 as amended in 1979 and modified in
1984 and 2001: see Vol. 15 p. 221.

Convention for the Protection of Producers of Phonograms against Un-
authorized Duplication of their Phonograms, 1971:
see Vol. 18 p. 109.

Multilateral Convention for the Avoidance of Double Taxation of
Copyright Royalties, 1979: see Vol. 6 p. 252.

Trademark Law Treaty, 1994: see Vol. 15 p. 222.

WIPO Performances and Phonograms Treaty, 1996:
see Vol. 18 p. 109.

WIPO Copyright Treaty, 1996: see Vol. 18, p. 109.

Patent Law Treaty, 2000: see Vol. 17 p. 172.

Singapore Treaty on the Law of Trademarks, 2006

(Continued from Vol. 18 p. 110)

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
Tajikistan	26 Dec 2014

INTERNATIONAL CRIMES

Slavery Convention, 1926 as amended in 1953: see Vol. 15 p. 223.

Convention on the Prevention and Punishment of the
Crime of Genocide, 1948: see Vol. 8 p. 182.

Supplementary Convention on the Abolition of Slavery, the Slave Trade,
and Institutions and Practices Similar to Slavery, 1956:
see Vol. 14 p. 236.

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 on the Prevention and Punishment of Crimes
Against Internationally Protected Persons Including Diplomatic Agents,
1973: see Vol. 14 p. 236

Protocol for the Suppression of Unlawful Acts Against the Safety of
Fixed Platforms Located on the Continental Shelf, 1988:
see Vol. 18 p. 112.

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, see Vol. 12 p. 247.

International Convention against the Recruitment, Use, Financing and
Training of Mercenaries, 1989: see Vol. 11 p. 254.

Convention on the Marking of Plastic Explosives for the Purpose of
Detection, 1991: see Vol. 15 p. 224.

Convention on the Safety of United Nations and Associated Personnel, 1994: see Vol. 11 p. 255.

Statute of the International Criminal Court, 1998: see Vol. 16 p. 171.

United Nations Convention Against Transnational Organized Crime, 2000: see Vol. 19 p. 191.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: see Vol. 15 p. 224.

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, 2001: see Vol. 17 p. 174.

United Nations Convention Against Corruption, 2003:
see Vol. 17 p. 175.

International Convention Against the Taking of Hostages, 1979

(Continued from Vol. 16 p. 171)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Vietnam		9 Jan 2014

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988

(Continued from Vol. 18 p. 111)

(Status as provided by IMO)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Maldives	25 Feb 2014	26 May 2014

International Convention for the Suppression of Terrorist Bombings, 1997

(Continued from Vol. 14 p. 236)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Vietnam		9 Jan 2014

**International Convention for the Suppression of the
Financing of Terrorism, 1999**

(Continued from Vol. 17 p. 174)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Timor Leste		27 May 2014

**Protocol to Prevent, Suppress and Punish Trafficking in Persons,
Especially Women and Children, supplementing the United Nations
Convention Against Transnational Organized Crime, 2000**

(Continued from Vol. 19 p. 191)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Afghanistan		15 Aug 2014

**International Convention for the Suppression of
Acts of Nuclear Terrorism, 2005**

(Continued from Vol. 19 p. 191)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Indonesia		30 Sep 2014
Korea (DPR)	16 Sep 2005	29 May 2014

**INTERNATIONAL REPRESENTATION
(SEE ALSO: PRIVILEGES AND IMMUNITIES)**

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with International Organizations of a Universal Character, 1975:
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INTERNATIONAL TRADE

Convention on Transit Trade of Land-locked States, 1965:
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Convention on the Limitation Period in the International Sale of Goods,
1974: see Vol. 6 p. 257.

UN Convention on Contracts for the International Sale of Goods, 1980:
see Vol. 14 p. 239.

UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: see Vol. 6 p. 257.

United Nations Convention on the Use of Electronic Communications in International Contracts, 2005: see Vol. 16 p. 173.

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: see Vol. 17 p. 176.

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. 16 p. 173.

Convention on Civil Procedure, 1954

(Continued from Vol. 6 p. 258)

(Status as provided by the HccH)

<i>State</i>	<i>Sig.</i>	<i>E.i.f.</i>
Mongolia	3 Mar 2014	14 Sep 2014

LABOUR

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Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): see Vol. 19 p. 192.

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): see Vol. 19 p. 193.

Equal Remuneration Convention, 1951 (ILO Conv. 100):
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Abolition of Forced Labour Convention, 1957 (ILO Conv. 105):
see Vol. 19 p. 193.

Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111): see Vol. 19 p. 193.

Employment Policy Convention, 1964 (ILO Conv. 122):
see Vol. 8 p. 186.

Minimum Age Convention, 1973 (ILO Conv. 138): see Vol. 19 p. 193.

Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182):
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**Promotional Framework for Occupational Safety and
Health Convention (ILO Conv. 187), 2006**

(Continued from Vol. 18 p. 114)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. Registered</i>
Vietnam	16 May 2014

NARCOTIC DRUGS

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.

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.

International Opium Convention, 1925, amended by Protocol 1946:
see Vol. 7 p. 334.

Agreement Concerning the Suppression of Opium Smoking, 1931,
amended by Protocol, 1946: see Vol. 6 p. 261.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: see Vol. 7 p. 334.

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.

Single Convention on Narcotic Drugs, 1961: see Vol. 13 p. 276.

Convention on Psychotropic Substances, 1971: see Vol. 13 p. 276.

Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972: see Vol. 15 p. 227.

Protocol amending the Single Convention on Narcotic Drugs, 1972: see Vol. 15 p. 227.

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

(Continued from Vol. 13 p. 276)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Timor Leste		3 Jun 2014

NATIONALITY AND STATELESSNESS

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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. 17 p. 179.

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. 19 p. 196.

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: see Vol. 19 p. 196.

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997: see Vol. 19 p. 196.

Convention on Nuclear Safety, 1994: see Vol. 18 p. 117.

Convention on Supplementary Compensation for Nuclear Damage, 1997: see Vol. 16 p. 178.

Protocol to Amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: see Vol. 17 p. 180.

Convention on the Physical Protection of Nuclear Material, 1980

(Continued and corrected from Vol. 18 p. 116)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Singapore		22 Sep 2014

**Amendment to the 1980 Convention on the Physical Protection of
Nuclear Material, 2005**

(Continued from Vol. 18 p. 116)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Japan		27 Jun 2014
Korea (Rep.)		29 May 2014
Singapore		22 Oct 2014
Tajikistan		10 Jul 2014

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. 16 p. 178.

Convention on Registration of Objects launched into
Outer Space, 1974: see Vol. 15 p. 229.

Agreement governing the Activities of States on the Moon and
other Celestial Bodies, 1979: see Vol. 10 p. 284.

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations,
1946: see Vol. 19 p. 197.

Convention on the Privileges and Immunities of the Specialized Agen-
cies, 1947: see Vol. 7 p. 338.

Vienna Convention on Diplomatic Relations, 1961: see Vol. 19 p. 197.

Optional Protocol to the Vienna Convention on Diplomatic Relations
concerning the Compulsory Settlement of Disputes, 1961:
see Vol. 6 p. 269.

Vienna Convention on Consular Relations, 1963: see Vol. 19 p. 197.

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.

United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004: see Vol. 15 p. 230.

REFUGEES

Convention relating to the Status of Refugees, 1951: see Vol. 12 p. 254.

Protocol relating to the Status of Refugees, 1967: see Vol. 12 p. 254.

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968: see Vol. 12 p. 254.

Convention on Road Signs and Signals, 1968

(Continued from Vol. 7 p. 338)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Vietnam		20 Aug 2014

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. 19 p. 198.

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. 19 p. 199.

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. 16 p. 230)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Philippines	30 Aug 1996	24 Sep 2014

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. 12 p. 255.

International Convention on Load Lines, 1966: see Vol. 15 p. 230.

International Convention on Tonnage Measurement of Ships, 1969:
see Vol. 15 p. 231.

Special Trade Passenger Ships Agreement, 1971: see Vol. 6 p. 275.

Convention on the International Regulations for Preventing Collisions at Sea, 1972: see Vol. 19 p. 200.

Protocol on Space Requirements for Special Trade
Passenger Ships, 1973: see Vol. 6 p. 275.

Convention on a Code of Conduct for Liner Conferences, 1974:
see Vol. 6 p. 276.

International Convention for the Safety of Life at Sea, 1974:
see Vol. 15 p. 231.

Protocol Relating to the International Convention for the Safety of
Life at Sea, 1974 as amended 1978: see Vol. 12 p. 256.

UN Convention on the Carriage of Goods by Sea, 1978:
see Vol. 6 p. 276.

International Convention on Standards of Training, Certification and
Watchkeeping for Seafarers, as amended, 1978: see Vol. 19 p. 200.

Protocol Relating to the International Convention on Load Lines, 1988:
see Vol. 17 p. 183.

Protocol Relating to the International Convention for the Safety of
Life at Sea, 1988: see Vol. 18 p. 120.

International Convention for Safe Containers, as amended 1972

(Continued from Vol. 19 p. 200)

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Vietnam	30 Sep 2013	30 Sep 2014

Nairobi International Convention on the Removal of Wrecks, 2007

Nairobi, 19 May 2007

Entry into force: not yet

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
India	23 Mar 2011	
Iran	19 Apr 2011	
Malaysia	28 Nov 2013	

SOCIAL MATTERS

- 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.
- International Convention for the Suppression of the Traffic in Women and Children, 1921: 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.
- International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: 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 of Full Age, 1933, amended by Protocol, 1947: see Vol. 6 p. 277.
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: see Vol. 12 p. 257.
- Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: see Vol. 12 p. 257.

International Convention Against Doping in Sports, 2005**Paris, 19 October 2005**

Entry into force: 1 Feb 2007

(Status as provided by UNESCO)

<i>State</i>	<i>Cons. (dep.)</i>
Bangladesh	22 Oct 2007
Bhutan	14 Nov 2011
Brunei	31 Mar 2008
Cambodia	9 Apr 2008
China	9 Oct 2006
India	7 Nov 2007
Indonesia	30 Jan 2008
Iran	23 Mar 2010
Japan	26 Dec 2006
Kazakhstan	8 Feb 2010
Korea (DPR)	4 Oct 2010
Korea (Rep.)	5 Feb 2007
Kyrgyzstan	4 Mar 2011
Malaysia	20 Dec 2006
Maldives	14 Oct 2010
Mongolia	15 Oct 2007
Myanmar	31 Mar 2010
Nepal	15 Jun 2010
Pakistan	4 Feb 2008
Papua New Guinea	6 Sep 2010
Philippines	17 Mar 2010
Singapore	5 Nov 2007
Sri Lanka	9 Mar 2011
Tajikistan	30 Mar 2012
Thailand	15 Jan 2007
Turkmenistan	17 Nov 2010
Uzbekistan	29 Apr 2011
Vietnam	2 Oct 2009

TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976:
see Vol. 13 p. 280.

Convention on the International Maritime Satellite Organization
(INMARSAT), 1976 (as amended): see Vol. 19 p. 202.

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.

Tampere Convention on the Provision of Telecommunication
Resources for Disaster Mitigation and Relief Operations, 1998:
see Vol. 15 p. 232.

Amendments to the Agreement establishing the Asia-Pacific Institute
for Broadcasting Development, 1999: see Vol. 10 p. 288.

Amendments to the Constitution of the Asia-Pacific Telecommunity,
2002: see Vol. 13 p. 280.

TREATIES

Vienna Convention on the Law of Treaties, 1969: see Vol. 19 p. 203.

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 Non-Proliferation of Nuclear Weapons, 1968:
see Vol. 11 p. 262.

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. 12 p. 258.

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:
see Vol. 11 p. 263.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993: see Vol. 12 p. 259.

Comprehensive Nuclear Test Ban Treaty, 1996:
see Vol. 19 p. 204.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997:
see Vol. 13 p. 281.

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, 2001: see Vol. 12 p. 259.

Convention on Cluster Munitions, 2008: see Vol. 19 p. 204.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972

(Continued from Vol. 13 p. 281)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Myanmar	10 Apr 1972	1 Dec 2014

Arms Trade Treaty, 2013

New York, 2 April 2013

Entry into force: 24 December 2014

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	26 Sep 2013	
Cambodia		18 Oct 2013
Japan	3 Jun 2013	9 May 2014
Korea (Rep.)	3 Jun 2013	
Malaysia		26 Sep 2013
Mongolia		24 Sep 2013
Philippines		25 Sep 2013
Singapore		5 Dec 2014
Thailand		25 Nov 2014

STATE PRACTICE

State Practice of Asian States in the Field of International Law

EDITORIAL NOTE

The Editorial Board has decided to reorganize the format of this section from Volume 16 (2010) onwards. Since the Yearbook's inception, state practice has always been reported and written up as country reports. While this format has served us well in the intervening years, we felt that it would make a lot more sense if we reported state practice *thematically*, rather than geographically. This way, readers will have an opportunity to zoom in on a particular topic of interest and get a quick overview of developments within the region. Of course, this reorganization cannot address our lack of coverage in some Asian states. We aim to improve on this in forthcoming volumes and thank the contributors to this section for their tireless and conscientious work.

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Aliens

JAPAN

ALIENS – WELFARE FOR FOREIGNERS WITH PERMANENT RESIDENCE STATUS – MUNICIPAL LAW

The Supreme Court Ruled Against Foreigners with Permanent Residence Status from Receiving Welfare, Supreme Court, 18 July 2014¹

An 82-year-old Chinese woman filed an application for welfare benefits to Oita City, which was rejected. The woman was born and raised in Japan and could not even speak Chinese.

On 18 July 2014, the Supreme Court Second Bench held that foreigners with permanent residence status could not receive welfare benefits because they lack the right to receive welfare benefits under the Public Assistance Act (Act No. 144 of 1950 Amendment: Act No. 53 of 2006). The Court held that the Article 1 of the Public Assistant Act applies only to the Japanese citizens, as it provides:

The purpose of this Act is for the State to guarantee a minimum standard of living as well as to promote self-support for all citizens who are in living in poverty by providing the necessary public assistance according to the level of poverty, based on the principles prescribed in Article 25 of the Constitution of Japan.²

While the lower court, the Fukuoka High Court, admitted her claim, the Supreme Court rejected it. In fact, welfare benefits are given to such foreigners as policy of each administrative authority from a humanitarian point of view.

1 Saikō Saibansho [Sup. Ct.] July 18, 2014, Hei 24 (Gyo) no. 45, 386 HANREI CHIHŌ JICHI [HANREI JICHI] 78 (Japan).

2 Sēgatsuhogohō [Public Assistance Act], Law No. 144 of 1950, art. 1, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=24&vm=04&re=02&new=1> (Japan).

PHILIPPINES

ALIENS – TREATIES CONCURRED IN BY THE PHILIPPINE SENATE IN 2014

Agreement on Social Security Between the Republic of the Philippines and the Kingdom of Denmark

The Agreement on Social Security between the Republic of the Philippines and the Kingdom of Denmark was ratified on 5 May 2014, which the Senate concurred with on May 12, 2015. The Agreement not only reaffirms the enhanced partnership between the Philippines and Denmark but also manifests the Philippine government's genuine concern for the welfare and well-being of Filipino migrant workers and their families. The Agreement seeks to reduce or eliminate border, nationality, or other restrictions that prevent covered workers from receiving benefits under the social security legislation of the Philippines and Denmark and aims to guarantee the portability of pensions of qualified Filipino and Danish citizens. The Agreement applies the principles of equality of treatment, export of benefits, and totalization of creditable periods to enable covered workers to access social security benefits.

ASEAN

INDONESIA

ENVIRONMENTAL POLLUTION – TRANSBOUNDARY HAZE – ASEAN AGREEMENT ON TRANSBOUNDARY HAZE POLLUTION – RATIFICATION BY INDONESIA

Law No. 26 of 2014 on the Ratification of the ASEAN Agreement on Transboundary Haze Pollution

On 14 October 2014, Indonesia ratified the ASEAN Agreement on Transboundary Haze Pollution ('Agreement') by enacting Law No. 26 of 2014 on the Ratification of the ASEAN Agreement on Transboundary Haze Pollution ('Law').³ The haze pollution in the region has occurred many times

3 Indonesia subsequently deposited its instrument of ratification to the ASEAN Secretary-General on 20 January 2015.

almost annually, the worst episodes of which happened in 1997, 1999, 2002, 2004, 2006, and 2010.⁴ The haze was caused by slash and burn practice to open land for agriculture in the islands of Sumatra and Kalimantan.⁵ Despite claims that Indonesia was working hard to reduce the pollution,⁶ many questioned Indonesia's capability to do so.⁷ Indonesia did not have sufficient political will to effectively enforce the existing laws to discourage such practice.⁸ This is due to a variety of factors, such as institutional deficiencies, weaknesses of regional autonomy, corruption, and land use conflicts.⁹

Indonesia's failure to prevent the fires from recurring made the haze pollution in Southeast Asia a matter of common concern to all ASEAN member States. Under the Agreement, a State party must take measures to prevent haze pollution, respond to land and forest fires, and mitigate the haze pollution that ensues (Articles 9 & 11). The Agreement also requires States parties to cooperate with each other to prevent and monitor transboundary haze pollution (Article 4(1)), as well as to respond promptly to a request for information or consultation by States affected by the haze (Article 4(2)).

4 Alan Khee-Jin Tan, 'Can't We Even Share Our Maps?': Cooperative and Unilateral Mechanisms to Combat Forest Fires and Transboundary 'Haze' in Southeast Asia, in *TRANSBOUNDARY POLLUTION: EVOLVING ISSUES OF INTERNATIONAL LAW AND POLICY* 327 (S. Jayakumar et al. eds., 2015).

5 Euan McKirdy, Southeast Asia's Haze Crisis: A 'Crime Against Humanity', CNN (Oct. 29, 2015), <http://edition.cnn.com/2015/10/29/asia/southeast-asia-haze-crisis/>.

