Asian Yearbook of International Law

Volume 27
2021

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Volume 27 (2021)

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Asian Yearbook of International Law

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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: (a) the study of and analysis of topics and issues in the field of international law, in particular from an Asian perspective; (b) the study of and dissemination of knowledge of international law in Asia; and (c) 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 states 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.

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 by Brill under the auspices of the Foundation for the Development of International Law (DILA).

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 goals 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 decided to make the Yearbook open access and is available through Brill Open.

Acknowledgments

The Co-Editors-in-Chief would like to acknowledge and thank the staff of the Handong International Law School Law Review for their work reviewing and editing the citations in the Yearbook. The staff for 2023 includes Senior Editors Yegee Ahn (Editor-in-Chief), Hanul Kang (Managing Editor), Seung Hwan Bae, Yeongshin Jang, Ju Young Kim, and Gloria Hai-Young Shin; and Junior Editors Wha Young Jung, Chae-Won Kim, Chanmi Kwak, and Hyegyeong Seo.

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Editorial Note

Volume 27 of the *Asian Yearbook of International Law* begins with a special article on the late MCW Pinto, one of the founders of the Foundation for the Development of International Law in Asia (DILA), followed by other articles and legal materials including a listing of the participation of Asian states in multilateral treaties and a description of the state practice of Asian states in the field of international law; along with a literature section featuring a book review and a bibliographic survey of materials dealing with international law in Asia; and finally, a summary of the activities undertaken by DILA in the 2021.

1 Articles

Volume 27 of the *Yearbook* is dedicated to the late MCW Pinto who passed away on 21 July 2022. Ambassador Pinto, along with Ko Swan Sik and JJG Syatauw, founded DILA in December 1989. The following biographical sketch of Ambassador Pinto was published in Volume 25 (2019) of the *Asian Yearbook of International Law* from a reflection by Professor Kevin YL Tan, former Chairman of DILA, upon the occasion of DILA's 30th anniversary:

> [MCW Pinto] was born on 17 November 1931 in Colombo, Sri Lanka (then Ceylon), to Moragodage Walter Leopold Pinto and Judith Beatrice Blazé. He studied at the University of Ceylon at Peradeniya, where he graduated with an LLB degree. He then attended the Sri Lanka Law College where he qualified as an Attorney and after that studied at Magdalene College, Cambridge University, where he obtained his master's degree (then known as an 'LLB' rather than as an 'LLM') at Cambridge and 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 in 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 became 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. During this last phase of Pinto's career, he came into contact and worked with Ko in the founding of DILA.

DILA is greatly indebted to Ambassador Pinto and his work promoting international law in Asia. His impact on the development of international is far and wide and described in the first article of this volume entitled "Mr. CW Pinto's Contribution to the Development of International Law" by Amrith Rohan Perera, former member of the International Law Commission (2007–2011) and former Legal Advisor to the Ministry of Foreign Affairs of Sri Lanka, and Karawita Arachchige Akalanka Nuwan Thilakarathna, Lecturer in Law, Faculty of Law, University of Colombo.

The articles that follow are from papers that were selected from the 2022 DILA International Conference [Online] on the topic of "Diplomatic Privileges and Immunities: Asian State Practice." They include "Philippine State Practice on Diplomatic Privileges and Immunities" by J. Eduardo Malaya, Philippine Ambassador to The Netherlands; "The Practices on Diplomatic Immunities and Privileges of the Republic of China on Taiwan: A Unique Case" by Chun-i Chen, Distinguished Professor, Department of Diplomacy and Department of Law (joint appointment), National Chengchi University; "Diplomatic Privileges and Immunities: Central Asian Law and Practice" by Rustam Atadjanov, Associate Professor of Public and International Law and Associate Dean at KIMEP University School of Law; "Diplomatic Privileges and Immunities: Australian Practice" by Dorothea Anthony, Lecturer, School of Law, Faculty of Business and Law, at the University of Wollongong; "Diplomatic Immunity and Privileges: Bangladesh State Practice" by Muhammad Ekramul Haque, Professor at the Department of Law, University of Dhaka, and Azhar Uddin Bhuiyan, Lecturer at the Department of Law, University of Dhaka; and "Diplomatic Privileges and Immunities: Looking at the Nepalese Approach" by Pranjali Kanel, Research Assistant, Kathmandu School of Law.

II Legal Materials

The *Yearbook* from its inception was committed to providing scholars, practitioners, and students with a report on Asian state practice as its contribution to provide an understanding of how Asian states act within the international system and how international law is applied in their domestic legal systems. The *Yearbook* does this in two ways. First, it records the participation of Asian states in multilateral treaties; and second, it reports on the state practice of Asian states. A number of diligent scholars have provided the *Yearbook* with reports on the 2021 state practice of their respective countries.

Participation in Multilateral Treaties

Karin Arts of the International Institute of Social Studies, Erasmus University Rotterdam in The Hague, The Netherlands has compiled and edited the participation of Asian states in multilateral treaties for the 2021 calendar year.

State Practice of Asian States in the Field of International Law

The State Practice section of the *Yearbook* is intended to offer readers an outline and summary of the activities undertaken by Asian states that have a direct bearing on international law. The state practice rapporteurs have undertaken the responsibility to report on the state practice of their respective countries during the 2021 calendar year. Their submissions describe how these states are applying international law in their domestic legal systems and in their foreign relations.

III Literature

Book Review

For this volume of the *Yearbook*, Raul C. Pangalangan, Professor of Law of the University of the Philippines and former judge of the International Criminal Court (The Hague), gives his review of *Domestic Application of International Law: Focusing on Direct Applicability* (Brill Nijhoff, 2023) by Yuji Iwasawa, judge of the International Court of Justice.

Bibliographic Survey

Angela Semee Kim, Assistant Professor of Law at Handong Global University in Korea, prepared the bibliography which provides information on books, articles, notes, and other materials dealing with international law in Asia published in 2021.

IV DILA Activities

The *Yearbook* concludes with a report on the activities undertaken by DILA in the year 2021, namely the aforementioned 2021 DILA International Conference held on June 28–29, 2021.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief

Articles

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M.C.W. Pinto's Contribution to the Development of International Law

Amrith Rohan Perera and Karawita Arachchige Akalanka Nuwan Thilakarathna***

1 Introduction

For a small island nation, Sri Lanka has produced well renowned scholars in the field of law. Two names spring to mind, among several legal scholars. One is Professor C.G. Weeramantry who served as the Vice President of the International Court of Justice and the other is Mr. Moragodage Christopher Walter Pinto who passed away on 21 July 2022. This article is a tribute to Mr. Pinto's services and focuses on an evaluation of the contribution towards the development of international law by Mr. Pinto who served Sri Lanka in different capacities ranging from an outstanding diplomat to holding key positions in international fora. He served as the first Legal Advisor of the then Ministry of Defence and External Affairs. The present article specially focuses on the significant contributions he made in different roles, *inter alia*, as a Secretary General of the Iran-United States Claims Tribunal (1982–2011); Chairman of the Sri Lankan delegation to the Third United Nations Conference on the Law of the Sea (1980–81); Chairman of the Conference's Negotiating Group of the Whole on the International Regime for the Seabed Beyond-National Jurisdiction; Chairman of the International Law Commission in 1980 and a member from 1973 to 1981; and Representative of Sri Lanka to the United Nations Conference on the Law of Treaties (1968–69). Apart from the above, he also contributed to developing a *Statement of Understanding*, regarding the extended continental shelf claim by Sri Lanka in the Bay of Bengal which helped negotiate a special procedure for making a claim for an extended continental shelf beyond 350 nautical miles. Mr. Pinto also helped to develop the Asian perspective on international law by working as a General

* Presidents Council, Former member of the International Law Commission (2007–2011), Former Legal Advisor to Ministry of Foreign Affairs, Former visiting lecturer on public international law, Faculty of Law, University of Colombo; Department of Law, University of Peradeniya.

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Editor of the *Asian Yearbook of International Law*. It is important to point out that his contribution towards the development of international law in these areas is significant because as an individual representing a small island nation, the impact and discourse he was able to create as a legal scholar was truly unparalleled. Due to his outstanding legal career and in recognition of his contribution towards the law, the Faculty of Law of the University of Colombo has a special prize in his name for the best student research paper, and he has also established a special Trust Fund on education and research at General Sir John Kotelawala Defense University. This article gives a brief outline of Mr. Pinto's contributions toward the development of international law.

2 A Delegate from Sri Lanka at the Vienna Conference on the Law of Treaties

The Vienna Convention on the Law of Treaties (VCLT), sometimes referred to as the 'treaty of all treaties,' is an international legal instrument formulated in 1969 that prescribes the way international treaties are to be negotiated and enforced. Mr. Pinto took part in the conference as a member of the Sri Lankan delegation along with Sir Lalit Rajapakse who served as then the High Commissioner of Ceylon in the United Kingdom. At that time, Mr. Pinto was serving as a legal advisor for the Ministry of Defense and External Affairs. The importance of the contribution lies in the fact that Mr. Pinto while representing an island nation which at the time was not a major player in the international arena was still able to engage with the participants in the conference on complex issues which arose during the negotiations. One important fact pointed out by Mr. Pinto dealt with Article 3 of the draft convention where he suggested that the Articles 3, 69 and 70 should be replaced with a general Article. Though this was not agreed upon by the majority, the mere fact that such discussion was being made can be identified as something important from the perspective of Ceylon.

A rather interesting episode occurred regarding the amendment proposed by Mr. Pinto as one of the Ceylonese delegates. The amendment he suggested to draft Article 27 concerning the interpretation of treaties, though rejected by a majority of votes, nevertheless gained more votes[1] in favor in comparison to the amendments suggested by the United States of America and Vietnam.

1 U.N. VCLT, 2d Sess., 33d plen. mtg. at 185, U.N. Doc. A/CONF.39/11/Add.1 (May 21, 1969). The amendment proposed by Ceylon was defeated by 29 votes to 9 with 49 abstentions, the one proposed by the United States of America was rejected by 66 votes to 8.

Perhaps one of the more significant contributions towards the development of international law in the realm of law of treaties that was made by Mr. Pinto is the proposal which he brought forward regarding the inclusion of *jus cogens* as something written into the VCLT. He thought this would be a milestone for the progressive development of international law.[2] This is remarkable since it would create a fetter on the discretion of States in picking and choosing their respective obligations arising out of an international treaty. As a general rule, States are not considered bound by a treaty provision unless they have given their consent. However, with a particular norm of international law that is recognized as a peremptory norm, States are considered bound by such norms irrespective of the consent and it would not be possible to derogate from such norms. The idea enunciated by Mr. Pinto which was later discussed and adopted at the conference with the inputs of other delegates representing their respective States is reflected in Article 53 of the VCLT which clearly prohibits the possibility of legislating at the international level through treaties which go against the recognized preemptory norms of public international law.

3 The Law of the Sea Convention and the Extended Continental Shelf Claim

One of the major criticisms leveled at treaty making is the lack of voice given to so called 'developing nations' in making or substantiating a claim of their own. However, the Sri Lankan claim for an extended continental shelf may provide an exception to this general practice. Sri Lanka was able to both generate a dialogue and to create a consensus among the more powerful countries to consider their claim in a serious manner. This was made possible by the delegates who took part in the discussion, which also included Mr. Pinto along with Dr. Hiran Jayawardene who at the time was the special advisor on the law of the sea. Mr. Pinto was appointed as the Chairman of the informal body of the whole and played a significant role in pursuing the establishment of the Sri Lanka's position on the issue of the continental shelf.[3]

As it was discussed prior to the intervention of Sri Lanka, which later came to be known as the 'Sri Lankan problem,' the agreement was that each costal state will be given rights over their continental shelf subject to a maximum

2 *See id.* at 181.

3 Robert B. Krueger et al., *The Third United Nations Law of the Sea Conference: The Current Status and the Informal Single Negotiating Text*, 8 Case Western Reserve Journal of International Law 33, 35 (1976).

extent of 350 nautical miles according to the Irish formula which was already formulated as a part of Article 76 of the Draft Convention. Sri Lankan delegates pointed out that, 'the foot of the continental slope and the 2,500-meter isobath are very close to its coast, while there is an exceedingly broad continental rise that extends many hundreds of miles from the coast.'[4] It was contended that, 'this rise qualifies under the general principle that the continental margin consists of the shelf, the slope, and the rise but is excluded by the more detailed rules for defining the outer limit of the continental shelf and continental margin.'[5]

Based on equitable principles, Sri Lanka proposed an alternative method for delimiting its continental shelf, through a proposal in an aide-memoire, by presenting the arguments for an alternative method of delimitation regarding States in the southern part of the Bay of Bengal.[6] This proposal considered the special nature of the geological and geomorphological factors present in the southern part of the Bay of Bengal.[7] Then it was pointed out that Sri Lanka has a unique continental margin both its width and the uniform thickness of its sedimentary layer.[8] As a developing country, if the Irish formula were to be applied, it would have had the effect of depriving valuable resources for Sri Lanka which it could not have afforded since it would have excluded vast extent of its margin.[9] The initial proposal made by Sri Lanka was to add a new sub paragraph to Article 76 of the draft Convention. However, this was not possible given the fact that when these discussions were initiated, Article 76 was already negotiated and had secured significant consensus among the contracting parties. To make any changes to the consensus already reached concerning the substance of Article 76 would have undermined the efforts taken thus far and it would also have not been practical to do so. As an alternative a *Statement of Understanding* was prepared with the support of India which came to be known as the "Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea in accordance with the Article 76 of the Convention."[10] This was made an integral part of the draft Convention and provided an alternative method for the delimitation of the

4 Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 American Journal of International Law 1, 22 (1980).

5 *Id.*

6 M.C.W. Pinto, *Article 76 of the UN Convention on the Law of the Sea and the Bay of Bengal Exception*, 3 Asian Journal of International Law 215, 216 (2013).

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* at 221.

continental shelf.[11] This is a significant achievement for a nation like Sri Lanka to pursue its claim and to secure its recognition with the support of countries such as India, Soviet Union, and the United States of America. Sri Lanka has made its submission on the claim for an extended continental shelf in 2009[12] and is currently being pursued before the Commission on the Limits of the Continental Shelf.

Another significant achievement for Sri Lanka was the compromise agreed upon at the Conference regarding the payments to be made on the resources extracted by countries beyond the 200 nautical mile limit of the continental shelf. This was proposed by Mr. Pinto[13] and it is reflected in Article 82 of the final Convention on the Law of the Sea that was adopted in 1982.

4 Contribution of Mr. Pinto as General Editor of Asian Yearbook of International Law

International law has been for the most part considered as a creation of the European powers. Due to this factor many of the other nations who do not belong to Europe have always entertained a sense of skepticism about whether it is in their best interest to observe the rules of international law for which they had no part to play in its creation. As an alternative to the European discourse on international law, it became important to others who wanted to advance a different approach and to have an academic forum to advance their claims or to confront the Europeanized ideologies surrounding international law. Mr. Pinto pioneered in creating such an academic forum with the launch of the *Asian Yearbook of International Law* in 1991 as one of its main editors to provide an ample space to generate research and collaborations on the Asian perspectives of international law as well as to formulate a separate stance about the Asian interests under international academic discourse which led

11 The Final Act of the Third United Nations Conference on the Law of the Sea, *Statement of Understanding Concerning a Specific Method to Be Used in Establishing the Outer Edge of the Continental Margin*, annex II, https://www.un.org/depts/los/clcs_new/documents/final_act_annex_two.htm.

12 Continental Shelf Submission of Sri Lanka to the Commission on the Limits of the Continental Shelf (May 8, 2009), https://www.un.org/depts/los/clcs_new/submissions_files/submission_lka_43_2009.htm.

13 Third United Nations Conference on the Law of Sea, *Informal Composite Negotiating Text, revision 1*, art. 82, U.N. Doc. A/CONF.62/Wp.10/Rev.1 (Apr. 28, 1979), https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_8/a_conf62_wp10_rev1.pdf.

to the emergence of alternative view points on international law, such as third world approaches on international law commonly referred to as 'TWAIL.'

The *Asian Yearbook on International Law* was developed as a project of the Foundation for the Development of International Law in Asia (DILA) in 1989 where Mr. Pinto was a founding member. He was elected as a member of the Board of Governors, and in this capacity he was a member of the executive committee.[14] The *Asian Yearbook of International Law* provided a platform for those who focused on international law from an Asian perspective to put forward their scholarly work so that they would get a broader audience who could both express and critique their views so as to advance the knowledge and scope of international law through broader perspectives thus enabling a greater consensus among those who hold different opinions concerning international law. Mr. Pinto served as a General Editor of the *Asian Yearbook of International Law* from 1991 to 1999 and as the Editor from 2000 to 2006.

The *Asian Yearbook of International Law* has enabled scholars and practitioners alike to contribute towards the dissemination of facts and knowledge concerning the Asian perspective on a wider variety of issues which go beyond the matters of pure Asian origin or interest. Mr. Pinto by taking this initiate as one of the founding members of DILA contributed to the idea of promoting Asian perspectives on international law through academia. This must be acknowledged for the fact that he endeavored to establish something sustainable in raising an effective voice regarding Asian concerns and perspectives within the main realm of international law. The *Asian Yearbook of International Law* has become an overwhelming success in achieving its ultimate objective which is evident from the fact that it has continued its publication of scholarly work for more than thirty years culminating in over hundreds of scholarly articles that have made a significant contribution to the development of international law, especially from an Asian perspective.

5 Mr. Pinto as the Secretary-General of the Iran-US Claims Tribunal

The hostage taking incident in Teheran that occurred in 1979 resulted in many hostilities between the United States of America and Iran, including the freezing of Iranian assets by the Government of the United States. In the aftermath of the incident, a claims tribunal was established, and Mr. Pinto was appointed as its Secretary General in 1982 and served until 2011 for 19 years continuously.

14 Kevin Y.L. Tan, *The Asian Yearbook of International Law 1995–2015: A Historical and Personal Reflection*, 20 ASIAN YEARBOOK OF INTERNATIONAL LAW 1, (2014).

It can be considered as an honor for a Sri Lankan to be appointed to such a position given the nature of the incidents that resulted in the establishment of a claims tribunal, where the experiences of Mr. Pinto as a diplomat-lawyer as well as his experiences in dealing with politically sensitive issues would have had a profound impact upon his selection. It was also important for the tribunal to have a full-fledged secretariat due to the number of claims which were anticipated to be brought before it. The overall responsibility of handling such a daunting task was left for the secretariat which prompted the appointment of a very capable individual, and in Mr. Pinto, they found such an individual.[15] In 2014, he was appointed to serve on the five-member Atlanto-Scandian Herring Arbitration Panel[16] that was established to adjudicate the dispute between the Kingdom of Denmark in respect of the Faroe Islands and the European Union. This appointment would have been to a large part influenced by the fact that he had served for nearly 20 years as the secretariat of the Iran-US Claims Tribunal.

6 Moragoda Endowment and the Special Prize in Public International Law

Mr. Pinto, being the generous personality he is, has contributed towards the development of legal education in the country through numerous ways as well. One such contribution is the Moragoda Trust where he was the settlor. It was established to advance, promote, and provide further education in the field of international law. The trust will be used to arrange annual academic programs on selected topics of public international law to be conducted by internationally renowned experts. This is consistent with the United Nations initiative for the promotion and wider dissemination of international law. This endowment has been granted to General Sir John Kotelawala Defense University through a *Memorandum of Understanding* which was signed in 2013. The fund has facilitated many foreign collaborations and projects between the Kotelawala Defense University and foreign affiliations in subjects such as public international law including the law of the sea and space law.

15 Wayne Mapp, The Iran-United States Claims Tribunal: The First Ten Years, 1981–1991: an Assessment of the Tribunal's Jurisprudence and Its Contribution to International Arbitration 31 (1993).

16 Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union), PCA Case Repository Case No. 2013-30, (Perm. Ct. Arb. 2014), https://pca-cpa.org/en/cases/25/.

Mr. Pinto has also contributed to the establishment of a special prize for third-year undergraduates of the faculty of law at the University of Colombo where there is a special award for the best essay written by third year undergraduates on a selected issue of public international law as decided by the faculty. The winner of the prize is given a monetary incentive as well as a medal in recognition of her/his academic achievement which is awarded at the annual general convocation of the university.

Mr. Pinto had a multifaceted personality and his expertise cut across wide and varied aspects of public international law. Mr. Pinto's demise is an irreparable loss both to Sri Lanka as well as to the international legal community.

Philippine State Practice on Diplomatic Privileges and Immunities

*J. Eduardo Malaya**

1 Introduction

The grant of immunities and privileges to diplomats and their staff dates back to the earliest relations between and among states, and the rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law.

Enforcing what was then customary international law and prior to the drafting of the Vienna Convention on Diplomatic Relations, the Philippine Government enacted Republic Act No. 75 on October 21, 1946 which made the assault, wounding, imprisonment, or inflicting of violence to the person of an ambassador or a public minister punishable by imprisonment of not more than three years. This law also declared as void any writ or process sued out or prosecuted by any person or judge whereby an ambassador or public minister or their domestic servant is arrested or imprisoned, or their goods or chattels distrained, seized or attached.

The legal framework of modern diplomatic law is the 1961 Vienna Convention on Diplomatic Relations (VCDR) to which the Philippines is a state party. The VCDR is largely a codification of customary international law, having attained stability over long practice among states.

* Malaya is the Philippine Ambassador to the Netherlands. He was previously the Undersecretary (Deputy Minister) of Foreign Affairs (Aug. 2019–March 2021) and served twice as the Assistant Secretary (Director-General) for Treaties and Legal Affairs (Apr. 2017–July 2019; 2009–2011) at the Philippine Department of Foreign Affairs (DFA). He is a career member of the Philippine foreign service since 1986 and was also previously the Philippine Ambassador to Malaysia and the DFA Spokesman. He is the author, main co-author and editor of seven books on Philippine diplomacy, Philippine presidency, and law, notably *Philippine Treaties in Force 2020* (*University of the Philippines Law Center* (UPLC), *2021*); *Treaties: Guidance on Practices and Procedures* (UPLC, *2018*); and *Forging Partnerships: Philippine Defense Cooperation under Constitutional and International Laws* (UPLC/*Foreign Service Institute, 2016*). He has a BA in Economics (*cum laude*) and a Law degree, both from the University of the Philippines. He is currently the Vice President of the Philippine Society of International Law and a Member of the Editorial Board of the Philippine Yearbook of International Law. The views in this paper do not necessarily reflect those of the Philippine Department of Foreign Affairs.

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The privileges and immunities granted to foreign diplomatic and consular missions and their officials and personnel in the Philippines are principally those provided in VCDR,[1] 1963 Vienna Convention on Consular Relations (VCCR),[2] and their Protocols. These Conventions were ratified by the President and concurred in by the Philippine Senate and have the force and effect of law.[3]

The Philippines has no special laws governing the treatment of diplomats and diplomatic premises, other than Republic Act No. 75, and generally follows those provided in the VCDR and VCCR.

This article will examine the extent of immunities and privileges extended, the manner by which immunity may be invoked, and the ways local courts have dealt with claims of immunity. It will also discuss the special cases of diplomats with same-sex spouses and the conduct of demonstrations in front of embassies, which shed further light on the privileges extended.

2 Extent of Privileges and Immunities

The privileges pertaining to diplomats include, depending upon their ranks, personal inviolability, immunity from jurisdiction (criminal, civil and administrative jurisdictions), immunity from giving evidence, and fiscal exemptions, while the privileges pertaining to properties include inviolability of embassy premises, residences, means of transportation, and archives and official correspondence. The purpose of these privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of the diplomatic mission.[4] The immunities and privileges would extend to the members of the family derivatively.

Meanwhile, diplomatic and consular officers and personnel who are nationals or permanent residents of the Philippines enjoy immunity from jurisdiction

1 Vienna Convention on Diplomatic Relations, opened for signature Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964) [hereinafter VCDR]; *see* J. EDUARDO MALAYA & CRYSTAL GALE P. DAMPIL-MANDIGMA, PHILIPPINE TREATIES IN FORCE 2020 263 (2021).

2 Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967) [hereinafter VCCR], Philippine ratified the VCCR on Oct. 11, 1965; *see* MALAYA, *supra* note 1, at 262.

3 MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 543 (2005), citing Guerrero's Transp. Serv., Inc. v. Blayblock Transp. Serv. Emps Ass'n – Kilusan, G.R. No. L-41518 (June 30, 1976) (Phil.), https://www.lawphil.net/judjuris/juri1976/jun1976/gr_41518_1976.html.

4 VCDR, *supra* note 1, at the Preambular ¶4.

and inviolability only with respect to official acts performed in the exercise of official duties and functions.

As a general rule, immunities are extended to foreign missions and their officials and personnel and their family members on the basis of reciprocity.