6 Singapore Reiterates Offer of Assistance to Indonesia to Fight Forest Fires, CHANNEL NEWSASIA (Sept. 14, 2015, 07:07 PM), <http://www.channelnewsasia.com/news/singapore/singapore-reiterates/2125790.html>; Ananda Teresia, Salat Istisqa, Wapres JK: Upaya Kita Sudah Maksimal, TEMPO.CO (Nov. 1, 2015, 10:11 AM), <http://nasional.tempo.co/read/news/2015/11/01/078714880/salat-istisqa-wapres-jk-upaya-kita-sudah-maksimal>.

7 Megan Rowling, Efforts to Stop Indonesian Haze Fires May Not Work for 2016, REUTERS (Dec. 18, 2015), <http://www.reuters.com/article/us-indonesia-haze-prevention-idUSKBN0U10QK20151218>; Georgia McCafferty & Tom Sater, Indonesian Haze: Why It's Everyone's Problem, CNN (Sept. 18, 2015), <http://edition.cnn.com/2015/09/17/asia/indonesian-haze-southeast-asia-pollution/>.

8 Tan, *supra* note 4, at 336-37.

9 *Id.* at 337-46.

The Agreement established the ASEAN Coordinating Centre for Transboundary Haze Pollution Control ('ASEAN Centre'), which is tasked with assessing the risks of haze pollution to human health or the environment (Article 8(3)). The ASEAN Centre collects its data from designated domestic bodies that function as National Monitoring Centres (Articles 7 & 8(2)), which in turn, have the responsibility to provide data relating to the fires and haze pollution (Article 8(1)). States parties are then obliged to develop strategies and response plans to identify, manage, and control the risks assessed by the ASEAN Centre (Article 10).

The Agreement also established the ASEAN Transboundary Haze Pollution Control Fund ('Fund'), which receives voluntary contributions from States parties (Article 20(4)) and from other sources agreed by the States parties (Article 20(5)). The Fund was established because without adequate financial arrangements, it would be nearly impossible for member States to mobilise their resources, equipment and technology to deal with the haze. However, there is very little information available on how the Fund is collected and disbursed, how much the contribution of each State party is, and the specific items that the Fund is allocated to.¹⁰

By ratifying the Agreement, Indonesia is required to designate Competent Authorities and a Focal Point to perform administrative functions required by the Agreement (Article 6(1)), as well as to enter into technical cooperation with other States parties and support scientific research relating to the causes and impacts of haze pollution (Articles 16-17). Indonesia's ratification of the Agreement is a major breakthrough,¹¹ since

10 In the 11th Meeting of the Conference of the Parties to the ASEAN Agreement on Transboundary Haze Pollution that was held on 29 October 2015, it was noted that most of the ASEAN member States have contributed to the Fund in order to achieve the initial goal of US\$ 500,000. However, the current amount of the Fund is unknown and it is not clear whether that goal has been achieved. *See* Media Release: 11th Meeting of the Conference of the Parties to the ASEAN Agreement on Transboundary Haze Pollution, HAZE ACTION ONLINE (Nov. 2, 2015), <http://haze.asean.org/2015/11/media-release-11th-meeting-of-the-conference-of-the-parties-to-the-asean-agreement-on-transboundary-haze-pollution/>.

11 Ratification of Asean Haze Agreement a Historic Step in Tackling Problem: Malaysia PM Najib Razak, THE STRAITS TIMES (Sept. 8, 2015, 1:41 PM), <http://www.straitstimes.com/asia/se-asia/ratification-of-asean-haze-agreement-a-historic-step-in-tackling-problem-malaysia-pm>.

Indonesia is the country from which most of the haze pollution in Southeast Asia originated. Indonesia is the last ASEAN Member State to ratify the Agreement, twelve years after it was signed on 10 June 2002. Now that all ASEAN member States have ratified the Agreement, it is hoped that they will fully implement it, in order to prevent recurrences of transboundary haze pollution.¹²

PHILIPPINES

ASEAN – TREATIES CONCURRED IN BY THE PHILIPPINE SENATE IN 2014

The Agreement Establishing ASEAN+3 Macroeconomic Research Office (“AMRO Agreement”)

The Philippines, together with other ASEAN States, China, Japan, and South Korea, signed an Agreement to establish the ASEAN+3 Macroeconomic Research Office (AMRO) as an international organization with full legal capacity for the purpose of conducting regional economic surveillance for the implementation of the ASEAN+3 multilateral support arrangement. This includes the monitoring, assessment, and reporting to members on macroeconomic status and financial soundness; identification of macroeconomic and financial risks and vulnerabilities and provision of assistance if necessary; support for implementation of regional financial arrangements, and other activities. The agreement also seeks to address potential and actual balance-of-payments and short-time liquidity challenges in the region.

12 Only one year after Indonesia ratified the Agreement, major haze pollution recurred. From June to October 2015, thick choking smoke produced by land burning in the Indonesian islands of Sumatra and Kalimantan blanketed Indonesia, Singapore, and Malaysia. Indonesia is known to have cooperated extensively with ASEAN and the authorities of other affected states, such as Singapore and Malaysia. See Media Release: 17th Meeting of the Sub-Regional Ministerial Steering Committee (MSC) on Transboundary Haze Pollution, HAZE ACTION ONLINE (July 29, 2015), <http://haze.asean.org/2015/07/media-release-17th-meeting-of-the-sub-regional-ministerial-steering-committee-msc-on-transboundary-haze-pollution/>.

Arbitration

INDONESIA

**ARBITRATION – ANNULMENT OF ARBITRAL AWARDS –
CONSTITUTIONAL GUARANTEE OF LEGAL CERTAINTY –
CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF
FOREIGN ARBITRAL AWARDS – IMPLEMENTATION BY INDONESIA**

Judgment of the Constitutional Court of the Republic of Indonesia No. 15/PUU-XII/2014 [11 November 2014]

This judgment significantly affects the enforcement of arbitral awards in Indonesia by removing some of the requirements to apply for annulment of arbitral awards to the court.

Facts

The Applicants in this case, Ir. Darma Ambiar, M.M. and Drs. Sujana Sulaeman, had referred a dispute to the Indonesian National Arbitration Board ('BANI'), following which BANI rendered its award against the Applicants. The Applicants subsequently filed an application for annulment of the award with the District Court of Bandung. The District Court rejected the application and the Applicants appealed to the Supreme Court. While the case was being heard by the Supreme Court, the Applicants petitioned the Constitutional Court to strike down the Elucidation of Article 70 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolutions ('Arbitration Law').¹³

Article 70 stipulates that the parties to an arbitration case may apply to the court for annulment of an arbitral award if the award is 'suspected' to have been based on fraudulent acts, or if the documents submitted during the arbitral hearings had been falsified, or new determinative documents were uncovered. The Elucidation of this Article

13 In Indonesia, each law has an Elucidation attached to it. The Elucidation is aimed at providing official interpretations of certain provisions under the Law. It may only explain how the existing provisions should be interpreted and applied. It may neither introduce new provisions nor obscure the provisions under the Law itself. See Attachment I to Indonesian Law No. 12 of 2011 on the Formation of Legislation, at 54, ¶¶ 176-78.

further stipulates that those grounds for annulment must be established pursuant to a judicial decision. The Applicants argued that the Elucidation of Article 70 was unconstitutional, since it breached the principle of 'legal certainty' as guaranteed under Article 28D(1) of the Constitution.

Judgment

The Constitutional Court was of the view that the Elucidation altered Article 70 by introducing a new requirement. While Article 70 merely stipulates that an application for annulment may be submitted when the arbitral award is 'suspected' to have been rendered in any of the circumstances prescribed in that Article, the Elucidation requires that those circumstances must be proven in accordance with a court decision. In the Court's opinion, this has left open a possibility for multi-interpretations of Article 70.

The Court stated that on one hand, Article 70 may be interpreted to require that the request for annulment and the claim of fraudulent acts forming the ground of such request should be heard and adjudged by the same court simultaneously. On the other hand, Article 70 can also be interpreted to mean that before a party requests for annulment to the court, it must have obtained a separate court decision establishing any of the circumstances under Article 70.

The Constitutional Court opined that if the latter were to be used as the correct interpretation, this would come into conflict with the object and purpose of the Arbitration Law, which is, *inter alia*, to accelerate the settlement of disputes between the parties. Furthermore, it would also contradict Article 71, which provides that an application for annulment must be submitted within 30 days after the award is delivered to and registered with the District Court. The Constitutional Court in the end agreed with the Applicants that the Elucidation of Article 70 violated the principle of 'legal certainty' under the Constitution and decided to revoke it.

By striking down the Elucidation, the Court eliminated ambiguity that the Elucidation might have created. At the same time, the Court has also removed the strict requirements that must be fulfilled by a party applying for annulment of an arbitral award. This leads to other questions that the Arbitration Law cannot answer, such as: what constitutes falsified evidence? What is the definition of 'fraudulent acts'? What is the proper forum to adjudicate on this matter? Is it the same court that examines the

application for annulment? Or should it be decided by a different court in different hearings?

Unfortunately, the Constitutional Court neither addressed those questions nor elaborated what to do now in the absence of stringent tests that courts can apply when dealing with applications for annulment of arbitral awards. This means that in examining such applications, different courts may apply different standards. Since Indonesia is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('Convention'), its courts can look at the Convention for guidance. However, under Article V(2)(b), the Convention gives States parties a wide margin of discretion to deny the enforcement of an arbitral award based on 'public policy,' which is nowhere defined under the Convention.

If Indonesia were to argue that Article 70 of its Arbitration Law and the revocation of the Article's Elucidation by the Constitutional Court are part of Indonesia's public policy, it should also ensure that additional safeguards are in place to protect investors in accordance with the Convention. This is particularly because the fundamental purpose of the Convention is to eliminate or at least reduce barriers to the recognition and enforcement of foreign arbitral awards. As long as the legislatures have not amended the Arbitration Law to provide a clearer mechanism for the annulment of foreign arbitral awards, the threat of arbitrary annulment of foreign arbitral awards persists. Thus, it is regrettable that while this Judgment aimed to create legal certainty at one end of the spectrum, it has inadvertently created uncertainty at the other end. This is bad news for investors, who may feel constantly at risk of having their arbitral awards thrown out by the court.

Courts and Tribunals

JAPAN

ICJ – ENVIRONMENTAL LAW – WHALING IN ANTARCTIC

International Court of Justice (ICJ)’s Judgment of Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) and the NEWREP-A

On 31 March, the ICJ issued the judgment of Whaling in the Antarctic. It held that the Second Phase of Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) in which Japan conducted whaling in the Antarctic Sea, could not be justified as scientific research under the Art. VII of the International Convention for the Regulation of Whaling (ICRW).

Consequently, Japan ended its JARPA II to comply with the Judgment and, on November 2014, made new scientific research called the New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A) to be reviewed under the International Whaling Committee (IWC) in 2015. The NEWREP-A aims:

- I. Improvements in the precision of biological and ecological information for the application of the Revised Management Procedure (RMP) to the Antarctic minke whales;
- II. Investigation of the structure and dynamics of the Antarctic marine ecosystem through building ecosystem models.¹⁴

While the ICJ did not forbid whaling in the Antarctic Sea, even if it involves using a lethal method, it determines the defects of the JARPA II on several grounds.

Japan clarified the six elements suggested by the ICJ concerning the reasonableness of (1) the use of lethal methods, (2) the size of the lethal methods, (3) the difference of the actual take from the targeted number, (4) the timeframe, (5) scientific outputs, and (6) coordination with the others, improving these elements in the NEWREP-A.

Concerning the Lethal Methods (1) and (2), the ICJ determined that considering “the expanded use of lethal methods in JARPA II, as compared

14 MINISTRY OF FOREIGN AFFAIRS OF JAPAN, OUTLINE OF THE PROPOSED PLAN FOR THE NEW SCIENTIFIC WHALE RESEARCH PROGRAM IN THE ANTARCTIC OCEAN (2014) [hereinafter NEWREP-A Proposal].

to JARPA, this is difficult to reconcile with Japan's obligation to give due regard to IWC resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives."¹⁵ And "weaknesses in Japan's explanation for the decision to proceed with the JARPA II sample sizes prior to the final review of JARPA lend support to the view that those sample sizes and the launch date for JARPA II were not driven by strictly scientific considerations."¹⁶ Therefore, Japan decided to limit the species to the Antarctica minke whales and the size to 333 animals. Since the ICJ only questioned the reasonableness of using the lethal methods and size in the JARPA II and did not deny the lethal methods, Japan continued to use the lethal methods on the ground that it is necessary "for estimating the age-at-sexual maturity (ASM), which makes considerable contribution to achieving the application of the RMP," with due considerations to the use of alternative non-lethal methods.¹⁷

In light of the unreasonable difference between the target sample sizes and the actual number of samples taken during JARPA II (elements (3)), the ICJ determined that "[t]his evidence suggests that the target sample sizes are larger than are reasonable in relation to achieving JARPA II's stated objectives."¹⁸ Therefore, Japan prepared a contingency backup plan to adjust to the disturbance from the natural and human factors.

Responding to the element (4), Japan also decided to set up a total timeframe of 12 years, and according to the IWC's review system, 6 years as a mid-term in order to more clearly define the ambiguous term "open-ended" in JARPA II, as the ICJ determined "time frame with intermediary targets" to be more appropriate.¹⁹

As to the improvement of scientific output from the research (in element (5)), Japan promised to send the data to the IWC, to publish scientific papers in the peer review articles, and to make the data available widely in the database. The ICJ determined that:

15 Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226, ¶ 144 (Mar. 31).

16 *Id.* ¶ 155.

17 NEWREP-A Proposal, *supra* note 14.

18 Whaling in the Antarctic, ¶ 212.

19 *Id.* ¶ 216.

only two peer-reviewed papers that have resulted from JARPA II to date. These papers do not relate to the JARPA II objectives and rely on data collected from respectively seven and two minke whales caught during the JARPA II feasibility study. While Japan also refers to three presentations made at scientific symposia and to eight papers it has submitted to the Scientific Committee, six of the latter are JARPA II cruise reports, one of the two remaining papers is an evaluation of the JARPA II feasibility study and the other relates to the programme's non-lethal photo identification of blue whales. In light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the scientific output to date appears limited.²⁰

Responding to the element (6), Japan also promised to enhance its coordination with other institutions such as the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The ICJ "observes that some further evidence of co-operation between JARPA II and other domestic and international research institutions could have been expected in light of the programme's focus on the Antarctic ecosystem and environmental changes in the region."²¹

Criminal Law

VIETNAM

CRIMINAL LAW – LAW ENFORCEMENT – MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS – EXTRADITION – TRANSFER OF SENTENCED PERSONS

Treaty on Mutual Legal Assistance in Criminal Matters Between Australia and the Socialist Republic of Viet Nam

On February 7, 2014, the Prosecutor General of the Supreme People's Procuracy Nguyen Hoa Binh, as the representative for the Socialist Republic of Vietnam, and the Minister of the Ministry of Justice Australia Michael Keenan, as the representative for the Commonwealth of Australia, signed the Treaty on Mutual Legal Assistance in Criminal Matters

20 *Id.* ¶ 219.

21 *Id.* ¶ 222.

between Australia and the Socialist Republic of Viet Nam (the “Australia – Vietnam MLAT”). The Treaty consists of 25 Articles, outlining that the two countries will work together to shut down the international criminal highways driving transnational crime.

Prior to this Agreement, Australia and Vietnam did not have a bilateral agreement to facilitate mutual legal assistance.²² However, the two countries have a close and supportive bilateral relationship, with a good strong record of cooperation between our law enforcement agencies and our justice agencies.²³ The strength of this partnership is demonstrated by the fact that Vietnam and Australia have signed the treaties on extradition²⁴ and transfer of prisoners.²⁵ The execution of this bilateral treaty on mutual legal assistance is expected to improve the cooperation by providing certainty, imposing obligations at international law and instituting practical arrangements for requesting and providing assistance.²⁶ In the absence of the Australia-Vietnam MLAT, it is suggested that there is no assurance that the request of one party will be considered by the other.²⁷ The Agreement obliges:

Australia and Vietnam to grant one another’s requests for assistance in criminal investigations and related proceedings in accordance with their respective laws and the provisions set out in the [Agreement] (Article 1(1)). The assistance to be granted may include: (a) taking evidence and obtaining statements of persons, including the execution of letters rogatory (Article 1(3)(a)); (b) providing documents, records and evidence (Article 1(3)(b)); (c) locating and identifying persons (Article 1(3)(c)); (d) executing requests for search and seizure (Article 1(3)(d)); (e) locating, restraining and forfeiting

22 Treaty on Mutual Legal Assistance in Criminal Matters between Australia and the Socialist Republic of Viet Nam, National Interest Analysis, signed 2 July 2014, [2014] ATNIF 22, ¶ 5 [hereinafter Australia – Vietnam MLAT].

23 *Id.*

24 Treaty Between Australia and the Socialist Republic of Viet Nam on Extradition, signed 10 April 2012, [2014] ATS 7.

25 Agreement Between the Government of Australia and the Socialist Republic of Viet Nam Concerning the Transfer of Sentenced Persons, 13 October 2008, [2008] ATS 27.

26 Australia – Vietnam MLAT, *supra* note 22, ¶ 8.

27 *Id.*

proceeds and/or instruments of crime (Article 1(3)(e)); (f) seeking the consent of persons in custody and others to give evidence or to assist in investigations (Article 1(3)(f)); (g) serving documents (Article 1(3)(g)); (h) collecting forensic material (Article 1(3)(h)); (i) exchanging information (Article 1(3)(i)); and (j) other assistance consistent with the objects of the Treaty, which is not inconsistent with the laws of the Requested Party (Article 1(3)(j)).²⁸

The mutual assistance under the Australia-Vietnam MLAT, however, “does not include the extradition, the execution of criminal judgments or the transfer of prisoners,”²⁹ since Vietnam and Australia have signed a separate bilateral agreement covering extradition and the transfer of prisoners.

Article 2 of the Australia-Vietnam MLAT further stipulates that the terms and provisions set therein:

will not affect the obligations of the two states arising from any other international instrument to which both are parties This would include situations where a party has a specific obligation to refuse mutual assistance under an international treaty outside of this ... Agreement.³⁰

It should be noted that the obligation to provide legal assistance under the Agreement shall be “subject to a number of internationally accepted mandatory and discretionary grounds for refusal which largely reflect the existing grounds”³¹ contained in the national legislation of each state. Under Article 4(1) of the Australia-Vietnam MLAT:

[T]he Requested Party must refuse to provide assistance in any of the following circumstances: (a) where execution of the request would prejudice the Requested Party’s sovereignty, security, national interest or other essential interests ... (b) where execution of the request would be contrary to the fundamental principles of its domestic laws and international agreements to which it is a party ... (c) where the person to whom the request relates would be exposed to ‘double jeopardy’; that is, where that person has

28 JOINT STANDING COMM. ON TREATIES, REPORT 147: TREATIES TABLED ON 18 JUNE, 24 NOVEMBER, 2 DECEMBER 2014 AND 25 FEBRUARY 2015, 34 (2015) (Austl.) [hereinafter Report 147].

29 *Id.*

30 *Id.*

31 *Id.*

already been acquitted, pardoned, or punished under the laws of the Requested Party, the Requesting Party or another country in respect of the same act or omission ... (d) where a lapse of time has meant that the person to whom the request relates has become immune from prosecution under the laws of the Requested Party ... (e) the request relates to an offence which is not criminalised in both countries ... (f) the request relates to an offence which the Requested Party considers as being of a political character . . . (g) the request relates to an offence that is regarded by the Requested Party as an offence under its military law but not also an offence under its ordinary criminal law ... (h) the Requested Party considers that there are substantial grounds for believing the request has been made for the purpose of investigating, prosecuting or punishing a person on account of race, sex, sexual orientation, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons ... or (i) the Requested Party considers that there are substantial grounds for believing that if the request was granted, any person would be in danger of being subjected to torture³²

Article 4(2) of the Australia-Vietnam MLAT also sets out discretionary grounds for refusal. Accordingly, the competent authorities of either state may refuse assistance if provision of the assistance: (a) "could prejudice an investigation or proceeding in the request party ... (b) would, or would be likely to, prejudice the safety of any person ... or (c) would impose an excessive burden on resources"³³

Notably, at the time the Australia-Vietnam MLAT is concluded, "Vietnam retains the death penalty for serious crimes including drug offences," while Australia has a long-standing policy of opposition to the death penalty.³⁴ This exemption relating to the death penalty reflects Australia's policy position and Vietnam's respect to the partner's domestic legal requirements.

Article 4(4) of the Australia-Vietnam MLAT provides that, "prior to refusing assistance, the Requested Party must consider whether assistance

32 *Id.* at 34-35.

33 *Id.* at 35-36.

34 *Id.* at 36.

could be granted subject to any necessary conditions.”³⁵ If it accepts conditional assistance, it must comply with the conditions.

The Agreement also requires each party to execute requests for assistance in accordance with its laws, and “to the extent those laws permit, in the manner requested.”³⁶ Further, “[i]f the Requested Party becomes aware of circumstances likely to cause significant delay in responding to the request for assistance ...or it is unable to comply, in whole or in part, with a request for assistance,”³⁷ it must inform the other promptly and to the extent possible, the reasons for such non-compliance.³⁸

The conclusion of the Agreement reinforced the substantive, positive and mutually beneficial development between Australia and Vietnam since 1973. It will also contribute to developing and strengthening Vietnamese international crime cooperation relationships and further strengthening the international crime-fighting capacity of Vietnam in the region.

Treaty Between the Socialist Republic of Vietnam and the Kingdom of Spain Concerning the Transfer of Sentenced Persons

On January 10, 2014, the Socialist Republic of Vietnam and the Kingdom of Spain signed the Treaty between the Socialist Republic of Viet Nam and the Kingdom of Spain concerning the Transfer of Sentenced Persons (“Vietnam-Spain TSPT”). The Treaty contributes to the further enhancement of the “strategic partnership oriented towards the future” between Vietnam and Spain. The Vietnam-Spain TSPT is:

primarily intended to facilitate the social rehabilitation of prisoners by giving foreigners convicted of a criminal offence the possibility of serving their sentences in their own countries. It is also rooted in humanitarian considerations, since difficulties in communication by reason of language barriers and the absence of contact with relatives may have detrimental effects on a person imprisoned in a foreign country. Transfer may be requested by either the state in which the sentence was imposed (sentencing State) or the State of which the sentenced person is a national (administering State). However, the transfer of sentenced persons shall be subject to the

35 *Id.* at 37.

36 Australia – Vietnam MLAT, *supra* note 22, art. 6(1).

37 Report 147, *supra* note 28, at 38

38 Australia – Vietnam MLAT, *supra* note 22, art. 6(4).

consent of the two states as well as that of the sentenced person. The [Agreement] lays down the procedure for enforcement of the sentence following the transfer. Whatever the procedure chosen by the administering State, a custodial sentence may not be converted into a fine, and any period of detention already served by the sentenced person must be taken into account by the administering State. The sentence in the administering State must not be longer or harsher than that imposed in the sentencing State.³⁹

Moreover, “[i]n the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.”⁴⁰ Pursuant to Article 10(1) of the Vietnam – Spain TSPT, however, if this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence.

As to the nature of the punishment, “the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.”⁴¹ Under the Agreement:

The administering State shall [also] provide information to the sentencing State concerning the enforcement of the sentence, including: (a) when it considers enforcement of the sentence to have been completed; (b) if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or (c) if the sentencing State requests a special report.⁴²

The execution of the Vietnam-Spain TSPT is expected to promote further mutual legal cooperation activities pertaining to criminal issues between relevant agencies of the two states and shall create an important legal framework and basis for the mutual legal assistance.

39 Details of Treaty No. 112, COUNCIL OF EUROPE, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/112>.

40 Convention on the Transfer of Sentenced Persons art. 10(1), Mar. 21, 1983, 1496 U.N.T.S. 92.

41 Id. art. 10(2).

42 Id. art. 15.

Treaty Between the Socialist Republic of Vietnam and the Democratic Socialist Republic of Sri Lanka Concerning the Transfer of Sentenced Persons

On October 4, 2014, the Socialist Republic of Vietnam and the Democratic Socialist Republic of Sri Lanka signed the Treaty between the Socialist Republic of Vietnam and the Democratic Socialist Republic of Sri Lanka concerning the Transfer of Sentenced Persons. The Treaty is an evidence of both countries' anti-crime prevention and fight after the Memorandum of Understanding on Cooperation in Preventing and Fighting Against Crimes was signed on October 22, 2009. The official full text of the Treaty is not yet published by both parties.

Environmental Law

INDIA

PREVENTION OF CRUELTY TO ANIMALS – NATIONAL AND INTERNATIONAL LEGAL PRINCIPLES AND LEGISLATIONS – THREE STAGE EVOLUTION OF INTERNATIONAL LAW

***Animal Welfare Board v. Nagaraja* [Supreme Court of India, 7 May 2014]**

Facts

This case, as noted by the Court, concerned an issue of seminal importance with regard to the rights of animals under the Indian Constitution, laws, culture, tradition, religion and ethology. The Court was examining this in connection with the conduct of *Jallikattu*,⁴³ bullock-cart race in the States of Tamil Nadu and Maharashtra. The Court was considering this

43 The Court also outlined the historical and cultural contexts of this game in the following way: "Jallikattu is a Tamil word, which comes from the term "Callikattu," where "Calli" means coins and "Kattu" means a package. Jallikattu refers to silver or gold coins tied on the bulls' horns. People, in the earlier time, used to fight to get at the money placed around the bulls' horns which depicted as an act of bravery. Later, it became a sport conducted for entertainment and was called "Yeruthu Kattu," in which a fast moving bull was corralled with ropes around its neck. Started as a simple act of bravery, later, assumed different forms and shapes like Jallikattu (in the present form), Bull Race etc., which is based on the concept of

in the context of the provisions of Prevention of Cruelty to Animals Act, 1960 (PCA Act) and the Tamil Nadu Regulation of Jallikattu Act, 2009 (TNRJ Act). Besides these two Indian laws, the Court also examined this case in the context of various international conventions and practices that prevailed in different parts of the world.

Summary of the Judgment

Animal Welfare Board of India (AWBI), a statutory entity, established under the PCA Act for the promotion of animal welfare and for the purpose of protecting the animal welfare and for the purpose of protecting the animals from being subjected to unnecessary pain or suffering had taken up a specific stand that Jallikattu and Bullock-Cart races inflicted on animals physical and mental torture. AWBI also contended that this kind of a treatment of animals violated PCA Act and did not justify such a treatment on the plea that it was a long historical practice, culture or tradition. The Court also noted the details of such treatment meted out to these animals in violation of PCA Act. Organizers of Jallikattu argued that these events took place at the end of harvest season and sometimes during temple festivals which were traditionally and closely associated with village life. They also took the stand that the same was going on for more than three hundred years by way of custom and tradition and that extreme care and protection were being taken not to cause any injury or pain to the bullocks which participated in the event. Organizers also submitted that such sport events attracted a large number of persons which generated revenue for the State as well as enjoyment to the participants.

The Court referring to various animal behavior studies noted that these animals adopted fight-or-flight response when they were frightened or threatened. The Court also noted that this instinctual response to a perceived threat was what was being exploited in *Jallikattu*. Many animals, the Court observed, engaged in a flight response as they tried to run away from the arena when they experience fear or pain, but could not do this, since the area was completely enclosed. According to the Court, *Jallikattu* demonstrated a link between actions of humans and the fear, distress and pain experienced by bulls. Various studies, the Court noted, indicated that

flight or fight. Jallikattu includes Manjuvirattu, Oormaadu, Vadamadu, Erudhu, Vadam, Vadi and all such events involve taming of bulls.”

rough or abusive handling of bulls, compromise welfare and for increasing their fear, often they were pushed, hit, prodded, abused, causing mental as well as physical harm.

After examining the detailed report provided by AWBI, the Court further noted that there was no international agreement that ensured the welfare and protection of animals. The Court pointed out:

[The] United Nations, all these years, safeguarded only the rights of human beings, not the rights of other species like animals, ignoring the fact that many of them, including Bulls, are sacrificing their lives to alleviate human suffering, combating diseases and as food for human consumption. International community should hang their head in shame, for not recognizing their rights all these ages, a species which served the humanity from the time of Adam and Eve. Of course, there has been a slow but observable shift from the anthropocentric approach to a more nature's right centric approach in International Environmental Law, Animal Welfare Laws⁴⁴

The Court referred to three stages in the development of international environmental law instruments.⁴⁵ The First Stage, the Court noted:

was about human self-interest reason for environmental protection. The instruments in this stage were fuelled by the recognition that the conservation of nature was in the common interest of all mankind. Some the instruments executed during this time included the Declaration of the Protection of Birds Useful to Agriculture (1875), Convention Designed to Ensure the Protection of Various Species of Wild Animals which are Useful to Man or Inoffensive (1900), Convention for the Regulation of Whaling (1931) which had the objective of ensuring the health of the whaling industry rather than conserving or protecting the whale species. The attitude behind these treaties was the assertion of an unlimited right to exploit natural resources – which derived from their right as sovereign nations.⁴⁶

44 Animal Welfare Bd. v. Nagaraja, (2014) 7 SCC 547, ¶ 47 (India).

45 The Court also referred to the Indian jurisprudence in this regard and noted, “We have accepted and applied the eco-centric principles in T. N. Godavarman Thirumulpad v. India (2012) 3 SCC 277, T.N. Godavarman Thirumulpad v. India (2012) 4 SCC 362 and in Centre for Environmental Law World Wide Fund - India v. India (2013) 8 SCC 234.”

46 *Id.*

Further, the Court outlined the Second Stage as:

International Equity – This stage saw the extension of treaties beyond the requirements of the present generation to also meet the needs to future generations of human beings. This shift signaled a departure from the pure tenets of anthropocentrism. For example, the 1946 Whaling Convention which built upon the 1931 treaty mentioned in the preamble that “it is in the interest of the nations of the world to safeguard for future generations the great natural resource represented by the whale stocks.” Similarly, the Stockholm Declaration of the UN embodied this shift in thinking, stating that “man ... bears a solemn responsibility to protect and improve the environment for present and future generations” and subsequently asserts that “the natural resources of the earth ... must be safeguarded for the benefit of present and future generations through careful planning and management.” Other documents expressed this shift in terms of sustainability and sustainable development.⁴⁷

In regards to the Third Stage, the Court pointed out:

Nature’s own rights - Recent Multinational instruments have asserted the intrinsic value of nature. - UNEP Biodiversity Convention (1992) “Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, educational, cultural, recreational and aesthetic values of biological diversity and its components ... [we have] agreed as follows:” The World Charter for Nature proclaims that “every form of life is unique, warranting respect regardless of its worth to man.” The Charter uses the term “nature” in preference to “environment” with a view to shifting to non-anthropocentric human independent terminology.⁴⁸

Referring to legislations of various countries the Court further noted:

Based on eco-centric principles, rights of animals have been recognized in various countries. Protection of animals has been guaranteed by the Constitution of Germany by way of an amendment in 2002 when the words “and the animals” were added to the constitutional clauses that obliges ‘state’ to respect ‘animal dignity’. Therefore, the dignity of the animals is constitutionally recognised in that country. German Animal Welfare Law, especially Article 3 provides far-reaching protections to animals including *inter alia* from animals fight and other activities which may result in the

47 *Id.*

48 *Id.*

pain, suffering and harm for the animals. Countries like Switzerland, Austria, Slovenia have enacted legislations to include animal welfare in their national Constitutions so as to balance the animal owners' fundamental rights to property and the animals' interest in freedom from unnecessary suffering or pain, damage and fear Animals Welfare Act of 2006 (U.K.) also confers considerable protection to the animals from pain and suffering. The Austrian Federal Animal Protection Act also recognises man's responsibilities towards his fellow creatures and the subject "Federal Act" aims at the protection of life and well being of the animals. The Animal Welfare Act, 2010 (Norway) states "animals have an intrinsic value which is irrespective of the usable value they may have for man. Animals shall be treated well and be protected from the danger of unnecessary stress and strain."⁴⁹

According to the Court, when one looked at the rights of animals from both national and international perspectives, what emerged was that every species has an inherent right to live and should be protected by law, subject to the exception provided out of necessity. Continuing on this, the Court pointed out that animals also have honor and dignity which could not be arbitrarily deprived of and their rights and privacy have to be respected and protected from unlawful attacks. Referring to the Universal Declaration of Animal Welfare (UDAW) the Court noted that it was a:

campaign led by World Society for the Protection of Animals (WSPA) in an attempt to secure international recognition for the principles of animal welfare. UDAW has had considerable support from various countries, including India. WSPA believes that the world should look to the success of the Universal Declaration of Human Rights (UDHR) to set out what UDAW can achieve for animals. Five freedoms referred to in UDAW ...find support in PCA Act and the rules framed thereunder to a great extent World Health Organization of Animal Health (OIE), of which India is a member, acts as the international reference organisation for animal health and animal welfare. OIE has been recognised as a reference organisation by the World Trade Organisation (WTO) and, in the year 2013, it has a total of 178 member countries. On animal welfare, OIE says that an animal is in good state of welfare if (as indicated by Scientific evidence) it is healthy, comfortable,

49 *Id.* ¶¶ 49-50.

well nourished, safe, able to express innate behaviour and if it is not suffering from unpleasant states such as pain, fear and distress.⁵⁰

Decision

The Court held that AWBI was right in its stand that *Jallikattu*, Bullock-cart race and such events per se violate the PCA Act. The Court, consequently, held that the Bulls could not be used as performing animals, either for the *Jallikattu* events or Bullock-cart races in the country. The Court directed the Government to take steps to prevent the infliction of unnecessary pain or suffering on the animals, since their rights had been statutorily protected. The Court also directed the AWBI and the Governments to take steps to educate people in relation to human treatment of animals inculcating the spirit of Articles 51A (g) & (h) of the Constitution.⁵¹ The Court also hoped that the Parliament would elevate rights of animals to that of constitutional rights, as done by many of the countries around the world so as to protect their dignity and honour.

JAPAN

CONSERVATION OF FISHERY RESOURCES – SUSTAINABLE DEVELOPMENT OF FISHERIES – SOUTH INDIAN OCEAN

Southern Indian Ocean Fisheries Agreement

On 17 June 2014, Japan acceded to the 2006 Southern Indian Ocean Fisheries Agreement by depositing its instrument of accession to the Food and Agriculture Organization of the United Nations (FAO) Director-General. Japan does not require new legislation for the implementation of the Agreement. The objectives of the Agreement are to ensure the long-term conservation and sustainable use of the fishery resources in the South Indian Ocean and to promote the sustainable development of fisheries, taking into account the needs of developing States, in particular the least-

50 *Id.* ¶¶ 52-53.

51 Articles 51A(g) & (h) of the Indian Constitution, provide, respectively: “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures ...to develop the scientific temper, humanism and the spirit of inquiry and reform.”

developed and small island developing States. The Agreement came into effect in Japan on 17 July 2014.

BALLAST WATER MANAGEMENT – HARMFUL AQUATIC ORGANISMS

International Convention for the Control and Management of Ships' Ballast Water and Sediments

On 10 October 2014, Japan deposited its instrument of accession to the International Maritime Organization (IMO) Secretary-General in London. The Convention aims to prevent the spread of harmful aquatic organisms from one region to another, by establishing standards and procedures for the management and control of ships' ballast water and sediments. Upon depositing its document of accession, Japan made a declaration reserving the right to perform its obligations on the ballast water management for ships under the provisions of regulation B-3 of the Annex to the Convention in accordance with the recommendations in Resolution A. 1088(28) adopted by the Assembly of the IMO. Prior to the accession, Japan enacted an Act that revises a part of the Act relating to the Prevention of Marine Pollution and Maritime Disaster and revised relevant cabinet orders and ministerial ordinances.