Notwithstanding their privileged status, it is the duty of all persons with such status to respect the laws and regulations of the receiving State.[5] They also have a duty not to interfere in the internal affairs of that State.[6] They shall not practice for personal profit any professional or commercial activity.[7] The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the Vienna Conventions or other rules of general international law.[8]

Privileges and immunities extended to the United Nations, its agencies and their officials and staff are generally only those granted by the 1946 Convention on the Privileges and Immunities of the United Nations,[9] the 1947 Convention on the Privileges and Immunities of the Specialized Agencies of the UN,[10] and other relevant agreements with the Philippine Government. The Asian Development Bank[11] and the International Rice Research Institute,[12]

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5 *Id*. art. 41.

6 *Id.*

7 *Id*. art. 42.

8 *Id*. art. 41(3).

9 Convention on the Privileges and Immunities of the United Nations, opened for signature Feb. 13, 1946, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967), ratified by the President on 30 July 1947; concurred in by the Senate on 18 February 1947; entered into force for the Philippines on 28 Oct. 1947; *see* MALAYA, *supra* note 1, at 272.

10 Convention on the Privileges and Immunities of the Specialized Agencies, opened for signature Nov. 21, 1947, 33 U.N.T.S. 261 (entered into force Dec. 2, 1948), adopted at New York on 21 Nov 1947; concurred in by the Senate on 17 May 1949; entered into force for Philippines on 20 March 1950; *see* MALAYA, *supra* note 1, at 272.

11 The Agreement Establishing the Asian Development Bank, opened for signature Dec. 4, 1965, 571 U.N.T.S. 123 (entered into force Aug. 22, 1966), adopted at Manila on 4 Dec 1965; ratified by the President on 5 July 1966; concurred in by the Senate on 22 August 1966; entered into force on 22 August 1966; and Agreement between the Government of the Republic of the Philippines and the Asian Development Bank regarding the Headquarters of the Asian Development Bank, signed at Manila on 22 Dec 1966; ratified by the President on 27 July 1967; concurred in by the Senate on 18 May 1967; entered into force on 28 July 1967. *See* MALAYA, *supra* note 1, at 221–222.

12 Headquarters Agreement between the Government of the Republic of the Philippines and the International Rice Research Institute, opened for signature Apr. 24, 2006 (entered into force May 14, 2008), https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/36/13101, signed by PH at Pasay on 24 April 2006; ratified by the President of the Philippines on 23 May 2006; concurred in by the Senate on 23 April 2008; entered into force on 14 May 2008. *See* MALAYA, *supra* note 1, at 255.

among other international organizations (IOs), are entitled to privileges and immunities that are specified in their respective headquarters/host country agreements with the Philippines.

2.1 *Recognition of Same-Sex Spouses of Diplomats*[13]

An issue which had vexed segments of the diplomatic corps through the years was the visa and protocolar treatment of same-sex spouses of some members. Same-sex marriages have been recognized in a number of countries, and diplomats with same-sex spouses have been assigned to the foreign missions and IOs in Manila.

Philippine law, specifically the Family Code,[14] does not provide for same-sex marriage. The Family Code, in Article 1, states that "marriage is a special contract of permanent union between a man and a woman." When diplomats and officials of IOs with same-sex spouses took up their assignments, the diplomats and officials were issued the diplomatic 9(e-1) visas, but until recently their same-sex spouse were not issued such visa, but instead the 9(e-3) visa, which is of a lower category.

The VCDR, in Article 37(1), provides for immunities and privileges to the family of the diplomat and the members of his or her household: "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36."

During the negotiations on the then proposed VCDR, attempts to define "members of the family" were made but ultimately failed, and the VCDR "was left without either a true definition or a procedure for settling differences of opinion between sending and receiving States."[15]

The DFA Protocol Handbook on Immunities and Privileges lists as "members of the family" the spouse (as defined in Philippine law) and unmarried sons and daughters less than 21 years of age, while "other recognized members of the household" are those physically residing with the diplomatic or consular agent and those subject to reciprocal arrangements including dependent

13 *See generally* extended treatment on the subject in J. Eduardo Malaya and Anna Christina R. Iglesias, *Recognizing the Effects of Same-Sex Marriages: An Examination of Department of Justice Opinion No. 11, Series of 2019 on the Issuance of 9(E-1) Visas to Same-Sex Spouses of Foreign Diplomats*, 18 PHILIPPINE YEARBOOK OF INTERNATIONAL LAW 77 (2019).

14 FAMILY CODE, Exec. Ord. 209 as amended (Phil.).

15 EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 319–320 (4th ed., 2016).

parents/parents-in-law, common-law spouse; and other dependents subject to approval of the DFA.[16]

As specified in the VCDR, VCCR and relevant agreements and conventions,[17] ambassadors and those with diplomatic rank, and the members of their families (who are issued Diplomatic IDs), are entitled to absolute immunity from the criminal jurisdiction of the host country. They may not be arrested nor detained, and are also immune from civil and administrative jurisdictions except in three cases.[18]

Administrative and technical staff and their families (who are holders of Official IDs) enjoy immunity from criminal jurisdiction, but their immunity from civil jurisdiction does not extend to acts performed outside the course of their duties. Service staff enjoy immunity only in respect to acts performed in the course of their duties.[19]

Inasmuch as the three 9(e) visa categories correspond to varying degrees of immunities and privileges, the lumping of same-sex spouses of diplomats with "members of the household, attendants, servants" has been a source of irritation to certain members of the diplomatic corps, particularly those who identify themselves as or with lesbian, gay, bisexual, and transgender.

The DFA had only been issuing 9(e-3) visas to same-sex spouses. Same-sex spouses were not accorded the same status as opposite-sex spouses. Representations were made with the DFA by a number of foreign missions, mostly from Western countries, for the recognition of same-sex marriages involving diplomats and the issuance of 9(e-1) visas and Diplomatic IDs (and not "Official IDs") to same-sex spouses.

The DFA sought guidance from the Department of Justice ("DOJ").

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16 Department of Foreign Affairs Office of Protocol, Handbook on Privileges and Immunities, 5 (2016), https://storage.googleapis.com/request-attachments/MUtvjYrIyGj8gBd9wx7XJG8yqUgx5mFC7nTy5Jodzr8zQoYYXLwHN3dcqfMQIVjkSW6EB3Q19axt4bhV9x8y75qF31WvKEy4iU4p/OP-0195-2021%20(attachment)%20(1).pdf.

17 *E.g.*, 1946 Convention on the Privileges and Immunities of the U.N., 1947 Convention on the Specialized Agencies of the U.N. and the Headquarters Agreements to which the Philippines is a signatory.

18 VCDR, *supra* note 1, art. 29, 31, and 37(1). Under Article 31 of the VCDR, the exceptions to immunity from civil and administrative jurisdiction are the following cases: (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending States; and (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

19 *Id.* art.37 ¶¶2–3.

In April 2019, in DOJ Opinion No. 11, series of 2019 ("*Opinion*"), Secretary Menardo Guevarra laid the new rule as follows:

> (it) is our opinion that if the marriage of a foreign government official assigned to the country and his or her foreign same-sex spouse is considered valid in the place where it was celebrated (*lex loci celebrationis*) and said spouses are also considered validly married under their laws of nationality (lex nationalii) or domicile (lex domicilii), a diplomatic 9(e-1) visa … may be issued to the foreign same-sex spouse of the said foreign government official. On the other hand, in view of the lack of a marriage bond between a foreign government official and his or her informal same-sex partner or common-law spouse or partner, a diplomatic 9(e-1) visa … may not be issued to such partner or spouse.

In its Opinion, the DOJ followed the principle of *lex loci celebrationis* with respect to the validity of marriage celebrated abroad, i.e., a marriage that is valid where it was celebrated are to be recognized as such elsewhere, including the Philippines. This principle is subject to certain exceptions as specified in the Family Code, such as when the marriage is considered incestuous or void by reason of public policy. These exceptions apply only to marriages solemnized abroad between Filipinos, and not to marriages solemnized outside the Philippines between foreigners, including foreign diplomats and their foreign same-sex spouses. The only instance when the validity of their marriages will not be recognized here in the Philippines is when their marriages are considered universally incestuous or highly immoral.

On the basis of the DOJ Opinion, the DFA issued a circular Note dated May 23, 2019 to the diplomatic and consular missions and international organizations informing them that "dependent spouses, who are current holders of 9(e-3) visas may now apply for conversion to 9(e-1) visas, provided that the subject marriage is considered valid in the place where it was celebrated and the parties are also considered validly married under their laws of nationality or domicile."

2.2 *Demonstrations before Embassy Premises*

Demonstrations have been held in front of foreign embassies in protest against the policies of their home governments. Leftist groups have often congregated before the U.S. Embassy in Manila and riled against the latter government's "imperialist policies." In recent years, picket rallies have been held in front of the Dutch Embassy in Makati calling attention to the "coddling" of Jose Ma. Sison

in the Netherlands and urging that he and his comrades be sent back to face charges filed against them in the Philippines.[20]

As noted by Denza, politically motivated demonstrations before foreign embassies have become a favored method of public protest at the policies of the sending State, and with the increasing emphasis in many States on freedom of speech and freedom of assembly they often give rise to difficult decisions as to how the balance between the rights of citizens of the receiving State and the duty to prevent disturbance of the peace of the mission or impairment of its dignity should be struck by the local authorities.[21]

In *Reyes v Bagatsing*,[22] the petitioner, on behalf of the Anti-Bases coalition, sought a permit from the City of Manila to hold a peaceful march and rally on October 26, 1983 from 2:00 to 5:00 in the afternoon, starting from the Luneta Park to the gates of the United States Embassy. Once there, a short program would be held. The march would be attended by the local and foreign participants of an anti-bases conference. There was an assurance in the petition that all necessary steps would be taken "to ensure a peaceful march and rally."[23]

However, the request was denied by the City Hall as their officials were "in receipt of police intelligence reports which strongly militate against the advisability of issuing such permit at this time at the place applied for."[24] City Ordinance No. 7295 also prohibits rallies or demonstrations within the radius of 500 feet from any foreign mission or chancery.[25]

An oral argument was heard, and the mandatory injunction was granted on the ground that there was no showing of the existence of a clear and present danger of a substantive evil that could justify the denial of a permit. In its ruling, the Court stated:

> The Constitution is quite explicit: "No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances." Free speech, like free press, may be identified with the liberty to discuss

20 Lade Jean Kabagani, *Groups call on Dutch gov't to stop coddling Joma Sison*, Philippine News Agency, (May. 5, 2021), http://www.pna.gov.ph/articles/1139244.

21 Denza, *supra* note 15, at 140.

22 J.B.L. Reyes v. Mayor Bagatsing, G.R. No. L-65366, Resolution (Oct. 25, 1983); Extended opinion, (Nov. 9, 1983) (Phil.), https://lawphil.net/judjuris/juri1983/nov1983/gr_l_65366_1983.html.

23 *Id.*

24 *Id.*

25 *Id.*

> publicly and truthfully any matter of public concern without censorship or punishment. There is to be then no previous restraint on the communication of views or subsequent liability whether in libel suits, prosecution for sedition, or action for damages, or contempt proceedings unless there be a clear and present danger of a substantive evil that [the State] has a right to prevent. Freedom of assembly connotes the right people to meet peaceably for consultation and discussion of matters of public concern. It is entitled to be accorded the utmost deference and respect. It is not to be limited, much less denied, except on a showing, as in the case with freedom of expression, of a clear and present danger of a substantive evil that the state has a right to prevent … In every case, therefore where there is a limitation placed on the exercise of this right, the judiciary is called upon to examine the effects of the challenged governmental actuation. The sole justification for a limitation on the exercise of this right, so fundamental to the maintenance of democratic institutions, is the danger, of a character both grave and imminent, of a serious evil to public safety, public morals, public health, or any other legitimate public interest.
>
> …
>
> … If the rally were confined to Luneta, no question, as noted, would have arisen. So, too, if the march would end at another park. As previously mentioned though, there would be a short program upon reaching the public space between the two gates of the United States Embassy at Roxas Boulevard. That would be followed by the handing over of a petition based on the resolution adopted at the closing session of the Anti-Bases Coalition. The Philippines is a signatory of the Vienna Convention on Diplomatic Relations adopted in 1961 … It (is) binding on the Philippines. The second paragraph of the Article 22 reads: "2. The receiving State is under a special duty to take appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." … That being the case, if there were a clear and present danger of any intrusion or damage, or disturbance of the peace of the mission, or impairment of its dignity, there would be a justification for the denial of the permit insofar as the terminal point would be the Embassy.[26]

There was no such showing of a clear and present danger in this case, the Court noted.