Extradition

PHILIPPINES

EXTRADITION – TREATIES CONCURRED IN BY THE PHILIPPINE SENATE IN 2014

Extradition Treaty Between the Government of the Republic of the Philippines and the Government of the United Kingdom of Great Britain and Northern Ireland

The Extradition Treaty between the Philippines and the Government of the United Kingdom of Great Britain and Northern Ireland was signed on 18 September 2009 in London and ratified by the Philippine Senate on 25 February 2014. It strengthens the bilateral cooperation between the Contracting States in the investigation, prosecution, and suppression of crimes, particularly transnational crimes. It provides for the general

obligation between the Contracting Parties to extradite to the other, in the circumstances and subject to the conditions specified in the Treaty, persons whom the authorities in the Requesting State have charged with or convicted of an extraditable offense.

Extradition Treaty Between the Government of the Republic of the Philippines and the Government of the Republic of India

In response to the increasing frequency of transnational crimes, such as terrorism, money laundering, corruption, human trafficking, as well as other violations of human rights, the Philippine Senate concurred in the ratification of the extradition treaty between Philippines and the Republic of India. It was signed on 12 March 2004 during the first Philippines-India Security Dialogue held in Manila. Article 21 of the Treaty provides that it shall enter into force on the date of the exchange of instruments of ratification.

The Treaty provides for the general obligation between the Contracting Parties to extradite to each other, in accordance with the provisions of the Treaty, any person who is wanted for prosecution, imposition, or enforcement of a sentence in the Requesting State for an extraditable offense. It lays substantive provisions on the extraditable offenses, exceptions, and basis for refusal of requests for extradition. Standard procedural provisions are included.

Human Rights

INDIA

RIGHTS OF TRANSGENDER COMMUNITY – NATIONAL AND INTERNATIONAL LEGAL REGIMES RECOGNIZING THEIR RIGHTS – HISTORY AND STATUS OF TRANSGENDER COMMUNITY IN INDIA

***National Legal Services Authority v. India* [Supreme Court of India, 15 April 2014]**

Facts

In this case, the Court dealt with the grievances of the members of the Transgender (TG) community who sought a legal declaration of their gender identity than the one assigned to them, which is either as male or

female, at the time of birth. They argued that non-recognition of their gender identities violated Articles 14 and 21 of the Constitution of India.⁵² Hijras/eunuchs, who also fall in this group, claimed legal status as a third gender with all legal and constitutional protection.

Summary of the Judgment

The Court, after considering the historical details of the existence of the TG community in India referred to various international conventions and instruments that provided them with certain basic rights. The Court, *inter alia*, pointed out:

United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to life and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity.⁵³

52 Article 14 provided for equality before law and Article 21 provided for the right to life.

53 Nat'l Legal Services Auth. v. India, (2014) 5 SCC 438, ¶ 21 (India).

The Court referred to the Yogyakarta Principles. These were, briefly, (1) The Right to Universal Enjoyment of Human Rights, including human beings of all sexual orientations and gender identities; (2) The Rights to Equality and Non-Discrimination; (3) The Right to Recognition before the Law; (4) The Right to Life; (5) The Right to Privacy; (6) The Right to Treatment with Humanity while in Detention; (7) Protection from Medical Abuses; and (8) The Right to Freedom of Opinion and Expression. The Court also noted that UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity.

Besides these, the Court also noted that various countries, including those in the European Union, that had given recognition to the gender identity of such persons, mostly in cases where transsexual persons started asserting their rights. The Court referred to various cases in several jurisdictions, in particular, United Kingdom, Germany, New Zealand, Australia and Malaysia. The Court also referred to a case in Nepal and Pakistan and noted the necessity of recognizing the historical context of the presence of transsexuals in the neighbouring countries as well. The Court also took note of the decision of the European Court of Human Rights in the case of *Christine Goodwin v. United Kingdom* (2002) that dealt with an application alleging violation of certain basic human rights and fundamental freedoms in respect of legal status of transsexuals in the United Kingdom and particularly their treatment in the sphere of employment, social security, pensions and marriage.

After referring to the Indian scenario, in particular, the plight of the transsexuals within the Indian society, the Court turned to India's obligations under various international conventions. The Court, again noted:

International Conventions and norms are significant for the purpose of interpretation of gender equality. Article 1 of the Universal declaration on Human Rights, 1948, states that all human-beings are born free and equal in dignity and rights. Article 3 of the Universal Declaration of Human Rights states that everyone has a right to life, liberty and security of person. Article 6 of the International Covenant on Civil and Political Rights, 1966 affirms that every human-being has the inherent right to life, which right shall

be protected by law and no one shall be arbitrarily deprived of his life. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights provide that no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment. United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (dated 24th January, 2008) specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para 21 of the Convention states that States are obliged to protect from torture or ill-treatment all persons regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contests of State custody or control. Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights state that no one shall be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence.”⁵⁴

Decision

The Court, based on the above national and international legal considerations, concluded that:

there seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. The Constitution has fulfilled its duty of providing rights to transgenders. Now it is time to recognize, extend and interpret the Constitution in a manner that ensures a dignified life for the TG community. All this can be achieved if the beginning is made with the recognition that TG as third gender.⁵⁵

The Court, *inter alia*, declared that:

(1) Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature. (2) Transgender persons’ right to decide their self identified gender is also upheld and the Centre and State Govern-

54 *Id.* ¶ 47.

55 *Id.* ¶ 114.

ments are directed to grant legal recognition of their gender identity such as male, female or as third gender.⁵⁶

**SCOPE OF RIGHT TO LIFE IN THE CONTEXTS OF DELAY IN
EXECUTION OF DEATH SENTENCE DUE TO SUPERVENING
CIRCUMSTANCES – COMMUTATION OF DEATH SENTENCE TO
LIFE IMPRISONMENT AND ITS SCOPE UNDER INTERNATIONAL
COVENANTS AND UNITED NATIONS RESOLUTIONS**

***Shatrughan Chauhan v. India* [Supreme Court of India, 21 January 2014]**

Facts

The issue before the Court related to the legal and constitutional validity of delayed execution of death sentences. In some cases, delays were more than ten years after confirmation by the competent appellate court. These delays had occurred due to various reasons at the time of consideration of mercy petitions before the President of India (and also the Governors of the States) as per Articles 72 and 161 of the Indian Constitution. The Court attributed these delays to what it termed as “supervening circumstances.”⁵⁷ The Court examined this in the context of Article 21 of the Indian Constitution which provided that every human being has an inherent right to life and mandated that no person should be deprived of his life or personal liberty except according to procedures established by law. The Court also noted that over the years it had “expanded the horizon of ‘right to life’ guaranteed under the Constitution to balance with the progress of human life.” The petitions filed before the Court prayed for the issuance of a writ declaring the delayed execution of sentence of death pursuant to the rejection of mercy petitions by the President of India as unconstitutional and to set aside the death sentence imposed by commuting the same to life imprisonment.

Summary of the Judgment

The Court noted that:

56 *Id.* ¶ 129.

57 Delay, Insanity, Solitary Confinement, Judgment declared per incuriam and procedural delays were broadly identified as “supervening circumstances” and the Court went on to examine each of these separately.

[T]he petitioners herein justly elucidated that they are not challenging the final verdict of this Court wherein death sentence was imposed. In fact, they asserted in their respective petitions that if the sentence had been executed then and there, there would have been no grievance or cause of action. However, it wasn't and the supervening events that occurred after the final confirmation of the death sentence are the basis of filing these petitions.⁵⁸

The Court further noted:

In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is unexcusable. Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanizing effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence.⁵⁹

After referring to its own jurisprudence in the last three decades, the Court also referred to several international legal developments in which India was also a part of. It, *inter alia*, stated:

India is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR). A large number of United Nations international documents prohibit the execution of death sentence on an insane person. Clause 3(e) of the Resolution 2000/65 dated 27.04.2000 of the U.N. Commission on Human Rights titled "The Question of Death Penalty" urges "all States that still maintain the death penalty ...not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."⁶⁰

The Court also referred to the Report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Execution, 1996 by the UN Commission on Human Rights and specifically referred to the caption "Restrictions on the use of death penalty" which, *inter alia*, stated that "the imposition of capital punishment on mentally retarded or insane persons, pregnant

58 Chauhan v. India, (2014) 3 SCC 1, ¶ 8 (India).

59 *Id.* ¶ 43.

60 *Id.* ¶ 73.

women and recent mothers is prohibited.” The Court also noted that while enforcing such legislation with respect to minors and the mentally ill, States were particularly called upon to bring their domestic criminal laws into conformity with international legal standards. Referring to the United Nations General Assembly Resolution adopted in its Sixty-Second Session on 18 December 2007 on the issue of moratorium on the use of death penalty, the Court referred to the various minimum standards that were to be applied to provide safeguards guaranteeing protection of the rights of those facing death penalty.

Decision

The Court concluded that the directions of the UN international conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia are crucial supervening circumstances, which should be considered by this Court in deciding whether in the facts and circumstances of the case, death sentence could be commuted to life imprisonment.

The Court, noting that the mercy jurisprudence was a part of evolving standard of decency which was the hallmark of the society, commuted the death sentences of fifteen convicts to life imprisonment.

JAPAN

DISCRIMINATION BASED ON CREED – ICCPR – INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION – DIFFERENTIAL TREATMENT OF FOREIGN NATIONALS UNDER STATE REDRESS ACT

***X v. Japan* [Not yet published in the official proceedings, 2215 Hanrei-Jihō 30. 15 January 2014; Tokyo District Court]**

In this case, the Tokyo District Court ordered the Tokyo Metropolitan Government to pay damages to the plaintiffs who suffered infringement of privacy and defamation from the leak of personal information gathered through counterterrorism investigations onto the internet. In relation to validity of Article 6 of the State Redress Act, the Court interpreted Article 2(3) of ICCPR and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination as not prohibiting differential treatment between Japanese nationals and foreign nationals.

Facts

The plaintiffs, 17 Muslim residents in Japan consisting of four Japanese and 13 individuals from Algeria, Iran, Tunisia and Morocco brought a case against Japan and the Tokyo Metropolitan Government for their joint tort liability for the allegedly illegal counterterrorism investigations conducted by the National Police Agency and Tokyo Metropolitan Police Department. The plaintiffs argued that the surveillance targeting Muslims entering mosques and the collection of their personal information violated freedom of religion enshrined under Article 20 of the Japanese Constitution and Article 18(2) of the International Covenant on Civil and Political Rights (ICCPR). According to the plaintiffs, such policing activities also fell within the meaning of discrimination based on creed under Article 14(1) of the Japanese Constitution. The plaintiffs further asserted that the collection, maintenance and utilization of the personal information gathered through the investigations infringed on the right to control one's own information guaranteed under Article 13 of the Japanese Constitution as well as the Act on the Protection of Personal Information Held by Administrative Organs (Act No. 58 of 2003) and the Ordinance on the Protection of Personal Information of the Tokyo Metropolitan Government (Ordinance No. 113 of 1990).

Furthermore, the plaintiffs claimed that the defendants failed to take appropriate measures when the personal information gathered during the investigations was leaked onto the internet. The 114 leaked documents included detailed personal information of the plaintiffs such as their names, birth places and dates, photos, passport numbers, physical characteristics, family information, occupations, frequency of entering mosques, friendships, addresses and contacts. The data were downloaded to more than 10,000 computers in over 20 countries and regions through file-sharing software.

The case also concerned constitutionality of Article 6 of the State Redress Act (Act No. 125 of 1947), which stipulates that “[i]n cases where the victim is a foreign national, this Act shall apply only when a mutual guarantee exists.”⁶¹ According to the plaintiffs, this Article should be

61 Kokkabaishōhō [State Redress Act], Law No. 125 of 1947, art. 6, translated in (Japanese Law Translation [JLT DS]), www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=1933 (Japan).

invalid as it conflicts with Article 17 of the Japanese Constitution protecting every person's right to seek redress from the State or a public entity for damage caused by illegal acts of any public official. They further asserted that Japan was under obligation to ensure an effective remedy to any person whose rights or freedoms are violated under ICCPR (Art. 2(3)) and the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 6).

Judgment

The Tokyo District Court opined that infringement of freedom of religion by the State occurs when there is an element of coercion such as a disparate treatment, *de jure* or *de facto*, by the State due to one's religion or when the practice of one's religion is coerced, prohibited or restricted by the State. The Court found that there was no such element of coercion in the counterterrorism investigations in the case. The Court further found that, in view of widespread international terrorism by Muslim extremists, counterterrorism investigations such as the surveillance of Muslims entering mosques were within the general duty of maintaining public safety and order, and were necessary for the purpose of preventing international terrorism. It thus declared that the collection, maintenance and utilization of personal information obtained through the counterterrorism investigations could not be regarded as a violation of the Japanese Constitution and other relevant laws and regulations of Japan.

The Court, however, admitted that the Tokyo Metropolitan Government breached its due diligence obligation in controlling the information gathered through the counterterrorism investigations. The Court accordingly ordered the Tokyo Metropolitan Government to pay damages for mental distress that the plaintiffs suffered from infringement of privacy and defamation caused by the leak.

With regard to the question concerning validity of Article 6 of the State Redress Act, the Court stated that the purpose of Article 6 was reasonable as it was based on the concept of equity in situations where Japanese nationals had no right to claim damage in foreign countries. In the Court's reasoning, Japan needs not be responsible for damage suffered by a foreign national of a country that does not guarantee the same right to a Japanese national. The Court, therefore, interpreted Article 2(3) of ICCPR and Article 6 of the International Convention on the Elimination

of All Forms of Racial Discrimination as not prohibiting differential treatment between Japanese nationals and foreign nationals. It concluded that mutual guarantees existed between Japan and the plaintiffs' countries of origin, and therefore, the plaintiffs were entitled to claim for damage under Article 1(1) of the State Redress Act.

**HATE SPEECH – INTERNATIONAL CONVENTION ON THE
ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION –
DISCRIMINATION AGAINST MEMBERS OF MINORITY GROUPS**

***Citizens Group That Will Not Forgive Special Privileges for Koreans in Japan v. Kyoto Chōsen Gakuen* [Not yet published in the official proceedings, 2232 Hanrei-Jihō 34. 8 July 2014; Osaka High Court]**

The Osaka High Court determined that the statements made by the appellant against a Korean school constituted racial discrimination as defined under the International Convention on the Elimination of All Forms of Racial Discrimination. The Court ordered the appellant to pay damages to the appellee in accordance with Article 709 of the Civil Code.

Facts

The members of the Citizens Group That Will Not Forgive Special Privileges for Koreans in Japan held anti-Korean demonstrations near a Korean elementary school on three occasions between 2009 and 2010. They chanted anti-Korean slogans by using loud speakers outside the school and later posted videos of their demonstrations on the internet.

The school operator, Kyoto Chōsen Gakuen, brought a case against the group before the Kyoto District Court, requesting the Court to order an injunction to stop the demonstrations and to order the defendant to pay damages to the plaintiff. In October 2013, the Court determined that the defendant was liable for disturbing the educational activities of the school and damaging the school's reputation by publicizing the videos on the internet.

In the appeal before the Osaka High Court, the appellant (defendant in the first trial) claimed that the statements expressed during the demonstrations were political opinions on policies concerning foreigners and immigrants, which were within the scope of freedom of expression. They further argued that the demonstrations were held for the purpose of criti-

cizing the unlawful occupation of the park by the appellee (plaintiff in the first trial) and helping reconstruct the legal order of the local community.

Judgment

The Osaka High Court dismissed the appeal by determining that the statements made in the demonstrations were beyond the permissible scope of freedom of expression and constituted racial discrimination as defined under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination. The Court stated that it was obvious that the demonstrations were held in order to escalate prejudice and discrimination in the community towards the Korean school. It opined that the degree of mental damage of the school children who suffered absurdity of racial discrimination was enormous.

Concerning the applicability of the International Convention on the Elimination of All Forms of Racial Discrimination, the Court held that the Convention could not be applied directly to the relationship between private individuals. The object and purpose of the Convention, however, could be realized through the interpretation and application of Article 709 (damages in torts) of the Civil Code of Japan in harmonization with principles of the Japanese Constitution and the principle of private autonomy.

DISCRIMINATION BASED ON GENDER IDENTITY - ICCPR – LIMITATION TO FREEDOM OF ASSOCIATION – PERSONS WITH GENDER IDENTITY DISORDER

***X v. Hamanako Kankō Kaihatsu Kabushiki Gaisha* [Not yet published in the official proceedings, 2243 Hanrei-Jjhō 67. 8 September 2014; Shizuoka District Court]**

In this case, the Shizuoka District Court determined that the denial of the golf club membership because of the plaintiff's sex change was beyond the socially permissible level and ordered the defendants to pay damages for mental distress suffered by the plaintiff. The Court referred to Article 26 of ICCPR in determining whether the defendants' act was beyond the socially permissible level under tort law.

Facts

The plaintiff (the first plaintiff, the same applies hereafter) who was diagnosed with gender identity disorder and changed her registered sex from

male to female in accordance with Article 3(1) of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (Act No. 111 of July 16, 2003, hereinafter GID Act) applied for membership of a shareholders-only golf club. The application process consisted of submitting required documents including a copy of *koseki* and having an interview, accompanied by two referees, with the director of the golf club. The defendants – the managing company and operator of the golf club – refused to grant the plaintiff a membership, after having noticed the sex change indicated on the copy of plaintiff's *koseki* submitted for the application. No interview was held and the reasons for denial of membership were not disclosed to the plaintiff despite her request.

The plaintiff asserted that the acts of defendants constituted discrimination based on illness and social status. She claimed that such discrimination was contrary to public policy under Article 90 of the Civil Code, which comprised the object and purpose of Article 14(1) of the Japanese Constitution, Article 26 of the International Convention on Civil and Political Rights (ICCPR), and the GID Act. The defendants maintained that they had freedom of association, including the freedom to choose their constituting members under Article 21(1) of the Japanese Constitution. They also argued that the admission of the plaintiff to the golf club would upset the other members, especially as the plaintiff would use the women's bathrooms.

Judgment

The Shizuoka District Court found that the acts of denial of membership by the defendants were beyond the socially permissible level in the light of the object and purpose of Article 14(1) of the Japanese Constitution and Article 26 of ICCPR. As to why unfair treatment against persons with GID constituted a part of public policy, the Court reasoned that, at the time when the golf club refused membership to the plaintiff, eight years had passed since the GID Act went into effect and gender identity disorder was clearly recognized as a medical illness. The Court recognized that the plaintiff suffered immense mental damage from being denied her identity.

In this case, the Court followed the jurisprudence of other Japanese courts by admitting that the Japanese Constitution and ICCPR do not apply to the relationship between private individuals. They can, however,

be regarded as providing standards when considering tort liability under Article 709 of the Civil Code.

**CHANGE OF SURNAME AFTER MARRIAGE – CONVENTION ON THE
ELIMINATION OF ALL FORMS OF DISCRIMINATION
AGAINST WOMEN – GENDER EQUALITY**

***X v. Japan* [Not yet published in the official proceedings. 28 March 2014; Tokyo High Court]**

The Tokyo High Court held that the rule requiring a married couple to adopt either the husband's or wife's original surname under Article 750 of the Civil Code was constitutional. The Court determined that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not have self-executing force, and therefore, cannot be applied directly to the case.

Facts

The appellants (plaintiffs in the first trial) challenged constitutionality of Article 750 of the Civil Code, which stipulates the requirement that a married couple must adopt either the husband's or wife's original surname. They argued that Article 750 of the Civil Code infringed on the right to maintain one's surname under Articles 13 of the Japanese Constitution and freedom of marriage under Article 24 of the Constitution, and violated Article 16(1)(b) and (g) of CEDAW. They asserted that Japan was liable for failing to take legislative actions for a long period of time, and therefore it should pay damages to the appellants based on Article 1(1) of the State Redress Act. The Tokyo District Court dismissed the plaintiffs' claim on 29 May 2013.

Judgment

The Tokyo High Court upheld the constitutionality of the rule under Article 750 of the Civil Code. While the Court acknowledged that one's full name is one's personal right, it expressed its view that one's surname is given and changed subject to the rules under the Civil Law, and therefore is not within the freedom guaranteed under the Japanese Constitution as one of natural rights. The Court observed that the practice of the world was that the change of surnames varied depending on the country's do-

mestic law (including customary law) based on the nation's opinions and values. From this perspective, the Court emphasized that, even though the CEDAW Committee recommended Japan to revise Article 750 of the Civil Code, the public opinion among Japanese nationals positively supported the change of surname after marriage. The Court concluded that the right to maintain one's surname – the right not to be coerced with the change of one's surname – had not yet become a concrete right to be guaranteed under Article 13 of the Japanese Constitution. The Court further interpreted that Article 24 of the Japanese Constitution concerns the prohibition of unfair treatment between husband and wife, and therefore does not prescribe that husband and wife always should have the same right in every legal relationship.

With regard to the applicability of Article 16(1)(b) and (g) of CEDAW, the Court's view was that the Convention does not have self-executing force, and therefore does not apply directly to Japanese nationals. The Court stated that the recommendation to revise Art. 750 of the Civil Code of Japan by the CEDAW Committee cannot affect its conclusion that the legislative purpose of Article 750 of the Civil Code to maintain the unit of a family is legitimate and that the means to achieve that legislative purpose is appropriate.

CHILD ABDUCTION – INTERNATIONAL MARRIAGE – RIGHTS OF CUSTODY – RIGHTS OF ACCESS

Convention on the Civil Aspects of International Child Abduction, 24 January 2014

On 24 January 2014, Japan signed the 1980 Convention on the Civil Aspects of International Child Abduction (The Hague Convention) and deposited the instrument of acceptance to the Ministry of Foreign Affairs of the Netherlands. The Hague Convention aims to protect children from the harmful effects of their wrongful removal or retention, to establish procedures to ensure their prompt return to the State of their habitual residence, and to secure protection for rights of custody and of access. Prior to the conclusion of The Hague Convention, Japan enacted the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (Act no. 48 of 2013). Considering child abduction cases related to domestic violence, the Act adds a new rule and stipulates that

the court, when considering reasons not to order the return of a child, examine the risk of the child being subjected to violence and other acts that cause physical or psychological harm. The Hague Convention came into effect in Japan on 1 April 2014.

**PERSONS WITH DISABILITIES – DISCRIMINATION – EQUAL
ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOM**

Convention on the Rights of Persons with Disabilities, Signed 28 September 2007, Ratified 20 January 2014

On 20 January 2014, Japan deposited the instrument of ratification of the 2006 Convention on the Rights of Persons with Disabilities. The Convention promotes, protects and ensures the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. Prior to the ratification, Japan revised the Basic Act for Persons with Disabilities (Act No. 84 of 1970) and Act on the Promotion of Employment of Persons with Disabilities (Act No. 123 of 1960), and newly enacted the Act on the Comprehensive Support for Persons with Disabilities (Act No. 123 of 2012) and Act on the Elimination of Discrimination against Persons with Disabilities (Act No. 65 of 2013). The Convention came into effect in Japan on 19 February 2014.

KOREA

**HUMAN RIGHTS – THE CONVENTION RELATING TO
THE STATUS OF REFUGEES**

Decision of Supreme Court Concerning the ‘Revocation of Disposition of Refugee Status Non-recognition’

Supreme Court – Judgment regarding assessment of credibility of statements by refugee status applicants. Daebeobwon [S. Ct.], 2013Du14269, March 10, 2016 (S. Kor.)

Facts

The plaintiff was a national of the People’s Republic of Bangladesh, who joined the anti-government activities of the Parbattya Chattogram Jana Samhati Samiti (hereinafter “JSS”) and the United People’s Democratic

Front (hereinafter “UPDF”) as a member of the indigenous Jumma tribe of the Chittagong Hill Tracts of Bangladesh. He “enter[ed] Korea on September 7, 2007, and applied to the [d]efendant [(Minister of Justice, Republic of Korea)] for recognition of refugee status on grounds of a well-founded fear of being persecuted ... [for reasons of] race, political orientation, etc., if he were to return to Bangladesh.”⁶² But the defendant rejected the application “following the determination that the [p]laintiff’s grounds for refugee recognition did not constitute a ‘well-founded fear of being persecuted’”⁶³ under Article 1 of the Refugee Convention. The plaintiff then brought a lawsuit seeking revocation of the disposition.

Issues

This case deals with “(1) the [m]ethod of assessing the credibility of a statement by a refugee applicant and the requirements for recognizing it,” and (2) “the method of proving the authenticity of a foreign official document submitted by a refugee applicant.”⁶⁴

Judgment

The Supreme Court ruled that it was difficult to recognize the credibility of the plaintiff’s statement on the actuality or possibility of persecution based on the following reasoning: “[A] statement shall: (a) contain concrete facts to such an extent as to sufficiently recognize the refugee applicant’s allegations on the face of the statement; (b) without any omission of material facts; (c) have consistency and persuasive power, standing alone; and (d) conform to the contents of other evidence.”⁶⁵

Comment

In this case, the Supreme Court confirmed that the applicant bears the burden of proving the existence of a well-founded fear of persecution. If there is special circumstance that makes it difficult for the applicant to col-

62 Supreme Court [S. Ct.], 2013Du14269, March 10, 2016 (S. Kor.), translated in Supreme Court Library of Korea online database, [http://library.scourt.go.kr/SCLIB_data/decision/9-ph-2013Du14269_\(RefAppStmtCred\).htm#article_356_1](http://library.scourt.go.kr/SCLIB_data/decision/9-ph-2013Du14269_(RefAppStmtCred).htm#article_356_1).

63 *Id.*

64 *Id.*

65 *Id.*

lect evidence, s/he is not “required to prove the entirety of the alleged facts by objective evidence.”⁶⁶ Rather, the facts shall be “deemed to have been proven when it is reasonable to recognize them based on the credibility of the totality of the statements.”⁶⁷ Furthermore, the Court confirmed that:

in assessing the statement by a refugee applicant, the overall credibility of the statement shall not be denied for the mere reason of discovering slight inconsistencies in the details of the statement ...[or detecting some exaggeration]. Rather, the overall credibility [should] be assessed by [focusing] on the essential content of the statement ...[and considering] ...the emotional shock from experiences of genuine persecution, unsound psychological condition due to the applicant’s distress, limitations in memory due to the passage of time, and [difference in] sense of language arising from a cultural and historical background[s]⁶⁸

VIETNAM

HUMAN RIGHTS – TREATIES AND CONVENTIONS – CONVENTION AGAINST TORTURE AND INHUMAN TREATMENT – OCCUPATIONAL SAFETY AND HEALTH PROMOTION

Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

On November 7, 2013, Vietnam signed the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Convention Against Torture”), which is one of the nine fundamental international conventions on human rights.⁶⁹ Vietnam had the Convention ratified by the National Assembly on November 28, 2014. “This makes Vietnam the 81st signatory to the [Convention],” as well as “reaffirming Vietnam’s unwavering commitment to prevent all acts of torture and

66 *Id.*

67 *Id.*

68 *Id.*

69 Convention Against Torture was adopted by the UN General Assembly on December 10, 1984 and it came into force on June 26, 1987.

cruel, inhuman or degrading treatment of persons and to better protect and promote fundamental human rights.”⁷⁰

Most of the provisions of the Convention Against Torture deal with the obligations of the States parties in relation to torture and cruel criminal punishment. These obligations may be summarized as follows:

- (i) Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture. The prohibition against torture shall be absolute and shall also be upheld in a state of war and other exceptional circumstances;⁷¹
- (ii) No State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture;⁷²
- (iii) Each State party shall ensure that acts of torture are serious criminal offences within its legal system;⁷³
- (iv) Each State party shall, on certain conditions, take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts;⁷⁴
- (v) Each State party shall either extradite a person suspected of the offence of torture or submit the case to its own authorities for prosecution;⁷⁵
- (vi) Each State party shall ensure that its authorities make investigations when there is reasonable ground to believe that an act of torture has been committed;⁷⁶

70 Statement by Ambassador Trung at the United Nations Headquarters for the Convention Against Torture, (Nov. 7, 2013), VIETNAM BECOMES 81ST SIGNATORY TO UNCAT, <https://en.vietnamplus.vn/vietnam-becomes-81st-signatory-to-uncat/51797>.

71 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

72 *Id.* art. 3.

73 *Id.* art. 4.

74 *Id.* art. 6.

75 *Id.* art. 7.

76 *Id.* art. 12.

- (vii) Each State party shall ensure that an individual who alleges that he has been subjected to torture will have his case examined by the competent authorities;⁷⁷
- (viii) Each State party shall ensure to victims of torture an enforceable right to fair and adequate compensation.⁷⁸

The Convention Against Torture aims to prevent in-human torture in any territory under the jurisdiction of State parties and “forbids states to transport people to any country where there is reason to believe they will be tortured.”⁷⁹ Parties to the Convention shall commit to improve the prevailing laws and mechanisms that prevent and protect people from torture. Specifically, they are required to train and educate their “law enforcement personnel, civilian or military personnel, medical personnel, public officials, and other persons . . .involved in the custody, interrogation, or treatment of any individual subjected to any form of arrest, detention, or imprisonment,” regarding the prohibition against torture.⁸⁰

Article 11 of the Convention Against Torture specifies that States must keep interrogation rules, instructions, methods, and practices under systematic review regarding individuals who are under custody or physical control in any territory under their jurisdiction, in order to prevent all acts of torture.⁸¹

The ratification of the Convention Against Torture shows the “consistent policy of the State of Vietnam to respect, protect and promote human rights in accordance with international standards. This is also a concrete step in the process of proactive international integration of Vietnam” and

77 *Id.* art. 13.

78 *Id.* art. 14; Hans Danelius, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (Dec. 10, 1984), <http://legal.un.org/avl/ha/catcidtp/catcidtp.html>.

79 Vietnam Joins the UN Convention Against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment, EMBASSY OF THE SOCIALIST REPUBLIC OF VIETNAM (Nov. 8, 2013, 2:30 PM), <http://vietnamembassy-usa.org/news/2013/11/vietnam-joins-un-convention-against-torture-and-other-cruel-inhuman-or-degrading>.

80 Convention Against Torture, *supra* note 71, art. 10.

81 *Id.* art. 11.

affirms that the country is a responsible member of the UN on the issues of international concern.⁸²

Ratification of the Promotional Framework for Occupational Safety and Health Convention

On January 23, 2014, Vietnam ratified the Promotional Framework for Occupational Safety and Health Convention (the “Convention No. 187”),⁸³ one of the International Labour Organisation’s essential instruments in safety and health at the workplace.

The ratification of Convention No. 187 is considered as Vietnam’s efforts and determination in striving for a “preventive culture” to make the workplace safer and is part of a “process of improvement” which also involves employer-worker dialogues and better labour inspection. In addition, it also helps the law-making process in the area of safety and health at work in the coming time, especially as the country is going ahead with the draft Law on Work Safety and Health and joining the Trans-Pacific Partnership negotiations. “Viet Nam is the third country in Southeast Asia and the fifth in Asia to ratify Convention 187, after Singapore, Malaysia, Japan and South Korea.”⁸⁴ Since 2012, Vietnam has become a party to three most important international labor conventions, including Convention No. 187, Employment Policy Convention (Convention 122) and Maritime Labor Convention (MLC 2006).

82 Vietnam Always Acts Against Torture, Cruel Treatment: Official, TUOI TRE NEWS (Dec. 9, 2014, 5:39 PM), <https://tuoitrenews.vn/politics/24554/vietnam-always-acts-against-torture-cruel-treatment-official>.

83 The Promotional Framework for Occupational Safety and Health Convention concluded in 2006, which entered into force in 2009.

84 Viet Nam Ratifies ILO Convention, Showing Strong Commitment to Work Safety, UNITED NATIONS – VIET NAM (Mar. 12, 2014), <http://www.un.org.vn/en/feature-articles-press-centre-submenu-252/3053-viet-nam-ratifies-ilo-convention,-showing-strong-commitment-to-work-safety.html>.

International Economic Law

VIETNAM

**REGIONAL INTEGRATION – TRADE IN SERVICES – MUTUAL
RECOGNITION ARRANGEMENT – CLMV SUMMIT JOINT STATEMENT
– ASEAN COMPREHENSIVE INVESTMENT
AGREEMENT AMENDMENT**

**Agreement on Trade in Services Under the Framework Agreement on
Comprehensive Economic Cooperation Between ASEAN and the Re-
public of India**

On July 25, 2014, Vietnam signed the Agreement on Trade in Services (the “ATS”) under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the Republic of India. The Agreement applies to measures by the parties affecting trade in services, except those supplied in the exercise of the governmental authority within the territory of each party; the procurement by governmental agencies of services purchased for governmental purposes and not with the view to commercial resale or to use in the supply of services for commercial resale, and cabotage in maritime transport services.⁸⁵ As can be seen from the Schedule of Specific Commitments For the First Package of Commitments under ASEAN–India Agreement on Trade in Services by Vietnam, the country provides open commitments in some areas of the Professional Services and Tourism and Travel Related services, while still maintains some certain restrictions on Banking and Other Financial Services and Transport Services.

**ASEAN Mutual Recognition Arrangement Framework on Accountancy
Services**

On July 25, 2014, Vietnam signed the ASEAN Mutual Recognition Arrangement Framework on Accountancy Services, which was concluded by the ASEAN countries since 2009. Mutual Recognition Arrangements (MRAs) are framework arrangements established in support of liberalising

85 Agreement on Trade in Services Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India art. 1(2), Oct. 8, 2003.

and facilitating trade in services, aiming to facilitate mobility of professional, skilled labor in ASEAN.

In this framework, Accountancy Services refers to the activities covered under the Central product Classification (CPC) 862 of the Provisional CPC of the United Nations as well as other accountancy related services or services incidental to an Accountancy Services provider.⁸⁶ By taking part in this MRA framework, Vietnam and other ASEAN members will recognize that education, licenses, demonstration of competencies and experience are the principal elements which should be taken into account in granting mutual recognition.⁸⁷

Joint Statement of the 8th Lao PDR – Myanmar – Viet Nam Cooperation Summit

On October 26, 2016, Heads of State/Government of the Kingdom of Cambodia, the Lao People's Democratic Republic (Lao PDR), the Republic of Union of Myanmar and the Socialist Republic of Viet Nam (hereinafter referred to as CLMV) gathered in Hanoi, Viet Nam for the Joint Statement of the 8th Lao PDR – Myanmar – Viet Nam Cooperation Summit, with the witness of The Secretary-General of the Association of Southeast Asian Nations (ASEAN), Under-Secretary-General of the United Nations, Executive Secretary of the ESCAP, representatives of the Asian Development Bank (ADB) and the World Bank (WB).

With the objective to “Seize Opportunities, Shape the Future,” the four countries recognized the essence to enhance regional connectivity and improving competitiveness to link the four economies and markets closer together in the areas of (i) transportation, (ii) trade and investment, (iii) industry, (iv) tourism, (v) human resource development and (vi) other areas such as agriculture and energy.⁸⁸

In *Transport Cooperation*, the CLMV agreed to:

86 ASEAN Mutual Recognition Arrangement Framework on Accountancy Services art. 2(1), (2009), http://asean.org/?static_post=asean-mutual-recognition-arrangement-framework-on-accountancy-services.

87 *Id.* art. 3.