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26 *Id.*

In sum, the Vienna Convention obligation to protect the premises of embassies must be honored, however observance of this obligation does not preclude the application of the clear and present danger rule which precisely is a way of measuring the degree of protection needed for safeguarding the premises of embassies.[27]

The *Reyes* ruling is significant not only for diplomatic law but also for the Bill of Rights as it is the first to deal with the cognate rights of free speech and peaceful assembly. Similar rulings followed, notably *Ruiz v Gordon*;[28] however, *Reyes* laid down the rules on assembly and petition.

3 Invoking Diplomatic Immunity

The Handbook on Privileges and Immunities of the Office of Protocol of the Philippines Department of Foreign Affairs states the following:

> 1.1 As a general rule, immunities shall be extended on a reciprocal basis to foreign mission and their representatives who are duly accredited to the Philippine government, subject to the Vienna Convention on Diplomatic Relations of 1961 and its protocol for diplomatic personnel; the Vienna Convention on Consular Relations of 1963 and its protocol for consular personnel; the pertinent Headquarters Agreement or Host Country Agreement for personnel of International Organizations; the 1947 Convention on the Specialized Agencies of the UN; the 1946 Convention on the Privileges and Immunities of the UN and other international agreements to which the Philippines is signatory.
>
> 1.2 Diplomatic and consular officers who are nationals or permanent residents of the Philippines shall enjoy immunity from jurisdiction and inviolability only with respect to official acts performed in the exercise of their official duties and functions.
>
> 1.3 Notwithstanding the entitlement of privileged parties to immunities under relevant conventions and agreements, it is the duty of all persons to respect the laws and regulations of the Philippines.[29]

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27 Joaquin G. Bernas, s.j., G., The 1987 Constitution of the Republic of the Philippines: A Commentary, 311 (2003).

28 Ruiz v. Gordon, g.r. No. 65695 (Dec. 19, 1983) (Phil.), https://lawphil.net/judjuris/juri1983/dec1983/gr_l_65695_1983.html.

29 Department of Foreign Affairs, *supra* note 16, at 28.

A foreign embassy, consulate, or an international organization may invoke its immunity or that of its officer or personnel by requesting the Department of Foreign Affairs (DFA) to issue a certificate pertaining to its status. The DFA will, upon receipt of the request and when warranted, issue a certificate of entitlement to immunity.

The DFA Handbook provides as follows:

> When warranted, the entities concerned may invoke its immunity or that of its officers and personnel, and may communicate a request for the issuance of a certificate confirming its status to the Department through a Note Verbale.
>
> The Department shall, upon receipt of the request, issue a certificate of identity and/or immunity of an officer or personnel after proper verification of its records.

3.1 *Recourses upon Receipt of Immunity Claim*

There are two recourses to the receiving State provided in the VCDR when immunity from jurisdiction is invoked by a foreign diplomatic person, namely a request for waiver of the immunity, and expulsion as a *persona non grata*.

Article 32 of the Vienna Convention allows the receiving State to ask the sending State to waive the diplomat's immunity. This is particularly useful with respect to, among other cases, civil claims in domestic courts when such waiver would not impede the daily performance of the foreign mission, or the alleged crime is of a serious nature which if not given redress could harm relations. The Convention requires the sending State to make an express waiver of this privilege, generally conveyed through a diplomatic note.

Article 9 of the Convention also allows the receiving State to declare the person in question *persona non grata* (PNG). The PNG procedure enables the receiving State to declare a member of the foreign mission unacceptable "without having to explain its decision." This signifies the expulsion of that member. An intimation that such a step may be taken can prompt the waiver of immunity or otherwise the settlement of the claim or issue. The Philippines rarely utilizes this remedy, as its use could create tension with the sending State.

Complaining parties at times seek the intervention of the Department of Foreign Affairs in their disputes with foreign diplomats, including on damages or money claims (for unpaid lease rentals and the like). Where appropriate, the DFA Office of Protocol play a mediation role between the parties toward a fair settlement of the claim. This is in view of the fact that the legal consequence of diplomatic immunity is procedural in character and does not affect

any underlying substantive liability, and that diplomatic immunity should not be used as a shelter from legal obligations.[30]

The DFA also uses administrative measures to address abuse of diplomatic privileges, such as suspension of driving privileges or withholding car license plates in cases of flagrant violations of traffic regulations. Motor vehicles bearing diplomatic plates that are in violation of traffic rules are subject to traffic fines. As a matter of practice, the DFA does not intervene with police or local authorities for reimbursement of traffic fines paid nor the cancellation of traffic tickets. There is no exemption from the payment of highway toll fees as these are considered service charges.[31]

3.2 *Manner of Invoking Immunity*

In *Holy See v. Rosario Jr.*,[32] the Supreme Court canvassed the ways by which immunity have been invoked. The Court noted that in the United States, the Executive Department, through the Secretary of State, makes a determination of a foreign state or international organization's entitlement to immunity. Thus, if the Secretary of State determines that the defendant is entitled to immunity from suit, he shall direct the Attorney General to submit to the court a "suggestion" stating the same. In the United Kingdom, the Foreign Office issues a "certification." The practice in the Philippines is for the concerned foreign embassy or international organization to first secure an executive endorsement of its claim of diplomatic immunity.

There have been different manners in which such endorsement is conveyed to courts, added the Court in *Holy See*. In *International Catholic Migration Commission v. Calleja*,[33] the Secretary of Foreign Affairs sent a letter directly to the Secretary of Labor and Employment attesting to the Commission's

30 *See* Resolution adopted by the United Nations Conference on Diplomatic Intercourse and Immunities: *Recommends that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when the immunity not waived, the sending State should use its best endeavors to bring about a just settlement of the claims*. U.N. Doc. A/Conf. 20/L.4/Rev.1 (Apr. 11, 1961) (draft proposed by Israel); A/Conf. 20/14, pp 50–1 (Apr. 14, 1961); A/Conf. 20/10/Add 1 (Apr. 14, 1961); DENZA, *supra* note 15, at 269–270.

31 DEPARTMENT OF FOREIGN AFF., *supra* note 16, at 28.

32 Holy See v. Rosario Jr., G.R. No. 101949 (Dec. 1, 1994) (Phil.), https://lawphil.net/judjuris/juri1994/dec1994/gr_101949_1994.html.

33 International Catholic Migration Commission v. Calleja, G.R. No. 85750 (Sept. 18, 1990) (Phil.), https://lawphil.net/judjuris/juri1990/sep1990/gr_85750_1990.html.

entitlement to immunity. In *World Health Organization v. Aquino*,[34] notice was sent by telegram. In *Baer v. Tizon*,[35] the U.S. Embassy asked the Secretary of Foreign Affairs to request the Solicitor General to make, on behalf of the Commander of the then U.S. Naval Base at Olongapo City, a "suggestion" to the Judge. The Solicitor General embodied the "suggestion" in a Manifestation and Memorandum as amicus curiae.

The procedure followed by the DFA, as stated in its Handbook, is for the embassy or international organization to communicate to the Department through a note verbale a request for the issuance of a certificate confirming its status, and then the Department may issue a certificate of identity and/or immunity after an evaluation of the matter.

3.3 *Judicial Appreciation of Immunity Claims*

In *World Health Organization*,[36] Judge Aquino issued a search warrant against the shipment belonging to Dr. Leonce Verstuyft, Acting Assistant Director of Health Service, for alleged violation of the Philippine Tariff and Customs Code. Satisfied that the World Health Organization official was entitled to immunity pursuant to the Host Agreement between the Philippine Government and the WHO, the Supreme Court sustained the immunity claim stating:

> It is a recognized principle of international law and under our system of separation of powers that diplomatic immunity is essentially a political question and courts should refuse to look beyond a determination by the executive branch of the government, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government as in the case at bar, it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the principal law officer of the government, the Solicitor General in this case, or other officer acting under his direction.[37]

The *WHO* ruling was prevailing jurisprudence on the matter until 2010 when the Supreme Court decided *Liang v. People of the Philippines*.[38] Mr. Jeffrey

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34 World Health Organization v. Aquino, G.R. No. L-35131 (Nov. 29, 1972) (Phil.), https://www.lawphil.net/judjuris/juri1972/nov1972/gr_l_35131_1972.html.

35 Baer v. Tizon, G.R. No. L-24294 (May 3, 1974) (Phil.), https://www.lawphil.net/judjuris/juri1974/may1974/gr_l_24294_1974.html.

36 World Health Organization v. Aquino, *supra* note 34.

37 *Id.*

38 Liang v. People of the Philippines, G.R. No. 125865 (Jan. 28, 2000) (Phil.), https://lawphil.net/judjuris/juri2001/mar2001/gr_125865_2001.html.

Liang was an economist in the Asian Development Bank (ADB). A case for grave oral defamation was filed against him for alleged defamatory words against a fellow ADB employee. Upon the filing of the case, the Metropolitan Trial Court judge received a communication from the DFA Office of Protocol that Mr. Liang is covered by immunity from legal processes under the PH-ADB Headquarter Agreement. Based on the said communication, the trial court dismissed the criminal cases against Liang without notice to the prosecution.

Somewhat departing from the *WHO* ruling, the Supreme Court held that Liang was not entitled to immunity:

> [T]he immunity mentioned in Section 45 of the Headquarters Agreement is not absolute, but subject to the exception that the acts were done in official capacity … Thus, the prosecution should have been given the chance to rebut the DFA (P)rotocol and it must be accorded the opportunity to present its controverting evidence, should it so desire … The DFA's determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts.

It is this writer's view that the *WHO* and *Liang* rulings can be reconciled. There is need to examine the level of immunity that the personnel is entitled to, specifically whether to full or absolute immunity (such as for diplomatic agents) or functional immunity (i.e., immunity for acts done in "official capacity" as in Mr. Liang's case). The act in question has to be assessed as to whether the claimed immunity applies. Furthermore, there is need to allow the complainant the opportunity to be heard. In sum, the *WHO* ruling is the better rule with respect to diplomatic agents and senior officials of IOs who are entitled to full immunity. On the other hand, the *Liang* ruling is more appropriate for personnel who are not entitled to full immunity but to functional immunity.

In instances where the claim of immunity is upheld, an individual who feels aggrieved can ask his own government to espouse his cause through diplomatic channels.[39]

A number of immunity cases involving IOs pertain to labor matters, specifically whether the National Labor Relations Commission can acquire jurisdiction over cases of dismissal of IO personnel, and whether the Department of Labor and Employment can order labor union certification election among them.

39 Holy See v. Rosario Jr., *supra* note 32.

In *DFA v. NLRC*,[40] the Supreme Court upheld the immunity of the ADB in a labor dismissal case. *International Catholic Migration Commission v. Calleja*[41] determined whether the right of labor to petition for certification election was availing alongside claims of immunity. In a Memorandum of Agreement with the International Catholic Migration Commission (ICMC), the government granted the former the status of a specialized agency with corresponding privileges and immunities. The DFA supported the claim of immunity, stating that an order to hold certification election violates this immunity. The Court ruled that specialized agencies are IOs with functions in particular fields, and ICMC enjoyed immunity as necessitated by its international character and recognized purposes.

The *ICMC* ruling was criticized by Merlin Magallona for its "sheer inaccuracies"[42] He pointed out that IOs are established in a multilateral treaty by States and the latter comprise its membership. In contrast, the ICMC, a non-governmental organization although international and registered with the UN Economic and Social Council, was not created under international law as an international person. It is a private corporation composed of individuals, and its status determined by the State of New York, where it was incorporated. It is "intriguing how the Government can create a specialized agency out of ICMC by means of a Memorandum of Agreement and conjure unilaterally its coverage under the Convention on Specialized Agencies," Magallona noted.[43]

40 DFA v. NLRC, G.R. No. 113191 (Sept. 18, 1996) (Phil.), https://lawphil.net/judjuris/juri1996/sep1996/gr_113191_1996.html.

41 International Catholic Migration Commission v. Calleja, *supra* note 32.

42 MAGALLONA, *supra* note 3, at 292; *quoted in* Francis Tom Temprosa, *Reflections of a Confluence: International Law in the Philippine Court 1940–2000*, 19 ASIAN YEARBOOK OF INTERNATIONAL LAW 88, 102–103 (2013).