88 Joint Statement of the 8th Lao PDR – Myanmar – Viet Nam Cooperation Summit, Oct. 26, 2016 C.L.M.V. 8.

(i) Accelerate the construction of missing links and upgrading roads along the North – South Economic Corridor (NSCE), East – West Economic Corridor (EWEC), and the Southern Economic Corridor (SEC). (ii) Construct the expressway of Vientiane – Hanoi to facilitate the movement of goods and people between the two capitals. (iii) Conduct feasibility study on the route connecting Yangon – Meikhtila – Tarlay – Kenglap (Myanmar) – Xiengkok – Loungnamtha – Oudomxay – Muong Khoa (Lao PDR) – Tay Trang – Hanoi (Viet Nam). (iv) Facilitate air transport through the implementation of the CLMV Agreement on the Air Transport and other bilateral and multilateral agreements on air services.⁸⁹

In *Trade and Investment Facilitation*, the four countries endorsed the Economic Ministers' plan to develop a Framework for CLMV Development and took additional measures, including:

(i) To promote border trade via harmonizing member countries' border trade procedures and developing a network of border markets. (ii) To encourage relevant agencies and business sector to organize and participate in trade fairs and investment conferences in the region. (iii) To facilitate the investment of CLMV enterprises in each other's markets. (iv) To promote cooperation on e-commerce among CLMV through capacity building activities and experience exchanges in developing related policies and legal frameworks.⁹⁰

In *Industrial Cooperation*, the CLMV:

encouraged and promoted the cooperation in the field of industry such as industrial policy development, standardization and conformance, and Small and Medium Enterprise (SME) policy development among CLMV through regular exchanges on information, experience and the best practices by organizing workshops and training courses, which are to aim at strengthening CLMV countries' competitive advantages in the region and global market.⁹¹

In *Tourism Cooperation*, the CLMV countries agreed to take the following actions:

(i) To fully implement the 2016 – 2018 Action Plan on Tourism Cooperation, particularly measures to ensure sustainable and

89 *Id.* ¶ 10.1.

90 *Id.* ¶ 10.2.

91 *Id.* ¶ 10.3.

responsible tourism. (ii) To encourage greater coordination, exchanges of information and experiences among member countries. (iii) To facilitate the participation of CLMV tourism agencies, associations and enterprises in the regional events and fairs. (iv) To promote public – private partnerships, particularly in tourism promotion activities and tourist product development. (iv) To enhance cooperation and promote more air linkages among the CLMV countries.⁹²

In *Human Resource Development Cooperation*, the countries appraised the exchange of scholarships, visits and experiences in education and training among CLMV countries:

(i) To continuously implement the CLMV Scholarship Program funded by the Vietnamese Government for the period of 2016-2020. (ii) To establish a database of labor market's demand and vocational training programs in CLMV countries. (iii) To promote joint programs among CLMV universities, language training institutions and exchange programs between educational leaders, high officials, experts, teachers, administrators and students. (iv) To promote mutual recognition of qualification among CLMV countries through cooperation in establishing national qualification frameworks that are compatible with ASEAN Qualification Reference Framework (AQRF) and European Qualification Reference Framework (EQRF); to develop CLMV mutual recognition arrangement for teachers and vocational trainers; to select priority professions for common core standards development.⁹³

In other areas such as *Agriculture and Energy*, the CLMV noted the “slow progress in the implementation of cooperation projects and initiatives due to resource constraint, and encouraged their Ministers and Senior Officials to identify ways and means for more practical and effective cooperation.”⁹⁴

In conclusion, the CLMV countries agreed that the “9th CLMV Summit will be chaired by the Kingdom of Cambodia and will take place in the Kingdom of Thailand in 2018 back-to-back with the Summit. The specific date and venue will be coordinated through diplomatic channels.”⁹⁵

92 *Id.* ¶ 10.4.

93 *Id.* ¶ 10.5.

94 *Id.* ¶ 10.6.

95 *Id.* ¶ 16.

First Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area

In 2014, the Socialist Republic of Vietnam, together with other ASEAN countries, signed the First Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area.

The First Protocol to amend AANZFTA:

- (a) Removes, for most shipments, the requirement for the FOB value to be included by the exporter on the origin documentation needed to be given to the importer if the latter is to claim AANZFTA tariff treatment when importing goods into an AANZFTA Party.⁹⁶
- (b) Simplifies the presentation of the Rules of Origin (ROO), which should assist business in understanding them and in completing the COO.⁹⁷
- (c) Provides that the Parties will be able to make any agreed administrative changes to the list of data requirements to be included on the COO more expeditiously, and without the need for a treaty amendment.⁹⁸
- (d) Uses the consolidation of the ROO into a single Annex to also implement HS 2012 in AANZFTA's ROO.⁹⁹
- (e) Makes clear the process for future introduction of an updated HS into AANZFTA's ROO.¹⁰⁰
- (f) Provides for the Parties to work together to agree on methodologies and procedures to ensure timely updating of each AANZFTA

96 First Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Jan. 8, 2014, pmbl, ¶ 5.

97 *Id.* at pmbl, art. 3.

98 *Id.*

99 *Id.* art. 1.

100 *Id.*

Party's schedule of tariff commitments from one HS into an updated HS.¹⁰¹

The First Protocol will enter into force for New Zealand and nine of the 12 AANZFTA Parties on October 1, 2015; and the remaining two Parties (Cambodia and Indonesia) are targeting implementation on January 1, 2016.

Jurisdiction

PHILIPPINES

JURISDICTION – NON-JUSTICIABILITY – FOREIGN RELATIONS

Vinuya v. Romulo [G.R. No. 162230. 12 August 2014]

Resolving motions for reconsideration of a previous decision in this case on 28 April 2010, the Supreme Court declared that the conduct of foreign relations is an entirely executive function that is beyond the judicial power of review.

Facts

The petitioners in this case petitioned the Supreme Court to order the Department of Foreign Affairs of the Philippines to pursue their claims for a formal apology, compensation, and reparations against Japan for having been forced to become sexual slaves or “comfort women” of the Imperial Japanese Army during the Second World War. The Supreme Court dismissed the petition on 28 April 2010, but the petitioners moved for reconsideration, arguing that the sexual slavery of “comfort women” constitute war crimes or crimes against humanity that the Executive “has the constitutional duty to afford redress and to give justice to the victims of the comfort women system in the Philippines.”

101 *Id.*

Judgment

The Supreme Court dismissed the motions for reconsideration principally on procedural grounds, and declined to address the petitioners' various arguments based on international law. It summarily dismissed the petition's entreaties for an order against the Executive Branch, noting that the pursuit of the comfort women's claims was entirely a matter of foreign policy and therefore beyond the jurisdiction of the Court. The Court held:

Here, the Constitution has entrusted to the Executive Department the conduct of foreign relations for the Philippines. Whether or not to espouse petitioners' claim against the Government of Japan is left to the exclusive determination and judgment of the Executive Department. The Court cannot interfere with or question the wisdom of the conduct of foreign relations by the Executive Department. Accordingly, we cannot direct the Executive Department, either by writ of certiorari or injunction, to conduct our foreign relations with Japan in a certain manner.¹⁰²

Law of the Sea

JAPAN

CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES – COMMISSION ON THE LIMITS OF CONTINENTAL SHELF

Cabinet Order Prescribing the Areas of the Sea under Article 2(2) of the Act on the Exclusive Economic Zone and the Continental Shelf [Cabinet Order No. 302]

On 9 September 2014, the Cabinet decided to issue a Cabinet Order to add the ocean floor beyond 200 nautical miles to Japan's continental shelf based on the recommendations given by the Commission on the Limits of the Continental Shelf (CLCS) in April 2012. The recommendations of CLCS recognized that about 310,000 square kilometers of the ocean floor was connected to Japan's continental shelf. By the Cabinet Order, 177,000 square kilometers in the Shikoku Basin Region and in the Southern Oki-

102 *Vinuya v. Romulo*, G.R. No. 162230 (S.C., Apr. 28, 2010) (Phil.), sc.judiciary.gov.ph/jurisprudence/2010/april2010/162230.htm.

Daito Ridge Region were added to Japan's continental shelf. The Cabinet Order was officially promulgated on the 12th of September and entered into force on the 1st of October 2014.

PHILIPPINES

LAW OF THE SEA – TREATIES AND CONVENTIONS – WARSHIPS – SOVEREIGN IMMUNITY – STATE RESPONSIBILITY FOR DAMAGES CAUSED BY WARSHIPS

Arigo v. Swift, Commander US 7th Fleet, [G.R. No. 206510. 16 September 2014]

This case involved the accidental grounding of the US Navy minesweeper *USS Guardian* on Tubbataha Reef Natural Park and World Heritage Site in the Sulu Sea due to navigational error, resulting in significant damage to the coral reef in the marine protected area. The petitioners asked for the issuance of an order against the United States of America to pay various fees and compensatory damages to the Philippines on account of the accident. The Supreme Court dismissed the petition, applying the principle of state immunity from suit, and invoking the provisions of the UN Convention on the Law of the Sea. Of interest are the Court's comments on the US commitment to abide by the Convention despite non-ratification.

Facts

While in transit through Philippine waters under diplomatic clearance in accordance with the Visiting Forces Agreement between the Philippines and the United States, the US Navy minesweeper *USS Guardian* ran aground on the northwest side of the South Reef of the Tubbataha Reef Natural Park and World Heritage Site, the Philippines' largest marine protected area located in the middle of the Sulu Sea. The grounding inflicted significant damage to the fragile coral reefs, and efforts to float the vessel failed and eventually the ship had to be broken and dismantled in order to remove it from the reef. The United States officially expressed regrets over the incident and assured the Philippines that appropriate compensation will be provided for the damage caused. Petitioners, however, filed a petition before the Supreme Court, seeking numerous and varied reliefs against the Governments of the United States and the Philippines. The Court dismissed the petition.

Judgment

The Supreme Court dismissed the case, noting that the doctrine of sovereign immunity from suits applied, particularly since the suit named US Navy officials in their official capacity as commanding officers of the US Navy. The incident having clearly involved an American warship, the Court considered the issue to be covered by the provisions of UNCLOS, which held the United States internationally responsible for the damage caused by the *USS Guardian*; however, the Court recognized that the pursuit of compensation and other remedies on the basis of such international responsibility was a matter of foreign policy and amicable settlement between the two States rather than by litigation. The Court noted:

[N]on-membership in the UNCLOS does not mean that the US will disregard the rights of the Philippines as a coastal State over its internal waters and territorial sea. We thus expect the US to bear ‘international responsibility’ under Art. 31 in connection with the *USS Guardian* grounding which adversely affected the Tubbataha Reefs. Indeed, it is difficult to imagine that our long-time ally and trading partner, which been actively supporting the country’s efforts to preserve our vital marine resources, would shrink from its obligation to compensate the damage caused by its warship while transiting our internal waters. Much less can we comprehend a Government exercising leadership in international affairs, unwilling to comply with the UNCLOS directive for all nations to cooperate in the global task to protect and preserve the marine environment¹⁰³

Further, the Court stated:

In fine, the relevance of UNCLOS provisions to the present controversy is beyond dispute. Although the said treaty upholds the immunity of warships from the jurisdiction of coastal States while navigating the latter’s territorial sea, the flag States shall be required to leave the territorial sea immediately if they flout the laws and regulations of the coastal State, and they will be liable for damages caused by their warships or any other government vessel operated for non-commercial purposes under Article 31.¹⁰⁴

103 *Arigo v. Swift*, G.R. No. 206510 (S.C., Sept. 16, 2014) (Phil.), <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/september2014/206510.pdf>.

104 *Id.* at 16.

After considering official statements of US and Philippine diplomats and the actions already undertaken by the US to salvage and remove the *USS Guardian* from the reef, and plans to convene inter-disciplinary teams to assess and remediate the environmental damage from the grounding, the Court decided to defer to the Executive Branch “on the matter of compensation and rehabilitation measures through diplomatic channels.” The Court recognized:

Resolution of these issues impinges on our relations with another State in the context of common security interests under the VFA. It is settled that “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – “the political” – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”¹⁰⁵

LAW OF THE SEA – AGREEMENTS SIGNED BY THE REPUBLIC OF THE PHILIPPINES IN 2014

Agreement Between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia Concerning the Delimitation of the Exclusive Economic Zone Boundary

The Agreement Between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia Concerning the Delimitation of the Exclusive Economic Zone (EEZ) Boundary was signed on 23 May 2014 in Manila, Philippines. It seeks to strengthen and enhance the friendly relations and establish the boundary line that delimits the overlapping exclusive economic zones (EEZ) between both countries. The Agreement lists the geographic coordinates of the geodetic lines establishing the EEZ boundary between them.

105 *Id.* at 19.

Municipal Law

KOREA

MUNICIPAL LAW – TREATIES – ENVIRONMENTAL LAW

Decision of Supreme Court Concerning the ‘Purification of Soil Contamination’

Supreme Court – Judgment for the exemption from the local government’s obligation to pay for the purification of soil contamination when the land had been freely leased under the Management and Disposal Act. Daebeobwon [S. Ct.], 2012Da22709, September 25, 2014 (S. Kor.)

Facts

Since 1957, the United States Forces Korea (USFK) has continuously used the land at issue in this case as a military garrison, which was granted by a local government in Korea (plaintiff) at the requisition of the Korean government (defendant). While the land was at use by the USFK, the Korean government enacted and implemented the Management and Disposal Act (Act No. 1905 of 3 March 1967). Thereafter, the requisition of the land was released and the legal relation of the land was switched to the plaintiff’s free lease to the Minister of National Defense.¹⁰⁶ In the process of returning the land, defendant carried out an investigation on the land of this case, and revealed that the soil contamination level exceeded the standard set by the Soil Environment Conservation Act (Act No. 4906 of 5 January 1995). Based on this investigation, the plaintiff brought a lawsuit against the defendant, demanding the purification of the soil contamination.

Issues

One of the main legal issues was the scope of exemption from the obligation of reinstatement as provided under Article 6(2) of the former Management and Disposal Act.

106 Supreme Court [S. Ct.], 2012Da22709, September 25, 2014 (S. Kor.), translated in Supreme Court Library of Korea online database, http://library.scourt.go.kr/SCLIB_data/decision/2012Da22709.htm.

Judgment

The Court dismissed all appeals by a unanimous decision, based on the following reasoning:

[T]hus, it can be deemed that the original legislative intent of the Management and Disposal Act, the appointment of the duty of national defense, has been attained to a considerable degree in a case where the local government provides free lease of its property for an indefinite time, and takes responsibility of the ordinary reinstatement of the land when it is returned. As such, it is reasonable to interpret the scope of exemption from the obligation to reinstate under Article 6(2) of the Management and Disposal Act as restricted to the scope of purpose of the free lease, i.e., the reinstatement of the ordinary status quo. Extending the interpretation beyond this boundary to obligate the local government to reinstate all the consequences of environmental contamination not originally anticipated, would be difficult to accept in terms of the legislative intent of the Management and Disposal Act, centering on the certainty and expeditiousness of lease, as well as in terms of equity.¹⁰⁷

Comment

The Management and Disposal Act was adopted for the purpose of ensuring the certainty and promptness of the Minister of National Defense's lease to USFK, by obligating the local government to freely lease its property. Therefore, based on this act, it is reasonable that the local government is liable only for the ordinary reinstatement of the property that is to be returned after an undetermined period of time. Such interpretation meets the legislative purpose of the Management and Disposal Act, which is to share the duty of national defense, and the Court confirmed this in its decision.

LEGISLATION AND ADMINISTRATIVE REGULATIONS

Amendment of Immigration Act December 30, 2014 Addenda, Act No. 12893

The purpose of the amendment of Immigration Act is to provide cases in which a written notice is not required, to delete the article on immigration control official's withdrawal and taking custody of national in possession

107 *Id.*

of a forged or fabricated passport, to grant to a foreigner in trial an extension of the period of sojourn until such procedure for the remedy of the right is completed, and especially to ensure protection of the foreigner wards, including patients, by competent Regional Immigration Service.¹⁰⁸

The amended articles are as follows:

- (a) Notwithstanding paragraph (1), the Minister of Justice need not give written notice under paragraph (1) in any of the following cases added (Article 4-4(3)).¹⁰⁹
- (b) If an immigration control official finds a national in possession of a forged or fabricated passport or seaman's identification paper, he/she may withdraw and take custody thereof (Article 5, Deleted).¹¹⁰
- (c) Where a foreigner in whose case a trial in a court, an investigation by an investigative agency, or procedure for the remedy of the right under other Acts due to sexual crime as defined in subparagraph 1 of Article 2 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes is proceeding, applies for an extension of sojourn, the Minister of Justice may grant an extension of the period of sojourn until such procedure for the remedy of the right is completed (Article 25, Newly Inserted).¹¹¹
- (d) The Minister of Justice may post social integration volunteer officers ...in the competent Regional Immigration Service, as prescribed by Ordinance of the Ministry of Justice, to support the social integration of foreigners (Article 41, Newly Inserted).¹¹²

108 Immigration Act, Act No. 4522, Dec. 8, 1992, amended by Act No. 12893, Dec. 30, 2014, art. 4-4(3) (S. Kor.), translated in Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/main.do (login and search required).

109 *Id.* art 4-4(3).

110 *Id.* art. 5.

111 *Id.* art. 25.

112 *Id.* art. 41.

- (e) The Commissioner of the competent Regional Immigration Service shall specially protect any of the following foreigner wards: 1. Patients; 2. Pregnant women; 3. The aged and invalids; 4. Persons of less than 19 years of age (Article 56-3(2), Newly Inserted).¹¹³

Amendment of National Human Rights Commission Act February 3, 2016 Addenda, Act No. 14028

The National Human Rights Commission works to establish specific requirements for commissioners to ensure participation of diverse social class in the process of election and to enhance the status of the National Human Rights Commission in accordance with the international standard such as ensuring immunity to Commissioners in performing related duties.

The National Human Rights Commission had provided recommendations including measures necessary for the prevention of recurrence of human rights violation, compensation for any violation of human rights or discriminatory acts based on Article 44(1)-1 and as it may cause unnecessary reinforcement by requiring the implementation of a decision in lieu of conciliation in order to make recommendations as stated in Article 44(1)-1 through interpretation, as to resolve the following issue, the act shall regulate that recommendation of remedies are available without the decision in lieu of conciliation.