43 *See* MAGALLONA 92. Magallona stated that the confusion as to diplomatic immunity and international immunity persists in Lasco v. UN Revolving Fund for Natural Resources Exploration, 241 S.C.R.A. 681 (Feb. 23, 1995) (Phil.), https://lawphil.net/judjuris/juri1995/feb1995/gr_109095_109107_1995.html; Department of Foreign Affairs v. National Labor Relations Commission, 262 S.C.R.A. 39 (Sept. 18, 1996) (Phil.), https://www.chanrobles.com/cralaw/1996septemberdecisions.php?id=563; and Southeast Asian Fisheries Development Center – Aquatic Department v. National Labor Relations Commission, 206 S.C.R.A. 283 (Feb. 14, 1992) (Phil.), https://www.chanrobles.com/cralaw/1995februarydecisions.php?id=107.

4 Philippines as Party Invoking Diplomatic Immunity

The Philippines is host to foreign embassies, consulates and IOs principally in Metro Manila as well as to foreign consulates in the cities of Cebu and Davao. It also deploys Filipino diplomats to other countries and the UN offices, among others. As both a sending and receiving State, it has received claims of immunity from foreign embassies and diplomats as well as asserted immunity on behalf of its embassies and Filipino diplomatic personnel.

As a matter of practice, the Philippines as a sending State will not subject its diplomatic personnel to the criminal or civil jurisdiction of the receiving State. Nonetheless, it may encourage the concerned personnel to seek a resolution or settlement of the claim with a complaining private party.

Though it may not opt to waive the immunity of its personnel in the receiving State, this does not preclude the Department of Foreign Affairs from investigating the matter and prosecuting the crime. As stated in Article 31(4) of the Convention, "the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."

In a number of cases, erring Filipino personnel have been recalled to Manila and not allowed to return. Some were made to face administrative charges and dismissed from the service. For instance, two staff members who abused the privilege of purchasing liquors in a Muslim country and sold them for profit were made to face proceedings before the Board of Foreign Service Administration and then their services were terminated.

5 Conclusion

Philippine practice in immunities and privileges of diplomats, embassies and international organization has evolved with the times. In the early decades after the entry into force of the VCDR, the issues mostly revolved around the extent of immunity entitlement, notably whether international organizations are exempt from the application of local labor laws. The duty of the host government to protect embassies during demonstrations have occasionally been raised, although this concern has mostly been addressed at the level of the DFA and police authorities and did not reach the courts. Same-sex spouses of foreign diplomats were finally given recognition in 2019 with the issuance of a Department of Justice opinion. There have been incidences of abuse of immunities and privileges, but these are few and far between.

Philippine practice in this field of diplomatic law has been rich, varied and adaptable to the times. It also adheres to the letter and spirit of the Vienna Convention of Diplomatic Relations, with its avowed purpose of "ensur(ing) the efficient performance of the functions of diplomatic missions."

The Practices on Diplomatic Immunities and Privileges of the Republic of China on Taiwan: A Unique Case

*Chun-i Chen**

1 Introduction

The principle of diplomatic immunities and privileges is one of the essential elements of foreign relations. Under this principle, receiving states extend certain privileges and immunities to foreign diplomatic missions and their personnel.[1] Although customary international law continues to refine the progress of diplomatic immunities and privileges, the basic rules have been codified in the Vienna Convention on Diplomatic Relations (VCDR)[2] and the Vienna Convention on Consular Relations (VCCR).[3] Most states worldwide are contracting parties of the two Vienna treaties, therefore, legally bound by such rules of immunities and privileges.

Compared to practices of other states, the Republic of China (ROC or Taiwan) has failed to gain full immunities and privileges under the VCDR and the VCCR from most countries of the world. The reality is, as of December 2022, the ROC[4] maintains diplomatic relations with only 13 countries.[5] Under such circumstances, Taiwan's diplomatic immunities and privileges practices

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1 *See* John P. Grant & J. Craig Barker, Parry & Grant Encyclopaedic Dictionary of International Law 156 (3d ed. 2009).

2 Vienna Convention on Diplomatic Relations, opened for signature Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964) [hereinafter VCDR]; *see generally* Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic relations (4th ed., 2016); The ICJ has held VCDR to "codify the law of diplomatic relations, state principles and rules essential for the maintenance of peaceful relations between states and accepted through the world by nations of all creeds, cultures and political complexions …." *see US Diplomatic and Consular Staff in Tehran Case*, 1980 ICJ 3, at 24.

3 Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967) [hereinafter VCCR].

4 *Id.* In this Article, the terms "Taiwan" and "ROC," as well as the terms "Mainland China" and "PRC," will be used interchangeably.

5 *Diplomatic Allies*, Ministry of Foreign Affairs, https://en.mofa.gov.tw/AlliesIndex.aspx?n=1294&sms=1007.

are unique, showing how the ROC maintains its foreign relations and international legal status through unorthodox channels in international law.

This article provides an overview of Taiwan's practices on diplomatic immunities and privileges. As mentioned above, customary law and the two Vienna Conventions are the primary basis for regulating diplomatic and consular relations concerning diplomatic allies. Therefore, part II will examine the status of customary international law and treaties concerning diplomatic immunities and privileges in the law of Taiwan. At the same time, section III will focus on Taiwan's legislation and cases concerning this issue toward states without diplomatic relations with the ROC, with a particular reference to the Agreement on Privileges, Exemptions, and Immunities between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Taiwan (hereinafter referred to as 2013 TECRO-AIT Agreement). Then, based on the above observations, this article will conclude how the ROC implements and observes international law on diplomatic immunities and privileges in its foreign relations.

2 Full Diplomatic Relations

As mentioned above, the ROC has full diplomatic relations with 13 states, which are Belize, Guatemala, Paraguay, Haiti, Saint Lucia, Saint Christopher and Nevis, Saint Vincent, the Marshall Islands, Nauru, Palau, Tuvalu, Eswatini, and Holy See (Vatican City). To these states, immunities and privileges are granted by the ROC to their embassies and envoys to carry out diplomatic functions based upon the VCDR and the VCCR and customary international law. Therefore, the status of customary international law and international treaties in the ROC's domestic law is a concern here.

2.1 *Customary International Law*

The present Constitution of the ROC does not prescribe whether, in the absence of statutory authorization, customary international law has validity in the internal law of the ROC so that the courts in Taiwan may apply it. However, it seems clear that legislative and administrative references to "public international law," "international law," or "international custom" include the rules of customary international law.[6]

6 Hungdah Chiu & Chun-i. Chen, *The Status of Customary International Law, Treaties, Agreements and Semi-official or Unofficial Agreements in Law of the Republic of China on Taiwan*, MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES 1, 4 (2007).

In the absence of a specific authorization by a statute or an administrative decree, there is no statutory prohibition against a court in Taiwan to apply a rule of customary international law in exercising its functions. In practice, the courts in Taiwan sometimes refer to rules of customary international law to clarify the meaning of statutory provisions or to decide a question of jurisdiction.[7] For example, *Kao Lin Co. v. The Embassy of the Republic of Panama in the Republic of China* is a case regarding the defendant, the Embassy of Panama, reselling a Mercedes-Benz sedan to the plaintiff. In the default judgment of 2001, the Taipei District Court indicated that although the Ambassador, as Head of the Mission of the Republic of Panama in the ROC, could claim jurisdictional immunity of the receiving state under paragraph 1 of Article 31 of the VCDR, the defendant, in this case, was the Embassy of Panama. Then, the court held, under customary international law, that the jurisdictional immunity of a sovereign state is restrictive and that a diplomatic mission of a foreign state may not claim state immunity for acta jure gestionis.[8] Upon appeal, the Taiwan High Court upheld the case that "according to international practices and customs, a state or its representative organ may not claim jurisdictional immunity for acta jure gestionis (commercial activities)."[9]

In 1994, Professor Hungdah Chiu, President of the International Law Association Chinese (Taiwan) Branch, forwarded a copy of the questionnaire of the International Law Association regarding the international law practice in the municipal courts of the ROC to the Judicial Yuan and requested its response. In the letter addressed to Professor Chiu, the Secretary-General of the Judicial Yuan replied:

> As to [the validity, content, scope, and manner of application of the international custom], the parties involved have the burden to prove them, and the court is also competent to initiate an investigation. As to general international law, the court can refer to the legal opinion of the International Court of Justice, other courts in the Republic of China, executive branches, and domestic and foreign scholars to ascertain what it is.[10]

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7 *See id.* at 4–5.

8 Civil Judgment 90 [2001], Shu-387 (Taipei District Court, June 3, 2003), *reprinted in* 17 Chung-kuo kuo-chi-fa yu kuo-chi-shih-wu nien-pao [CHINESE YEARBOOK OF INTERNATIONAL LAW AND INTERNATIONAL AFFAIRS] 937, 937–982 (2003).

9 Civil Judgment 92 [2003], Shang-yi-875 (Taiwan High Court, Feb. 17, 2004), *reprinted in* 17 Chung-kuo kuo-chi-fa yu kuo-chi-shih-wu nien-pao [CHINESE YEARBOOK OF INTERNATIONAL LAW AND INTERNATIONAL AFFAIRS] 982, 982–988 (2005).

10 *See Responses of the Chinese (Taiwan) Branch of the International Law Association and the Judicial Yuan of the Republic of China to the Questionnaire of the International Law*

The application of customary international law rules by the courts of the ROC or judicial authorities has been taken for granted. None of the procurators, attorneys, judges, writers, and Ministry of Foreign Affairs (MOFA) has raised the question of whether the courts or agencies of the ROC could apply customary international law in exercising their functions.[11] Thus, ROC courts and government agencies can apply rules of customary international law on diplomatic immunities and privileges in exercising their functions without special authorization by statutes or administrative decrees.

2.2 *Treaties*

The ROC signed the VCDR on April 18, 1961, and ratified it on December 19, 1969.[12] On the other hand, the Vienna Convention on Consular Relations (VCCR) was signed on April 24, 1963, and passed by the Legislative Yuan on March 7, 1972. However, the ROC could not deposit its ratification in the United Nations due to the UN General Assembly resolution 2758 (XXVI).[13]

From Taiwan's point of view, the VCDR is absolutely a "treaty" in Taiwan's domestic legal system because it is consistent with interpretation 329 of the Grand Justice Council of the Judicial Yuan of December 24, 1993[14] and article 3

Association Regarding the International Law Practice in the Municipal Courts of the Republic of China, 13 CHINESE (TAIWAN) YEARBOOK OF INTERNATIONAL LAW & AFFAIRS 200, 202 (1994–1995).

11 Chiu & Chen, *supra* note 6, at 9.

12 However, on November 25, 1975, the PRC government deposited the instrument of accession to declare, "[t]he 'signature' on and 'ratification' of this Convention by the Chiang Kai-shek clique usurping the name of China are illegal and null and void"; *see also* VCDR, *supra* note 2, at 16, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-3.en.pdf.

13 On September 29, 1972, the MOFA of the PRC sent a communication to the Secretary-General indicating that the ROC government's multilateral treaties signed, ratified, or acceded to "are all illegal and null and void"; my government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be acceded to Multilateral Treaties Deposited with the Secretary-General, *Historical Information, China*, https://treaties.un.org/Pages/HistoricalInfo.aspx?clang=_en#China; upon the accession of VCCR, the PRC Government declared, "[t]he Taiwan authorities' signature on this Convention in the name of China is illegal and null and void"; *see also* VCDR, *supra* note 2, at 16, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-3.en.pdf.

14 Interpretation 329 of the Grand Justice Council of the Judicial Yuan of December 24, 1993, explained,

> [w]ithin the Constitution, "treaty" means an international agreement concluded between the ROC and other nations or international organizations whose title may apply to a treaty, Convention, or Agreement. Its content involves essential issues of the Nation or rights and duties of the people, and its legality is sustained.

of the Conclusion of Treaties Act.[15] The status of VCCR in Taiwan is questionable because it still needs to complete the deposit process. However, the author tends to treat VCCR as a treaty duly ratified by the Legislative Yuan and has the force of municipal law under the ROC legal system.[16] Thus, the status of VCDR and VCCR in the ROC legal system shall be summarized as follows.

First, given Article 58, paragraph 2; Article 63 and Article 57, paragraph 1, subparagraph 3 of the Constitution, the review procedure is the same as that of general domestic laws. They should be deemed to have the same force as domestic laws and should be applied by the court.[17] Article 1 of the Conclusion of Treaties Act indicates that "treaties have the force of domestic laws is provided for by law."