The amended provisions include:

- (a) The Commission shall be of any of the following persons who have expertise and experience in human rights issues and are deemed capable of performing duties to protect and improve human rights fairly and independently: ...[a] person who has served for at least ten years at a university ...as an associate professor or higher ...a judge, prosecutor, or attorney-at-law for at least ten years ...[a] person who has been engaged in activities for human rights for at least ten years, ...[and] [a]ny other person highly respected in society, who is recommended by civic groups (Article 5(3)).¹¹⁴

113 *Id.* art. 56-3(2).

114 National Human Rights Commission of Korea Act, Act No. 6491, May 24, 2001, amended by Act No. 14028, Feb. 3, 2016, art. 5(3) (S. Kor.), translated in Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/main.do (login and search required).

- (b) When selecting or nominating commissioners, the National Assembly, the President, or the Chief Justice of the Supreme Court shall receive recommendations for candidates or hear opinions from various social groups to ensure that commissioners represent each social group related to protecting and improving human rights. (Article 5(4)).¹¹⁵
- (c) The number of commissioners of any gender shall not exceed 6/10 of the total number of commissioners based on gender equality (Article 5(7)).¹¹⁶

Terrorism

INDONESIA

TERRORISM – NUCLEAR TERRORISM – INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF ACTS OF NUCLEAR TERRORISM – ACCESSION BY INDONESIA

Law No. 10 of 2014 on the Accession to the International Convention for the Suppression of Acts of Nuclear Terrorism

On 30 September 2014, Indonesia submitted its instrument of accession to the International Convention for the Suppression of Acts of Nuclear Terrorism (“Convention”) to the UN Secretary-General. This accession followed the enactment of Law No. 10 of 2014 on the Accession to the International Convention for the Suppression of Acts of Nuclear Terrorism (“Law”) on 19 March 2014. The Convention was adopted by the UN General Assembly on 13 April 2005 and entered into force on 7 July 2007. The Convention obliges States parties to criminalize acts of nuclear terrorism under their national laws (Article 5) as well as to establish jurisdiction, both territorial and extra-territorial, over the said offences (Article 9).

Aside from being the legal basis for Indonesia’s accession to the Convention, the Law also stipulates that the provisions under the Convention constitute an inseparable part of the Law. This not only means that Indo-

115 *Id.* art. 5(4).

116 *Id.* art. 5(7).

nesia is now obliged to adopt appropriate legislation (Article 6), but also to prosecute or extradite the offenders (Article 11). The latter is interesting to point out, since Indonesia has been very prudent with signing extradition treaties. In this regard, the Convention would act as a basis for extradition in the absence of a treaty, and it even goes as far as stipulating that a request for extradition cannot be rejected solely on the ground that it concerns a political offence or is inspired by political motives (Article 15).

In acceding to the Convention, Indonesia appended a Declaration to Article 4 of the Convention. Article 4 excludes military activities from the scope of the Convention. This was one of Indonesia's issues with the Convention, and in its Declaration Indonesia made it clear that this Article "shall not be construed as supporting, encouraging, condoning, justifying or legitimizing the use or the threat of use of nuclear weapons for any means or purposes. Furthermore, Indonesia also made a Reservation to Article 23(1). This Article allows a State party to unilaterally bring any dispute with another State party arising from the application of the Convention to arbitration or the International Court of Justice. Indonesia is of the view that any disputes regarding the Convention may only be submitted to any of those forums with the consent of all of the disputing parties.

Indonesia is not an original signatory of this Convention, but saw the need to become a party as it was planning to launch its nuclear power program.¹¹⁷ As Indonesia was planning to build its first nuclear plant,¹¹⁸

117 RI Revives Nuclear Power Plants Vision, *THE JAKARTA POST* (Sept. 21, 2015, 5:00 PM), <http://www.thejakartapost.com/news/2015/09/21/ri-revives-nuclear-power-plants-vision.html>; Sudi Ariyanto & Wiku Lulus Widodo, Status of Nuclear Power Plant Development in Indonesia, IAEA (Mar. 17, 2014), [https://www.iaea.org/NuclearPower/Downloadable/Meetings/2014/2014-03-17-03-21-WS-INIG/DAY1/COUNTRY/INDONESIA_-_National_Presentation\(1\).pdf](https://www.iaea.org/NuclearPower/Downloadable/Meetings/2014/2014-03-17-03-21-WS-INIG/DAY1/COUNTRY/INDONESIA_-_National_Presentation(1).pdf); Samantha Yap, Inside Indonesia's Nuclear Dream, *CHANNEL NEWSASIA* (Feb. 16, 2016, 7:06 PM), <http://www.channelnewsasia.com/news/asiapacific/inside-indonesia-s/2519384.html>.

118 Indonesia Plans to Build Its First Nuclear Power Plant by 2024, *SPUTNIK* (Aug. 28, 2015, 6:04 AM), <http://sputniknews.com/asia/20150828/1026285900.html>; Batan Tekno Announces Plan for Indonesia's 4th Nuke Reactor, *JAKARTA GLOBE* (Mar. 4, 2014), <http://jakartaglobe.beritasatu.com/news/batan-tekno-announces-plan-for-indonesias-4th-nuke-reactor/>.

there were some concerns on the safety and security of the program,¹¹⁹ including how to ensure that the nuclear materials would not fall into the hands of terrorists.¹²⁰ Accession to the Convention thus provides a stronger legal framework to cooperate with other States parties in ensuring that no nuclear materials will be used for terrorist purposes. Additionally, Indonesia has been cooperating closely with the International Atomic Energy Agency to demonstrate its commitment to peaceful uses of nuclear technology in accordance with international standards.¹²¹

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- 119 Sulfikar Amir, Indonesia Mau Nuklir Tapi Tak Mau Tahu Resikonya, *DEUTSCHE WELLE* (Mar. 11, 2015), <http://www.dw.com/id/sulfikar-amir-indonesia-mau-nuklir-tapi-tak-mau-tahu-resikonya/a-16555478>; Rizal Ramli Pertanyakan Soal Keamanan PLTN, *BADAN TENAGA NUKLIR INDONESIA (BATAN)* (Feb. 11, 2016), <http://www.batan.go.id/index.php/id/ke deputian/manajemen/hhk/2046-rizal-ramli-pertanyakan-soal-keamanan-pltn>; Andi Rusli, Indonesia Siap Kembangkan Pembangkit Listrik Nuklir, Tapi, *TEMPO.CO* (Aug. 27, 2015, 9:49 AM), <http://bisnis.tempo.co/read/news/2015/08/27/090695379/indonesia-siap-kembangkan-pembangkit-listrik-nuklir-tapi>. See, Sulfikar Amir, *The State and the Reactor: Nuclear Politics in Post-Suharto Indonesia*, *INDONESIA* (Apr. 2010), http://cip.cornell.edu/DPubS?service=Repository&version=1.0&verb=Disseminate&view=body&content-type=pdf_1&handle=seap.indo/1273069462#. The author addresses the opinions against the use of nuclear technology in Indonesia. Id. at 130-33.
- 120 Dede Rifa'atul Mahmudah, BIN Dorong Komisi I Ratifikasi Konvensi Teroris Nuklir, *RAKYAT MERDEKA ONLINE* (Jan. 27, 2014, 2:41 PM), <http://m.rmol.co/read/2014/01/27/141480/BIN-Dorong-Komisi-I-Ratifikasi-Konvensi-Teroris-Nuklir->; see *Terorisme Makin Canggih Ikuti Perkembangan Teknologi*, *DEWAN PERWAKILAN RAKYAT REPUBLIK INDONESIA* (Feb. 25, 2014), <http://www.dpr.go.id/berita/detail/id/7686>; see *Sosialisasi UU No. 10 Tahun 2014 tentang Pengesahan International Convention for the Suppression of Act [sic] of Nuclear Terrorism*, *BADAN PENGAWAS TENAGA NUKLIR* (Apr. 24, 2015), <http://www.bapeten.go.id/?p=14886>.
- 121 See IAEA Mission Reviews Indonesia's Regulatory Framework for Nuclear and Radiation Safety, *INTERNATIONAL ATOMIC ENERGY AGENCY (IAEA)* (Aug. 14, 2015), <https://www.iaea.org/newscenter/pressreleases/iaea-mission-reviews-indonesias-regulatory-framework-nuclear-and-radiation-safety>.

VIETNAM

TERRORISM – TREATIES AND CONVENTIONS – INTERNATIONAL CONVENTIONS – FIGHT AGAINST TERRORISM – TAKING OF HOSTAGES – SUPPRESSION OF TERRORIST BOMBING – INTERNATIONAL COOPERATION**Ratification of the International Convention Against the Taking of Hostages**

On January 9, 2014, Vietnam ratified the Convention Against the Taking of Hostages of 1979, which will enter into force on February 8, 2014 in Vietnam. Together with the International Convention on Suppression of Terrorist Bombing adopted by the General Assembly of the United Nations in resolution 54/109 of December 9, 1999, Vietnam is a party to 12 international instruments on counter-terrorism.¹²²

The Convention provides that member states agree to prohibit and punish hostage taking with respect to the principle of *aut dedere aut judicare*, which means “a party to the treaty must prosecute a hostage taker if no other state requests extradition for prosecution of the same crime.”¹²³ By being a member of this convention, Vietnam affirms its commitment to promote international cooperation in the fight against terrorism.

International Convention for the Suppression of Terrorist Bombings

On January 9, 2014, Vietnam ratified International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations in resolution 54/109 of December 9, 1999, which entered into force on February 8, 2014 in Vietnam, at the same time with the International Convention Against the Taking of Hostages of 1979. The Convention is designed to criminalize terrorist bombings by prescribing

122 Statement by Mr. Pham Quang Hieu, Deputy Permanent Representative of Vietnam, to the United Nations at the 6th Committee of the UNGA 69th Session on Agenda Item: 107 Measures to Eliminate International Terrorism (New York, Oct. 7-8, 2014), <https://papersmart.unmeetings.org/media2/4652271/viet-nam.pdf>.

123 United Nations Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205.

legal provisions on the definition of terrorist bombings and promoting police and judicial co-operation to prevent, investigate and punish those acts.

This event reflects Vietnam's support of activities and programs carried out under the framework of United Nations against terrorism.

Treaties

JAPAN

REGULATION OF CONVENTIONAL ARMS – INTERNATIONAL PEACE AND SECURITY – INTERNATIONAL TRADE

Arms Trade Treaty

On 9 May 2014, Japan deposited its instrument of acceptance for the 2013 Arms Trade Treaty to the Secretary-General of the United Nations. The Treaty aims to establish common international standards for regulating or improving the regulation of the international trade in conventional arms and to prevent and eradicate the illicit trade in conventional arms as well as to prevent their diversion. Japan was one of the seven States that jointly submitted a draft resolution before the United Nations General Assembly, which led to the successful adoption of the Treaty.

OVERSEAS TRANSFER OF DEFENSE EQUIPMENT AND TECHNOLOGY – INTERNATIONAL PEACE AND SECURITY – NATIONAL SECURITY

Three Principles on Transfer of Defense Equipment and Technology

On 1 April 2014, the Cabinet adopted the Three Principles of Transfer of Defense Equipment and Technology as a set of new policies concerning overseas transfer of defense equipment and technology. The Principles replaced the previously adopted Three Principles on Arms Exports and Their Related Policy Guidelines.

The first principle provides that overseas transfers of defense equipment and technology are prohibited under the following circumstances:

- (1) Cases where the transfer violates obligations under treaties and other international agreements that Japan has concluded[.]
- (2) Cases where the transfer violates obligations under United Nations Security Council resolutions[.]
- (3) Cases where the defense

equipment and technology are destined for a country party to a conflict (a country against which the UN Security Council is taking measures to maintain or restore international peace and security in the event of an armed attack)[.]¹²⁴

The second principle provides that transfers of defense equipment and technology may be permitted, upon strict examination and information disclosure, when the transfer contributes to active promotion of peace contribution and international cooperation, or to Japan's security.

The third principle concerns ensuring appropriate control regarding extra-purpose use or transfer of defense equipment and technology to third parties. The Japanese Government must oblige the Government of the recipient country to obtain its prior consent regarding extra-purpose use and transfer to third parties.

KOREA

TREATIES – JURISDICTION– THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR (MONTREAL CONVENTION)

Decision of Supreme Court concerning the ‘Damages’

Supreme Court – Judgment for the inapplicability of the Montreal Convention to an international air transport agreement when the place of departure or destination is not a contracting party. Daebeobwon [S. Ct.], 2013Da81514, March 24, 2016 (S. Kor.)

Facts and Issues

The plaintiff and the defendant made an international air transport agreement. In the agreement, the place of departure was Korea and the destination was the base of United Nations Stabilization Mission in Haiti (hereinafter “MINUSTAH”). The plaintiff asserted that the agreement was subjected to application of the Montreal Convention.¹²⁵ As Korea is

124 Three Principles on Transfer of Defense Equipment and Technology, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/fp/nsp/page1we_000083.html.

125 Supreme Court [S. Ct.], 2013Da81514, March 24, 2016 (S. Kor.), translated in Supreme Court Library of Korea online database, <http://library.scourt.go.kr/>

party to the Montreal Convention, but the Republic of Haiti is not, the main issue in the case was whether the places of departure and destination should both be in the territory of contracting parties in order to apply the Montreal Convention.

Judgment

The Supreme Court ruled that:

An international covenant signed by the Republic of Korea generally supersedes civil, commercial, or international private laws; however, its applicability should be strictly determined as prescribed under the said covenant [Article 1 of the Convention provides] that “[t]his Convention applies to all international carriage of persons, baggage, or cargo performed by aircraft for reward” (Article 1 subparag. 1) and that “the expression ‘international carriage’ means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party” (Article 1 subparag. 2). As such, the places of departure and destination should both be a contracting party in order to apply the Montreal Convention to an international air transport agreement.¹²⁶

Comment

The Court confirmed that although the place of destination under the Transport Agreement in this case is the base of the MINUSTAH, the Agreement “does not exclude the general application of Haiti’s law toward areas where [MINUSTAH] peacekeepers are stationed.”¹²⁷ Overall, “even if MINUSTAH’s base in Haiti is stipulated as the place of destination under the Transport Agreement, the Montreal Convention is not applicable so long as the Republic of Haiti is not a contracting party”¹²⁸

SCLIB_data/decision/4.%202013Da81514_international%20carriage_jh.htm.

126 *Id.*

127 *Id.*

128 *Id.*

PHILIPPINES

TREATIES AND OTHER INTERNATIONAL AGREEMENTS – PACTA
SUNT SERVANDA – EXECUTIVE AGREEMENTS*Land Bank v. Atlanta Industries, Inc.* [G.R. No. 193796. 2 July 2014]

In this case, the Supreme Court recognized the international personality of the International Bank for Reconstruction and Development (IBRD) and extended the application of international law not only to the IBRD's principal loan agreements with contracting States, but also the subsidiary loan agreements entered into between domestic entities making use of the loan facility provided by the principal loan agreement. This meant that the terms and conditions of subsidiary loan agreements between domestic entities are exempt from the requirements of domestic legislation and administrative rules, but are governed entirely by the principal loan agreement between the IBRD and the contracting State.

Facts

The Land Bank of the Philippines (Land Bank) and the International Bank for Reconstruction and Development (IBRD) entered into Loan Agreement No. 4833-PH for the implementation of the IBRD's "Support for Strategic Local Development and Investment Project". The loan facility was fully guaranteed by the Government of the Philippines and was conditioned upon the participation of at least two local government units by way of a Subsidiary Loan Agreement (SLA) with Land Bank. Land Bank entered into an SLA with the City Government of Iligan to finance the development of its water supply system. The SLA expressly provided that the goods, works, and services to be financed out of the proceeds of the loan were to be "procured in accordance with the provisions of Section I of the 'Guidelines: Procurement under IBRD Loans and IDA Credits... and with the provisions of [the] Schedule 4" of the SLA. Subsequently, a public bidding was held wherein Atlanta Industries, Inc. (Atlanta) produced the second lowest bid. However, the Bids and Awards Committee (BAC) declared the bidding a failure upon the recommendation of Land Bank due to the IBRD's non-concurrence with the Bid Evaluation Report, and disqualified Atlanta from the bidding for alleged failure to meet the documentary requirements. Atlanta contested both the declaration of

failure of bidding and its alleged disqualification, but opted to participate in the re-bidding. However, at the second pre-bidding conference, Atlanta called the BAC's attention to its use of Bidding Documents that purportedly contained numerous provisions that were not in accordance with the bidding procedures prescribed in the Government Procurement Reform Act,¹²⁹ and the regulations of the Government Procurement Policy Board (GPPB). The BAC declared that the project was not covered by the said law or by any of the GPPB's issuances, and scheduled the date of the second bid opening. Apprehensive of the non-compliance with the Government Procurement Reform Act and its implementing regulations, Atlanta filed a case to enjoin the re-bidding.