Second, the Statute Governing Privileges and Immunities of Foreign Missions and Their Personnel in the ROC (Taiwan)[18] stipulates that the privileges and immunities of foreign missions and their personnel in Taiwan shall be governed by the Foreign Missions and Their Personnel Statute "unless specified otherwise by relevant treaties or agreements." Therefore, it is beyond doubt that where such references exist, courts or administrative organs in Taiwan must apply the indicated treaties or agreements in exercising their functions.

Third, when a treaty and a municipal law conflict, which rule should a court or administrative organ of the ROC apply? The present Constitution is silent on this question. In its instruction No. 459 to the Ministry of Justice, the Judicial Yuan, on July 27, 1931, stated, "In principle [if a treaty conflicts with the municipal law] ... the validity of treaties should prevail."[19] In 1990, the

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Above quote translated by the Judicial Yuan, http://www.judicial.gov.tw/constitutionalcourt/en/ p03_01.asp?expno=329.

15 Article 3 of the Conclusion of Treaties Act stipulates that "treaty" means internationally written agreements that meet one of the following circumstances:
(1) carry the designation of "treaty" or "convention";
(2) contain a ratification, acceptance, approval, or accession clause;
(3) involve people's rights and obligations;
(4) involve national defense, foreign affairs, financial matters, economic interests, or other issues of national interest;
(5) involve incoherence or changes to domestic laws, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=E0020021.

16 Chiu & Chen, *supra* note 6, at 17.

17 *See* Judgment of 72 (1983)-t'ai-shang-tzu no. 1412 by the Supreme Court [of Taiwan].

18 Promulgated on July 9, 1982; Article 7-1 was added and Article 9 was amended on May 7, 1997.

19 *Chung-hua Min-kuo liu-ga li-yu p'an-chieh ch'uan-pien* [*Collection of Reasons, precedents, and Interpretations of the Six Laws of the Republic of China*] 8 (Chung-Kuang Book Co., 1964), *reprinted in* HUNGDAH CHIU & CHUN-I CHEN, Hsien-tai kuo-chi-fa [MODERN INTERNATIONAL LAW] 131–32 (4th ed. 2021) (Taiwan).

Taiwan High Court, in a case regarding American Encyclopedia Britannica, elaborated on the issue of treaties conflicting with municipal laws of the ROC. The court held:[20]

> Besides, based on the "respecting treaties" provision of Article 141 of the Constitution, the force of treaties should have supremacy over the general domestic laws, thus becoming special laws. Thus, where treaties conflict with the general domestic law, treaties should have priority to be applied according to the principle of supremacy of special law over general laws.

Based upon the above observations, the VCDR and the VCCR are applied to missions and personnel of countries that are allies of the ROC. Similarly, the privileges and immunities of diplomatic missions and personnel of the ROC also apply the norms of the Conventions to its diplomatic allies.[21] One may argue that the provisions of VCDR do not apply to the diplomatic missions of the ROC and their staff because the ROC is not a party of VCDR.[22] However, neither Taiwan nor its diplomatic allies support this argument.

3 Non-Diplomatic Relations

3.1 *The Status of Unofficial Representation of ROC Abroad*

As of March 7, 2023, Taiwan has 112 unofficial representative offices around the world.[23] From a legal point of view, issues of privileges and immunities are irrelevant to unofficial foreign representations of Taiwan. However, it is not the reality. Many states granted the unofficial representations of Taiwan a particular scope of privileges and immunities. Among them, Australia is a case that grants a relatively broad scale of privileges and immunities to Taiwan's representation offices based on its Overseas Missions (Privileges and

20 Civil Judgment, 79 [1990], shang-keng-i-128 (Taiwan High Court, Jan. 28, 1991), *translated in* 9 Chinese (Taiwan) Yearbook of International Law & Affairs 328, 328–329 (1989–1990).

21 Erik Pajtinka, *Between Diplomacy and Paradiplomacy: Taiwan's Foreign Relations in Current Practice*, 11(1) Journal of Nationalism, Memory & Language Politics 39, 47 (2017).

22 *Id.*

23 *Links to Embassies and Missions*, Ministry of Foreign Affairs, https://en.mofa.gov.tw/OverseasOfficeLink.aspx?n=1573&sms=957.

Immunities) Act 1995 and Taipei Economic and Cultural Office (Privileges and Immunities) Regulations 1998.[24] The United States is another case that had concluded a bilateral agreement to grant a relatively wide scale of privileges and immunities to the Taipei Economic and Cultural Representative Office (TECRO) of Taiwan.

Today, most of Taiwan's representative offices abroad hold various privileges and immunities established through practice and reciprocity. Singapore and the Philippines have provided Taiwan with substantial privileges and immunities, including the use of diplomatic passports, diplomatic bags, and airport privileges and an exemption from taxes and duties arising from salaries and vehicles.[25] Slovakia and the Czech Republic grant Taiwan the same privileges and immunities as stipulated by the VCCR.[26] On the other hand, Cambodia and Laos have severely restricted engagement with Taiwan.[27]

The overall trend shows that Taipei representative offices in most states have enjoyed an increasing degree of diplomatic treatment, primarily based on reciprocity and often not externally discernible.

3.2 *The Status of Unofficial Representation of Foreign Missions and Their Personnel in Taiwan*

3.2.1 ROC Domestic Laws

Taiwan also hosted 53 representative offices from countries around the world.[28] For these unofficial presentations and their staffs in Taiwan, Statute Governing Privileges and Immunities of Foreign Missions and their Personnel in the Republic of China (Taiwan) (hereinafter referred to as "the Statute") was enacted to deal with issues such as the inviolability of the premises, freedom of communications, Immunity from jurisdiction, exemption from taxation, exemption from customs duties and inspection, etc.

3.2.1.1 *Basic Principles*

The ROC's MOFA has primary jurisdiction over matters regarding the privileges and immunities of foreign missions and their personnel in Taiwan. The Statute, therefore, authorized MOFA to approve the establishment of a foreign

24 Ivan Shearer, *International Legal Relations Between Australia and Taiwan: Behind and Facade*, 21 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 113, 125 (2000).

25 Pasha L. Hsieh, *Rethinking non-recognition: Taiwan's new pivot to ASEAN and the one-China policy*, 33(2) CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 204, 216–217 (2020).

26 Pajtinka, *supra* note 21, at 51.

27 Hsieh, *supra* note 25, at 217.

28 *Taiwan – Embassies & Consulates*, Embassy Pages, https://www.embassypages.com/taiwan.

mission and accredit its personnel in Taiwan.[29] Only those missions and their personnel confirmed by MOFA can enjoy the privileges and immunity provided by the Statute.

Taiwan grants privileges and immunities to foreign missions and their personnel based on reciprocity.[30] In exceptional circumstances, some privileges apply to foreign missions, or their personnel may be the same as those that apply to foreign embassies and consulates in Taiwan.[31]

3.2.1.2 *Immunities from Jurisdiction*

Under international law, the immunities of the diplomatic mission, members of the diplomatic mission, and their families are not absolute.[32] Article 5 and 6 of the Statute applies similar rules. Article 5 stipulates that foreign missions do not enjoy immunity from civil or administrative jurisdiction in some cases, such as a case of (1) waiver of immunity by foreign missions; (2) counterclaim concerning any legal action initiated by foreign missions; (3) legal action arising from commercial activities conducted by foreign missions; (4) legal action related to immovable property situated in the Republic of China (Taiwan).[33]

Article 6 prescribes that personnel of foreign missions in Taiwan without ROC's nationality shall enjoy "immunity from civil and criminal jurisdiction related to acts performed within the scope of their official duties."[34] If approved by the Executive Yuan, their privileges and immunities will be accredited to the scope of privileges and immunities accorded to foreign diplomats and consular officers.[35]

3.2.1.3 *Exemption from Taxation and Exemption from Customs Duties and Inspection*

Foreign missions enjoy the same treatment as foreign embassies and consulates in Taiwan in matters such as applications for tax obligation and exemption[36] and importation and exportation of articles for office use by

29 Statute Governing Privileges and Immunities of Foreign Missions and Their Personnel in the Republic of China (Taiwan), art. 2 [hereinafter Statute].

30 *Id.*, art. 3 of the Statute.

31 *Id.*

32 *See* VCDR, art. 31(1); *see* VCCR, art. 43; United Nations Convention on Jurisdictional Immunities of States and Their Property, opened for signature Jan. 17, 2005 (not yet in force).

33 Statute, *supra* note 29, art. 5 § 1 para. 4.

34 *Id.* art 6 § 1 para. 1 (indicating that "The term 'personnel' referred to in paragraph 1 of this Article is limited to non-ROC nationals").

35 *Id.* art. 6 § 1 para. 3.

36 *Id.* art. 5 § 1 para. 6.

foreign missions.[37] Thus, they are exempt from all national, regional, or municipal dues and taxes concerning the mission's premises other than representing payment for specific services rendered.[38]

To the personnel of foreign missions in Taiwan, under the condition that they are not ROC nationals, taxation on their income derived from official duties, purchase of goods, and personal effects and luggage upon the first arrival in Taiwan shall be exempted as those foreign diplomats and consular officers accredited to the ROC.[39]

Article 49, sec. 1, para. 2, of the ROC Customs Act further stipulates that imported articles are exempt from customs duty if "articles imported for official or personal use by diplomatic and consular officials of foreign embassies, legations, and consulates stationed in the Republic of China, and articles imported by other organizations and personnel that are entitled to diplomatic privileges, provided that the foreign governments concerned are extending reciprocal privileges to the Republic of China."

3.2.1.4 *Inviolability*

The latter part of Article 22 (1) of the VCDR stipulates, "[t]he agents of the receiving state may not enter them, except with the consent of the head of the mission." Responding to this obligation, article 5. sec. 1, para. 1 of the Statute established with the specific exception of the inviolability of mission premises. It stipulates, "the premises of foreign missions shall be inviolable. No entry is admitted unless with the consent of the person in charge of the mission. However, consent may be assumed in case of fire or other disasters requiring prompt action."

The Statute does not request that members of foreign missions and their families shall be inviolable.[40] However, Article 116 of the ROC Criminal Code stipulates, "intentionally causing bodily injury to, restraining the personal freedom of, or injuring the reputation of the head of a friendly state or the representative of a friendly state will be punished." It is unclear that "the representative of a friendly state" includes personnel of foreign missions from sending states without diplomatic relations with Taiwan.

37 *Id.* art. 5 § 1 para. 7.

38 VCDR, *supra* note 32, art. 23(1); VCCR, *supra* note 32, art. 32(1).

39 Statute, *supra* note 29, art. 6 § 1 para. 2(b).

40 VCDR, *supra* note 32, art. 29, 37.

3.2.1.5 *Freedom of Communications and Diplomatic Bag*

Protecting all forms of diplomatic communication is essential to the functioning of a diplomatic mission. The Statue provides telecommunications and mail foreign missions in Taiwan shall not be inspected, "and may be conducted in the form of code or cipher. The installation of radio transmitters shall be subject to authorization by the Ministry of Foreign Affairs and other relevant authorities."[41]

Unlike the Vienna Convention, the Statute does not assert the right of the sending state to communicate by "all appropriate means," which in the longer term is probably more significant.[42] Methods of communication have proliferated, and undetected interception has become more accessible. Hence, the basic principle of the right to free communication is even more important as a guide to lawful conduct.

3.2.2 2013 TECRO-AIT Agreement

After the US changed its diplomatic recognition from Taipei to Beijing in 1979, the Coordination Council for North American Affairs (CCNAA) and American Institute in Taiwan (AIT) were established to deal with bilateral matters between Taiwan and the United States. On October 2, 1980, Taiwan and the US signed an agreement on privileges, exemptions, and immunities to cover personnel in CCNAA and AIT.[43] On February 4, 2013, Taiwan and the United States signed a new "Agreement on Privileges, Exemptions and Immunities Between the Taipei Economic and Cultural Representative Office" (TECRO) in the United States and the American Institute (AIT) in Taiwan (hereinafter as 2013 TECRO-AIT Agreement).[44]

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41 Statute, *supra* note 29, art. 5 § 1 para. 5.

42 VCDR, *supra* note 32, art. 27(1) (stipulating that "In communicating with the Government and the other missions and consulates of the sending state, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher").

43 Zhongwai Tiaoyue Jibian, 6 Treaties between the Republic of China and Foreign States 378–383 (Ministry of Foreign Affairs ed.) (1982).

44 The case of *US v. Liu* may be one of the major reasons Taiwan and the US signed the 2013 TECRO-AIT Agreement to replace 1980 one. In November 2011, Ms. Liu, the director-general of the Taipei Economic and Cultural Office in Kansas City, was arrested for mistreating, underpaying, and fraud in foreign labor contracting (18 USC §1351). Director-general Liu finally paid US$80,044 in restitution to the two Filipina housekeepers and then was deported to Taiwan. *See* Chen-Yu Wang, *Taiwan-USA Agreement on Privileges, Exemptions and Immunities*, 1 Encyclopedia of Public International Law in Asia 528 (Seokwoo Lee ed.) (2021); US v. Liu, No. 11-00284 (W.D. Mo. Nov. 18, 2011); *High-Ranking Taiwan Representative Pleads Guilty to Felony Charge, Pays $80,000 Restitution to Victims and Will be Deported*, FBI, https://archives.fbi.gov/archives

The 2013 TECRO-AIT Agreement has the validity of municipal law in Taiwan and US. After terminating diplomatic relations with the ROC, the US continues to consider its Treaties or agreements with the ROC as remaining in force based upon Section 4(c) of the US Taiwan Relations Act of 1979,[45] while the MOFA in Taiwan indicated that except for the Sino-American Treaty of Mutual Defense and the Agreement on the Status of United States Forces in the ROC to be terminated on January 1, 1980, "all other treaties or agreements, including those provisions involving the judiciary, shall remain in force."[46]

On the other hand, although the US cannot conclude treaties with the ROC under traditional international law and diplomacy after 1979, "semi-official agreements" have been concluded between "unofficial agencies" of the ROC, and the US may have the full force and effect if they are consistent with the US Taiwan Relations Act[47] and the ROC Conclusion of Treaties Act.[48] 2013 TECRO-AIT Agreement is such a case. Here are the significant points as follows.

3.2.2.1 *AIT*

The Taiwan Relations Act (TRA) set up the American Institute in Taiwan (AIT) to handle substantive relations to facilitate the commercial, cultural, and other relations between the people of the United States and the people of Taiwan. AIT officially is not an embassy of the US and is an explicitly non-governmental organization Headquartered in Arlington, Virginia, maintaining offices in Taipei and Kaohsiung, Taiwan. These offices performed most of the functions that the US embassy and consulates-general had previously carried out.[49]

/kansascity/press-releases/2011/high-ranking-taiwan-representative-pleads-guilty-to-felony-charge-pays-80-000-restitution-to-victims-and-will-be-deported.

45 Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) *reprinted in* CHINA AND THE TAIWAN ISSUE 266–275 (Hungdah Chiu ed., 1979).

46 Hungdah Chiu, Rong-jye Chen & Tzu-wen Lee, *Contemporary Practice and Judicial Decisions of the Republic of China Relating to International Law, 1981–1983*, 2 CHINESE (TAIWAN) YEARBOOK INTERNATIONAL LAW & AFFAIRS 256, 256–257 (1982) (regarding letter from the Ministry of Foreign Affairs, Wai (68) Pei Mei (1) No. 06514 of April 13, 1979, to the Ministry of Justice [now Legal Affairs]).

47 Taiwan Relations Act, Pub. L. No. 96–8, § 6, 93 Stat. 17 (1979); Taiwan Relations Act, Pub. L. No. 96–8, § 10(a), 93 Stat. 18 (1979); Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs, 45 Fed. Reg. 34483 (May 22, 1980).

48 Conclusion of Treaties Act, *supra* note 15.

49 For its part, the ROC government established the Coordination Council for North American Affairs (CCNAA), with its leading representative office in Washington, DC. It has 12 other offices in Atlanta, Boston, Chicago, Denver, Honolulu, Guam, Houston, Los Angeles, Miami, New York, San Francisco, and Seattle. Following the United States Taiwan

According to the 2013 TECRO-AIT Agreement, AIT can contract, acquire, and dispose of real and personal property and institute legal proceedings.[50] It enjoys privileges and immunities, such as immunity of vehicles, financial assets, and bank accounts from attachment, execution, requisition, or any other form of seizure or confiscation, the inviolability of premises from forced entry and search, inviolability of archives and documentation,[51]and exemption from major taxations of local and central authorities in Taiwan.[52]

Furthermore, AIT is free to communicate and enjoys inviolability for all correspondence related to its functions.[53] The bag carrying correspondences and articles related to the performance of its functions shall be kept from being opened nor detained.[54] The designated carrier shall enjoy personal inviolability and shall not be liable for any arrest or detention.[55]

3.2.2.2 *AIT Personnel*

Personnel of the AIT office located in Taipei, whom TECRO accredits, enjoy complete immunity from criminal jurisdiction,[56] but only enjoy immunity from civil jurisdiction for their official acts.[57] Their residences may not be entered or searched and are not subject to arrest or detention.[58] They may not be obliged to give evidence as witnesses in criminal, civil, administrative, or other proceedings.[59] Their property, including vehicles, may not be entered or searched in matters involving the exercise of criminal jurisdiction or matters related to the exercise of civil jurisdiction for acts performed within their official duties.[60] The immediate family members of an AIT personnel in Taipei,

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Policy Review of 1994, the name of the CCNAA office in Washington, DC, was changed to the "Taipei Economic and Cultural Representative Office" (TECRO), while the names of all other CCNAA offices in the United States were changed to "Taipei Economic and Cultural Office."

50 Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States, art. 3, Taiwan-U.S., Oct. 2, 1980, https://uploads.mwp.mprod.getusinfo.com/uploads/sites/68/2022/03/20130204-agmt-on-privileges-exemptions-immunities-english.pdf.

51 *Id.* art. 7(c).

52 *Id.* art. 7(d).

53 *Id.* art. 6(a).

54 *Id.* art. 6(b).

55 *Id.* art. 6(c).

56 *Id.* art. 8(a).

57 *Id.* art. 8(e).

58 *Id.* art. 8(b).

59 *Id.* art. 8(c).

60 *Id.* art. 8(e).

forming part of his or her household, enjoy the same immunity from criminal jurisdiction, arrest, and detention, so long as such individuals are not nationals or permanent residents of the ROC.[61]

Under the new 2013 Agreement, entirely criminal immunity is granted only to AIT's representative office in Taipei, while the directors and deputy directors of AIT branches in Kaohsiung may be arrested or detained pending trial in the case of a criminal offense punishable by one year or more in prison.[62] That personnel of AIT branches in Kaohsiung would only enjoy functional immunity as before. Their residences and property are not inviolable, and they may decline to give evidence as witnesses only on matters related to their official duties.[63]

AIT personnel are eligible for tax exemption privileges similar to those for foreign missions in Taiwan. Those privileges include exemption from sales, occupancy, and other similar taxes at the point of sale. The wages, fees, or salaries shall be exempt from taxation;[64] shall not be subject to withholding; shall be exempt from making contributions for unemployment, social security, or similar insurance.[65]

4 Conclusion

International treaties and customary international law have the validity of municipal law in Taiwan. Courts or administrative organs of the ROC can directly apply provisions of the VCDR and the VCCR in exercising their functions. In cases concerning countries that have no formal diplomatic relations with the ROC, Taiwan has established statutory laws for implementing its duties under international law. Thus, diplomatic missions and foreign missions and their staff members enjoy privileges and immunities in Taiwan under the VCDR 1961, the Vienna Convention on Consular Relations 1963, bilateral agreements, international practices, principles of reciprocity, as well as Taiwan's rules, regulations, and practices.

61 *Id.* art. 8(f).
62 *Id.* art. 8(g).
63 *Id.* art. 8(i).
64 *Id.* art. 7(a).
65 *Id.* art. 7(b).

Diplomatic Privileges and Immunities: Central Asian Law and Practice

*Rustam Atadjanov**

1 Introduction

As it has been clearly and very simply explained by Shaw, rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law while the field of diplomatic immunities represents one of the most accepted and un-controversial of international law topics; this is because it is in the interest of all states ultimately to preserve an even tenor of diplomatic relations, although not all states act in accordance with this.[1] The principle of personal diplomatic immunity, i.e., that the person of a diplomatic agent is inviolable under article 29 of the 1961 Vienna Convention on Diplomatic Relations (VCDR), is the most fundamental rule of diplomatic law and at the same time its oldest established rule.[2]

The established nature of important legal rules constituting the modern diplomatic law notwithstanding, the contemporary customary practice in the field of immunities and privileges for both diplomatic missions and agents has not become less interesting or relevant. In fact, the growing number of cases involving personal as well as proprietal immunities, consular immunities, unusual issues such as waiver of immunity, indicates towards the opposite. Questions continue to arise as to, for example, when and on what grounds a diplomat may be arrested or detained – even with the existing exceptions to immunity in the domestic law, or what considerations, diplomatic or otherwise, are guiding the states in their practice of applying the pertaining exceptions to diplomatic immunities towards diplomatic agents of sending states, or of declaring an agent a *persona non-grata*. This fully applies to the region of Central Asia as well. Very little has been discussed in English scholarly literature on how diplomatic and consular law, in particular, privileges and immunities granted to diplomatic representations and diplomatic agents, is

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1 MALCOLM N. SHAW, INTERNATIONAL LAW 568 (8th ed. 2017).

2 *Id.*; Vienna Convention on Diplomatic Relations, art. 29, opened for signature Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964) [hereinafter VCDR].

being implemented in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.[3]

This article aims at starting to fill in that gap. It first looks at the ratification status of diplomatic treaty law in the region, then reviews the applicable domestic law on privileges and immunities of all five states, and eventually proceeds to the analysis of the volume and extent of legal regulation on the matter. It the process, it notes the current practice of granting privileges and immunities; the author also attempts to review possible factors and reasons (e.g., of a political nature) that might have been affecting the corresponding decisions of receiving states in the region. The article concludes by briefly reflecting on certain observed trends in that practice.

2 Diplomatic Treaty Law: Ratification Status in Central Asia

In order to provide a better picture of the situation with implementing the requirements for diplomatic immunities at the domestic level, it is useful to first look at what relevant important treaties, multilateral or bilateral, the Central Asian states have ratified since gaining independence in the beginning of the last decade of the 20th century. But prior to doing so, one would probably need a concise description of how international law interacts with domestic legal systems in Central Asian states, and of its place in the national legislative framework.

Since becoming independent, the states in Central Asia have been trying to build up and gradually develop their own statehood, political and legal systems, and establish their own place in the world despite the challenges they had/have to overcome, as noted by this author elsewhere.[4] The domestic legal systems of all five states in the region – Kazakhstan, Kyrgyzstan, Tajikistan,

3 There is also quite scarce literature on the matter in Russian. Just to cite a couple of non-recent semi-scholarly analytical sources where personal immunities are only very briefly and indirectly mentioned: Shuxrat Rakhmanov, Legal Frameworks and Pressing Issues of Application of Privileges and Immunities of Representations of States to International Organizations, 4 Bulletin of the Academy of the General Prosecutor's Office of the Republic of Uzbekistan 26 (2018) (Uzb.); M. Suleymenov, Ye. Osipov, *Immunity of an International Organization*, Paragraph www (2011), available in Russian at: https://online.zakon.kz/lawyer (last visited Jan. 3, 2023).

4 Rustam B. Atadjanov, *Building the State of Law (Rechtsstaat) in the Countries of Central Asia: An Unachievable Dream or Realistic Objective?* 3(92) Law & State 52 (2021); Rustam B. Atadjanov, *Teaching Public International Law in Central Asia: Significant Challenges, Problematic Issues, Coping Strategies and Useful Methods*, 20 Indonesian Journal of International Law 1 (2022).

Turkmenistan and Uzbekistan – belong to the continental civil law tradition, or Romano-Germanic legal family: normative legal acts are considered the main source of law, with their respective written Constitutions serving as the Supreme Law of the state and providing the legal basis for all other – constitutional and ordinary – laws, codes and what are known as sublegal acts.[5] All Central Asian states recognize international law as a source of law, to varying extents.[6]

For example, Article 4(1) of the Constitution of Kazakhstan stipulates that "international agreements and other commitments of the Republic" are a part of the functioning law in the Republic of Kazakhstan.[7] It can logically be assumed that "other commitments" include, in particular, customary international law and the law of various international organisations of which Kazakhstan is a member.[8] Article 4(3) stipulates further that "[i]nternational agreements ratified by the Republic have primacy over its laws.[9] The domestic legislation of the Republic determines the procedure and conditions of operation of international agreements in the territory of the Republic of Kazakhstan to which Kazakhstan is a party," hence ratified treaties hold quite a superior position in the hierarchy of sources of Kazakhstani law.[10] And all states of Central Asia have enacted laws on treaties, which regulate the order of their conclusion, observance and application, domestic implementation, amendments and modifications, invalidity, suspension or termination of their operation, etc., with due regard to the Vienna Convention on the Law of Treaties (VCLT).[11]

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5 *See* Atadjanov, 20 Indonesian Journal of International Law 1 (2022); *see also* Atadjanov, 3(92) Law & State 52 (2021).