Judgment

The Supreme Court held that the principal Loan Agreement with the IBRD was an executive agreement with an international institution, and thus governed by international law. On account of its provisions, this status extended to the Subsidiary Loan Agreement, even though the signatories to the latter were both domestic entities. As a result, the bidding procedure and requirements in domestic legislation are not applicable, and the public bidding was governed only by guidelines of the IBRD and Schedule 4 of the SLA. The Court noted:

Loan Agreement No. 4833-PH is in the nature of an executive agreement ...defined ...as one concluded between states in written form and governed by international law, "whether embodied in a single instrument or in two or more related instruments and whatever its particular designation," and ...may be in the form of either (a) treaties that require concurrence after executive ratification; or (b) executive agreements that are similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters than treaties. Examining its features, Loan Agreement No. 4833-PH between the IBRD and the Land Bank is an integral component of the Guarantee Agreement executed by the Government of the Philippines as a subject of international law possessed of a treaty-making capacity, and the IBRD, which, as an international lend-

129 Republic Act No. 9184, An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for other Purposes, 10 January 2003.

ing institution organized by world governments to provide loans conditioned upon the guarantee of repayment by the borrowing sovereign state, is likewise regarded a subject of international law and possessed of the capacity of enter into executive agreements with sovereign states. Being similar to a treaty but without requiring legislative concurrence, Loan Agreement No. 4833-PH ...is an executive agreement and is, thus, governed by international law. Owing to this classification, the Government of the Philippines is therefore obligated to observe its terms and conditions under the rule of *pacta sunt servanda*, a fundamental maxim of international law that requires the parties to keep their agreement in good faith. It bears pointing out that the *pacta sunt servanda* rule has become part of the law of the land through the incorporation clause found under Section 2, Article II of the 1987 Philippine Constitution, which states that the Philippines “adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.”¹³⁰

The Court further noted:

As may be palpably observed, the terms and conditions of Loan Agreement No. 4833-PH, being a project-based and government-guaranteed loan facility, were incorporated and made of the SLA that was subsequently entered into by Land Bank and the City Government of Iligan. Consequently, this means that the SLA cannot be treated as an independent and unrelated contract but as a conjunct of, or having a joint and simultaneous occurrence with, Loan Agreement No. 4833-PH. Its nature and consideration, being a mere accessory contract of Loan Agreement No. 4833-PH, are thus the same as that of its principal contract from which it receives life and without which it cannot exist as an independent contract. Indeed, the accessory follows the principal, and concomitantly, accessory contracts should not be read independently of the main contract. Hence ...the SLA has attained indivisibility with the Loan Agreement and the Guarantee Agreement through the incorporation of each other’s terms and conditions such that the character of one has likewise become the character of the other.¹³¹

130 Land Bank v. Atlanta Indus., G.R. No. 193796 (S.C., July 2, 2014) (Phil.), <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/july2014/193796.pdf>.

131 *Id.*

TREATIES CONCURRED IN BY THE PHILIPPINE SENATE IN 2014**Agreement Between the Republic of the Philippines and The Government of the United States on Enhanced Defense Cooperation**

The Enhanced Defense Cooperation Agreement (EDCA) was signed on 28 April 2014 in Manila, Philippines, in furtherance of the Mutual Defense Treaty (MDT) signed by the Philippines and the United States on 30 August 1951 and the Visiting Forces agreement (VFA) signed between them on 10 February 1998.

The EDCA is premised upon Article II of the MDT which states that “the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack,” and implemented within the context of the VFA. It creates more opportunities for defense cooperation between the two parties while maintaining and developing their individual and collective self-defense capacities, by access/use of Philippine military bases and facilities for purposes of pre-positioning of US supplies and increased rotational presence of US forces. It thereby deepens the defense cooperation between the two States while maintaining and developing their individual and collective capacities. The EDCA however affirms that both countries share an understanding that the US will not establish a permanent military presence or base in the territory of the Philippines, and expressly provides that the US will not bring nuclear weapons into Philippine territory.

United Nations

INDIA

STATEMENT BY INDIA ON THE AGENDA ITEM 61 – “REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, QUESTIONS RELATING TO REFUGEES, RETURNEES AND DISPLACED PERSONS AND HUMANITARIAN QUESTIONS” AT THE THIRD COMMITTEE OF THE 69TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY ON 5 NOVEMBER 2014¹³²

India noted that it was worrisome in the High Commissioner’s report that last year, the number of all displaced people reached more than 50 million, the highest level since the Second World War. Equally alarming, India further noted, was that 2.5 million persons, highest recorded number in nearly a decade, sought refuge outside their country boundaries. According to India it was also a matter of concern that children now constitute 50 percent of the global refugee population and that the number of refugees returning home had gone down in 2013.

India shared the concerns of the High Commissioner raised in his report. It also felt that there was an imperative to formulating comprehensive policies and creating favorable conditions much needed for their early return and reintegration in their society. In this regard, it commended the role played by UNHCR in collaborating with member states in providing protection and assistance to refugees. India also noted the work of UNHCR in implementing the four strategies introduced in 2013 in the areas of, *inter alia*, public health, settlement and shelter, livelihood and safe access to fuel and energy, continues to give hope to the protracted refugees.

India pointed out that an enabling environment for protection, re-settlement, rehabilitation and opportunities for sustainable livelihood for the displaced persons was a prerequisite for encouraging their voluntary return. In this regard, it would be pertinent to underline that UNHCR’s

132 Mayank Joshi, First Secretary, Statement on Agenda Item 61, at the Third Committee of the 69th Session of the United Nations General Assembly (Nov. 5, 2014) PERMANENT MISSION OF INDIA TO THE UN, (transcript available in <https://www.pminewyork.org/pages.php?id=2087>).

involvement in internally displaced people (IDPs) should only be with the concurrence of and in consultation with national authorities.

India further noted that the international community needed to consistently address the causes of displacement, including inadequacy of protection, discrimination, family separation and poverty. The link between poverty and refugee issue was well recognized, but the search for durable solutions would remain elusive unless these causes remained unaddressed for the realization of targeted global development goals.

For India, growing violence against asylum seekers by non-state actors, particularly in armed conflict was a matter of great concern. This, India pointed out, was aggravated by the problem of securing access to and delivering in high-risk environments across many regions.

India pointed out that the issue of treating the two separate issues of asylum-seekers *vis-à-vis* migrants needed special mention and careful attention. According to India, countries needed to guard against mixing the two and international migration needed to be promoted in a regular non-discriminatory and orderly manner. Maintaining a clear distinction between refugees and economic migrants was in the interest of the protection needs of the former.

India also referred to the enormous contribution of developing countries in hosting refugees as part of fulfilling their voluntary humanitarian obligations and that needed sufficient recognition and commendation in the deliberations.

According to India, the 1951 Convention and the 1967 Protocol did not cater to the phenomena of massive flows and mixed migration. In the absence of appropriate adjustments to match these realities, it noted, countries such as India would continue to find it difficult to accede to the present legal framework, their commitment to hosting refugees notwithstanding.

With its history, culture, traditions India had opened its border to all and it continued to host a large number of refugees. Its programs for them were managed entirely from within its own resources. India asserted that its protection regime was based on the fundamental rights guaranteed by the Indian Constitution and other relevant legal provisions. India also noted that it had time and again demonstrated its abiding commitment to the principles of protection and non-refoulement. India also reiterated that it continued to refine its administrative mechanisms for providing greater hospitality to refugees during their stay in country.

Statement by India on the Agenda Item 78 – “Report of the International Law Commission” at the Sixth Committee of the 69th Session of the United Nations General Assembly on 3 November 2014¹³³

On the topic, Identification of Customary International Law, India commended the work of the Special Rapporteur for his second Report, which contained eleven draft conclusions. India noted that the Report covered the central questions concerning the approach to the identification of rules of customary international law (CIL), in particular the two constituent elements, namely – ‘general practice’ which is ‘accepted as law’ – commonly referred to as ‘state practice’ and ‘*opinio juris*,’ respectively. India agreed generally with the approach adopted by the Special Rapporteur in his Report.

Commenting on the draft, India noted that the draft had been divided into four parts, namely: introduction; two constituent elements; and a general practice accepted as law. India also noted that in its understanding the Special Rapporteur would focus in his next Report the relationship between treaty and custom, role of International Organizations, especially whether they might have an influence on custom, as well as regional, special and bilateral customs and their relationship to CIL, if any.

While India welcomed the Special Rapporteur’s methodology in identifying the State practice, primarily the International Court of Justice (ICJ) decisions including their separate and dissenting opinions, it noted that excluding other international tribunals might sometimes be mismatched and minimalistic approach to the topic. Therefore, India pointed out that the Special Rapporteur may not leave the other tribunals’ decisions for identifying the customary international law. India further pointed out that in the Arrest Warrant case, the ICJ ruled that the Minister of Foreign Affairs enjoyed *rationae persone* immunity for the reason that the Foreign Affairs Minister had plenary competence in international relations. This, India explained, was initially questioned by many States but later agreed by them. India felt that the response of the Court certainly helps it to understand the identification of Customary International Law.

India pointed out that it was well known that the CIL was a formal source of international law. The ICJ, India stated, was mandated to apply CIL to settle the disputes brought before it by the States. India Article 38(1)

133 *Id.*

(b) of the Statute of the ICJ described CIL as the State practice 'as evidence of general practice accepted as law.' Thus, CIL consisted of 'settled practice' of States and the belief that it was binding. Thus, it had objective and subjective/mental elements (*opinio juris*).

While conventional law was both formal and material source of international law, India noted, CIL was not considered to be a material source. Therefore, unlike the treaty provisions, it was not so easy to find out what the applicable CIL was in a given case or situation; the amount of evidence that needed to be produced or examined and relative weight/importance to be given to the objective or subjective elements to identify or for formation of CIL made the application of CIL difficult. The challenge, India stated, was compounded, if the persons who sought to apply CIL are domestic lawyers, judges, courts or arbitral tribunals, who might not be trained or well versed in international law. Furthermore, it was not easy even for those who had training and experience in international law to identify rules of CIL in all cases. There was no readily available guidance or methods by which evidence of the existence or process of formation of CIL rules could be appreciated and identified.

India favored both elements, 'State practice' and '*opinio juris*,' and gave them equal importance in the study. India argued that the practices of States from all regions should be taken into account. In this regard, developing States that did not publish digests of their practice should be encouraged and assisted to submit their State practice, including their statements made at international and regional fora, and the case-law, etc.

At the same time, India urged the Commission to exercise utmost caution in taking into account the arguments and positions advanced by the States before international adjudicative bodies and they should not be detached from the context in which they were made.

Now turning to the topic, 'Protection of the environment in relation to armed conflicts,' India thanked the Special Rapporteur for the preliminary report. India noted that the Report provided an overview of the topic and examined the aspects relating to scope and methodology. It was India's understanding that the Special Rapporteur would focus the work to clarify the rules and principles of international environmental law applicable in relation to armed conflict situations.

India noted that the armed conflicts had often devastating effects on the environment. They affected the ecosystems directly – degradation of

the natural environment, pollutions due to different military activities, illegal exploitation of natural resources – or indirectly – deforestation, massive exodus of refugee. This, according to India, needed clarification and coherence.

India further noted that the environmental laws had witnessed a spectacular development during the last two decades as the urgency of the need for the solution to the environmental problem had become more and more apparent, both at the national and international levels. According to India, it was the duty of each State not to allow its territory to be used in such a manner as to injure another, principle that was laid down in the Trail Smelter Arbitration. The Tribunal in this case stated that, under international law, no State had the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another State.

India supported the three-phased approach adopted by the Special Rapporteur for facilitating the work. While dealing with the topic in a comprehensive manner, India felt, it would be relevant to see the existing international legal framework, including the areas of international humanitarian law, international human rights law, international refugee law, and international environmental law, as they provided legal obligations that either directly or indirectly had a bearing on the protection of the environment in relation to armed conflict.

On Chapter VI of the ILC Report ‘The obligation to extradite or prosecute (*aut dedere aut judicare*),’ India thanked the Working Group of the ILC and its Chairman, Mr. Kriangsak Kittichaisaree for accomplishment of the work on the topic during the 66th session of the ILC. India also thanked the Commission and the Special Rapporteur for the work done on this topic since the 57th session of the ILC.

India was of the view that instead of totally leaving the applicability of this principle to the suitability and convenience of States, the international community would have benefited if some certainty and consistency is brought in the application of this principle based upon established international legal practice, thereby ensuring that serious crimes would be prosecuted and the impunity would be fought against.

India congratulated the Special Rapporteur for the first report on the topic ‘Protection of the atmosphere.’ It noted that the Commission considered the report without formally adopting it in this session.

The Report addressed *inter alia* the general objective of the project, providing the rationale for work on the topic, delineating its general scope, identifying the relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject, and presented three draft guidelines concerning (a) the definition of the term 'atmosphere; (b) the scope of the draft guidelines; and (c) the legal status of the atmosphere.

Considering the threats posed to the atmosphere, in particular, by air pollution, ozone depletion and climate change, the protection of the atmosphere was extremely important for humankind. In this context, there lied a general obligation for all the States to protect the atmosphere.

India noted with interest that the Special Rapporteur dealt with the topic by providing a historical sketch of atmosphere in international law through diverse sources and subsequently through the relevant judicial decisions rendered by the ICJ in *Nuclear Tests Case*, *Gabcikovo - Nagymaros Case*, *Pulp Mills Case*, and the like.

The proposed three guidelines of the Special Rapporteur, India pointed out, needed an in-depth analysis since they involve technical, scientific and legal issues. With regard to the concept of atmosphere as a common 'concern' of mankind, dealt in the Draft Guideline 3 – legal status of atmosphere, the Special Rapporteur, India argued, might explore more legal reasoning and justification to propose such a concept for this topic, as the concept was highly debated and less accepted in other fields of international law.

While formulating the future guidelines, India suggested that the Special Rapporteur might ensure that the interests of developing countries were protected and in case of any obligations 'the principle of common but differentiated responsibility' needed to be considered and respected. The Special Rapporteur might also focus more on cooperative mechanisms to address issues of common concern, and this aspect might be given priority.

Referring to its domestic laws, India pointed out that at the national level, the environmental protection rights and duties were enshrined in the Indian Constitution. Besides this, it was pointed out by India that it had an elaborate legal framework on environmental protection. Key national laws for the prevention and control of industrial and urban pollution, include: the Environment (Protection) Act of 1986 (EPA), Public Liability Insurance Act of 1991, National Environmental Tribunal Act of 1995, and National Environmental Appellate Authority Act of 1997.

Reference was also made by India to a number of national policies governing environmental management. The National Environment Policy (NEP) of 2006, India noted, was the most recent pronouncement of the government's commitment to improving environmental conditions while promoting economic prosperity nationwide. The NEP's key objectives, India further pointed out, included conservation of critical environmental resources, intra-generational equity, livelihood security for poor, integration of environment in economic and social development, efficiency in environmental resource use, environmental governance, and enhancement of resources for environmental conservation. This policy promoted mainstreaming of environmental concerns into all development activities, advocating important environmental principles and identifying regulatory and substantive reforms.

On the topic, 'Immunity of State Officials from Foreign Criminal Jurisdiction,' India appreciated the progress made thus far in ICL. It commended the Special Rapporteur for the third report on the topic.

The Commission considered the draft article 2(e) on the definition of 'State official' and draft article 5, on the 'beneficiaries of immunity *ratione materiae*' and provisionally adopted these two draft articles.

Based on the analysis of the State practice made by the Special Rapporteur, India noted, the concept of 'State Official is defined as any 'individual' who represented the State or who exercises State functions.' India agreed with the understanding of the Commission as reflected in paragraph 4 of the commentary to draft article 2(e) that the term 'individual' had been used to indicate that the draft articles covered only natural persons.

According to India the Commission noted that the individuals who might be termed as 'State official' for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis and the linkage was his/her representation of the State or exercise of State functions. Thus, the emphasis was on the link between the individual and the State and the form of that link is irrelevant. It was India's understanding that the Special Rapporteur might deal with specific situations while considering with the substantive scope of immunity (e.g., a private contractor represents the State – would this link be sufficient to cover this situation under the definition as a 'State official').

India also noted that in the draft article 5, the phrase ‘acting as such’ referred to the official nature of the acts of the officials and therefore, this would establish a distinction with immunity *ratione personae*. Although it was clear that the essence of immunity *ratione materiae* was the nature of the acts performed and not the status of the individual who performed them, India agreed with the majority of the Commission members’ view that it would be useful to identify the persons in this category of immunity, since immunity from foreign criminal jurisdiction applied to these individuals.

LITERATURE

International Law in Asia: A Bibliographic Survey 2014

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INTRODUCTION

This bibliography provides information on books, articles, notes, and other materials dealing with international law in Asia, broadly defined. Only English language publications are listed. Most, if not all, of the materials can be listed under two or more categories, but to save space each citation has been placed under one category.

The bibliography is limited to new materials published in 2014, or in some cases, previously published materials that have new editions in 2014. The headings used in this year's bibliography are as follows:

1. General
2. States and statehood
3. IGOs
4. NGOs
5. Territory & jurisdiction
6. Seas
7. Watercourses
8. War
9. International & transnational crimes
10. Peace & transitional justice
11. Security & non-proliferation
12. Environment & development
13. Human rights – General
14. Human rights – Central Asia
15. Human rights – South Asia
16. Human rights – Northeast Asia
17. Human rights – Southeast Asia
18. Human rights – West Asia

19. Nationality, migrants & refugees
20. Colonialism & self determination
21. Private International law
22. International economic & business law – General
23. WTO & Trade
24. Investment
25. Intellectual property
26. Dispute settlement
27. Arbitration
28. Internet, data & privacy
29. Air & Space
30. Miscellaneous

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- Articles of 6,000 words or more, on topics of public or private international law, either with special reference to Asia or of general relevance.
- Shorter articles and comments.

- Notes for the Developments section containing succinct critical analysis of international legal developments relevant to Asia of between 2,000 and 4,000 words generally.
- Translated versions of articles originally written in a language other than English.
- Materials in the field of municipal or international state practice of Asian states and organizations, with relevance to international law
- Information on literature and documents concerning international law in Asia or concerning international law in general and published or issued in Asia.

All submissions shall be sent to either of the two addresses listed above in any version of Microsoft Word with a .doc or .docx extension.

THE DILA PRIZE

Every year, the Asian Yearbook of International Law invites the submission of original essays of excellent quality written by young scholars of Asian nationality residing anywhere in the world on a topic of public or private international law for consideration of the award of the DILA International Law Prize.

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- Since its inception, the Prize been generously sponsored by Mr. Sata Yasuhiko of Tokibo Ltd., Japan. Up till 2011, this was known as the Sata Prize, but was renamed the DILA Prize at Mr. Sata's insistence. The winning essay is published in the *ASIAN YEARBOOK OF INTERNATIONAL LAW*.
- Participants must not be over the age of 40 years on the submission date. Each essay should be accompanied by a curriculum vitae of the author. Essays must be written in English, and the length should be between 8,000 and 14,000 words excluding footnotes.