6 *See generally* Sergey Sayapin, *State Report Overview | Central Asia*, Encyclopedia of Public International Law in Asia, Oct. 2021; Sergey Sayapin, *Human Rights in Post-Soviet Central Asia*, *in* State-Building, Rule of Law, Good Governance and Human Rights in Post-Soviet Space (Lucia Leontiev & Punsara Amarasinghe eds., 2022), for context on region-specific issues related to international law. *See* Rustam Atadjanov, *Domestic Implementation of Crimes against Humanity in Central Asia*, 17 Asian Journal of Comparative Law 268 (2022), for a discussion of issues that arise during implementation of international law.

7 *See* Sayapin, *State Report Overview | Central Asia*, *supra* note 6; конституция республики казахстан [Constitution of the Republic of Kazakhstan], Aug. 30, 1995, art. 4 (1), https://online.zakon.kz/document/?doc_id=1005029#sub_id=0.

8 Sayapin, *State Report Overview | Central Asia*, *supra* note 6, at 2.

9 *Id.*

10 *Id.*

11 *Id.* at 3; Atadjanov, *Teaching Public International Law in Central Asia: Significant Challenges, Problematic Issues, Coping Strategies and Useful Methods*, *supra* note 4; Vienna

1961 VCDR:[12] all five states in the region have ratified (acceded to) this key treaty of diplomatic law, with Uzbekistan doing so as early as in 1992, followed by Kazakhstan and Kyrgyzstan in 1994, and by Tajikistan and Turkmenistan in 1996.[13]

1963 Vienna Convention on Consular Relations (VCCR):[14] the same is true with respect to another crucial treaty instrument, or the VCCR; apparently, the states in question decided to become State Parties to VCCR at the same time as they joined the VCDR.[15]

1946 Convention on the Privileges and Immunities of the United Nations (UNCPI):[16] this particular treaty instrument was ratified by the Central Asian states at a much later time than the two previously mentioned instruments. Uzbekistan, again, joined it first before all the others – in 1997; it was followed by Kazakhstan (1998), Kyrgyzstan (2000), Tajikistan (2001) and finally Turkmenistan (2007).[17]

1969 VCLT:[18] one of the most crucial treaties of international law, the VCLT, was acceded to by all five states of the region in the following chronological order: Kazakhstan (1994), Uzbekistan (1995), Turkmenistan (1996), Tajikistan (1996) and Kyrgyzstan (1999).[19]

In addition to these main treaties, all five states have also concluded a number of bilateral treaties with states from other regions of the world as well as with some international and/or international-like organizations represented in the

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Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

12 VCDR, *supra* note 2.

13 See *Vienna Convention on Diplomatic Relations: Status of Treaties*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-3&chapter=3&clang=_en. (last visited Jan. 3, 2023), for ratification status of all five states.

14 Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967).

15 *Id.*

16 Convention on the Privileges and Immunities of the United Nations, opened for signature Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 (entered into force Sept. 17, 1946).

17 *Id.*

18 VCLT, *supra* note 11.

19 *Id.*

region.[20] It is also worth noting that when acceding to all four multilateral treaties referred to above no state in Central Asia made any single reservation, declaration, or objection.

3 Domestic Law on Privileges and Immunities

When it comes to the matter of domestic implementation of international legal obligations of the Central Asian states under the applicable treaty law, all five states have adopted specific normative acts dealing with immunities of diplomatic missions and agents. What follows is a very brief overview of the most pertaining implementing legislation in Central Asia.

Kazakhstan: The Law "On the Diplomatic Service of the Republic of Kazakhstan" was adopted back in 2002.[21] Much more recently, in 2017, the Kazakh Minister of Foreign Affairs issued a decree titled "On Approval of the Rules for the Registration of a Diplomatic Mission, an International Organization and (or) Its Representative Office, a Consular Institution and Accreditation of Heads, Members of the Staff of Diplomatic Missions, International Organizations and (or) Their Representative Offices, Employees of Consular Institutions in the Republic of Kazakhstan."[22] The Rules states that they have been elaborated in accordance with the provisions of the VCDR, the VCCR, international treaties ratified by the Republic of Kazakhstan, the Law of the Republic of Kazakhstan "On the Diplomatic Service of the Republic of Kazakhstan."[23] The document regulates the procedure for registration of diplomatic missions, international organizations and (or) their representative offices, consular institutions and accreditation of heads, members of the staff of diplomatic missions,

20 See ЮРИСТ [Lawyer], https://online.zakon.kz/lawyer (last visited Mar. 8, 2023), for full texts of treaties in English or Russian; LEX.UZ [NATIONAL DATABASE OF LEGISLATION OF THE REPUBLIC OF UZBEKISTAN], https://lex.uz/en/ (last visited Mar. 8, 2023).

21 ON THE DIPLOMATIC SERVICE OF THE REPUBLIC OF KAZAKHSTAN, https://online.zakon.kz/Document/?doc_id=1029703&pos=3;-116#pos=3;-116.

22 ON APPROVAL OF THE RULES FOR THE REGISTRATION OF A DIPLOMATIC MISSION, AN INTERNATIONAL ORGANIZATION AND (OR) ITS REPRESENTATIVE OFFICE, A CONSULAR INSTITUTION AND ACCREDITATION OF HEADS, MEMBERS OF THE STAFF OF DIPLOMATIC MISSIONS, INTERNATIONAL ORGANIZATIONS AND (OR) THEIR REPRESENTATIVE OFFICES, EMPLOYEES OF CONSULAR INSTITUTIONS IN THE REPUBLIC OF KAZAKHSTAN, https://online.zakon.kz/Document/?doc_id=36022680 [hereinafter Kazakhstani Rules].

23 *See* ON THE DIPLOMATIC SERVICE OF THE REPUBLIC OF KAZAKHSTAN, *supra* note 21.

international organizations and (or) their representative offices, employees of consular institutions in the Republic of Kazakhstan.[24]

Kyrgyzstan: The Government of the Kyrgyz Republic adopted a resolution called "On the Issues of Accreditation of Employees of Representative Offices of Foreign States, Employees of Representative Offices of International Organizations and Registration of Diplomatic License Plates" in September 2015.[25] Somewhat similarly to the Kazakhstani Rules, this resolution regulates the procedure for accreditation of employees of diplomatic missions, consular offices of foreign states, as well as representative offices of international organizations and other representative offices equivalent to them operating in the territory of the Kyrgyz Republic, in the Ministry of Foreign Affairs of the Kyrgyz Republic, in accordance with the provisions of the VCDR, VCCR, UNCPI and international treaties to which the Kyrgyz Republic is a State Party, as well as normative legal acts of Kyrgyz Republic.[26]

Tajikistan: Tajikistan's "Procedure for Accreditation of Personnel of Diplomatic Missions, Consular Offices, International Organizations and Their Representative Offices, as well as Members of Their Families in the Ministry of Foreign Affairs of the Republic of Tajikistan" was adopted in 2013.[27] Again, it is stated in the Procedure's text that it was developed in accordance with the provisions of the VCDR, VCCR, UNCPI, international legal acts recognized by Tajikistan and the current legislation of the Republic of Tajikistan, and that it determines the procedure (order) for accreditation and issuance of accreditation cards to the personnel of diplomatic missions, consular institutions, international organizations and their representative offices, their family members, as well as honorary consuls of foreign states in the Ministry of Foreign Affairs of the Republic of Tajikistan.[28]

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24 *See* Kazakhstani Rules, *supra* note 22, ¶ 1.

25 On the Issues of Accreditation of Employees of Representative Offices of Foreign States, Employees of Representative Offices of International Organizations and Registration of Diplomatic License Plates, http://cbd.minjust.gov.kg/act/view/ru-ru/98059/10?mode=tekst [hereinafter Kyrgyzstani Resolution].

26 *Id.* at Preamble.

27 Procedure for Accreditation of Personnel of Diplomatic Missions, Consular Offices, International Organizations and Their Representative Offices, as well as Members of Their Families in the Ministry of Foreign Affairs of the Republic of Tajikistan, https://mfa.tj/ru/almaty/konsulskie-voprosy/konsulskie-uslugi/konsulskie-uslugi [hereinafter Tajikistani Procedure].

28 *Id.* ¶ 1.

Turkmenistan: In Turkmenistan, the Law "On Diplomatic Missions of Foreign States in Turkmenistan" was adopted way back in December 1996.[29] Without much ado or declarative introductions or preambles, the document stipulates that diplomatic missions of foreign states permanently operating in Turkmenistan represent their states, maintain official interstate relations, and protect the rights and legitimate interests of these states and their citizens.[30]

Uzbekistan: The Cabinet of Ministers issued a resolution in May 2001 approving the Regulations "On Diplomatic Missions and Consular Offices of Foreign States in the Republic of Uzbekistan."[31] According to this Regulations, a diplomatic representation (embassy or mission) of a foreign state in the Republic of Uzbekistan, a consular institution (consulate general, consulate, vice-consulate or consular agency) of a foreign state in the Republic of Uzbekistan as bodies of a foreign state, employees of diplomatic missions and members of consular institutions for the performance of their functions are granted the privileges and immunities provided for by this Regulations, which are determined in accordance with the VCDR and VCCR, international customs, legislation and international treaties of the Republic of Uzbekistan.[32]

4 Volume and Extent of Legal Regulation

The foregoing overview demonstrates that the authorities in Central Asian countries have relied on both legislative and sub-legal normative acts in their efforts to implement the state obligations under the applicable treaty law on diplomatic immunities. This is in addition to their obvious and explicable tendency to pursue the conclusion of bilateral treaties when it comes to granting privileges and immunities to representatives of particular states.

As for the specific content of this legal regulation, the following types of diplomatic privileges and immunities, in accordance with the relevant provisions of the VCDR, have been implemented by the states in the region under review:

29 On Diplomatic Missions of Foreign States in Turkmenistan, https://www.mfa.gov.tm/ru/articles/75 [hereinafter Turkmenistani Law].

30 *Id.* art. 1.

31 On Diplomatic Missions and Consular Offices of Foreign States in the Republic of Uzbekistan, https://lex.uz/docs/324552 [hereinafter Uzbekistani Regulations].

32 *Id.* ¶ 1.1.

(1) Personal inviolability of diplomatic agents (art. 29 of the VCDR);[33]
(2) Inviolability and protection of residence / premises (art. 30(1) of the VCDR);[34]
(3) Protection of property, correspondence and documentation (art. 30(2) of the VCDR);[35]
(4) Immunity from criminal, civil and administrative jurisdiction (art. 31(1) of the VCDR);[36]
(5) Exemptions from tax, dues, customs and duties (art. 34(1), art. 36(1) of the VCDR);[37]
(6) Exemptions from personal, public and military services (art. 35 of the VCDR).[38]

A quick glance at the reviewed normative instruments reveals that establishment and implementation of diplomatic immunities and privileges in domestic law appears to have been done to more or less full extent in all five Central Asian contexts. This has been carried out at a sufficiently early stage during the last decade of the last century with the use of either legislative acts (adopted at the parliamentary level) or sublegal acts (issued by authorized state structures). That concerns first of all diplomatic agents including consular officers especially in Kazakhstan and Uzbekistan.

In these contexts, along with legal regulation of diplomatic immunities, certain express requirements and duties in law for diplomatic agents

33 Kazakhstani Rules, *supra* note 22, Annex 1, ¶ 1(2); *See generally* Kyrgyzstani Resolution, *supra* note 25, ¶ 11; Tajikistani Procedure, *supra* note 27, ¶ 26; Turkmenistani Law, *supra* note 29, arts. 17, 20; Uzbekistani Regulations, *supra* note 31, ¶¶ 3.13, 3.16.

34 Kazakhstani Rules, *supra* note 22, Annex 1, ¶ 1; *See generally* Kyrgyzstani Resolution, *supra* note 25, ¶ 11; Tajikistani Procedure, *supra* note 27, ¶ 26; Turkmenistani Law, *supra* note 29, art. 12; Uzbekistani Regulations, *supra* note 31, ¶ 3.1.

35 Kazakhstani Rules, *supra* note 22, Annex 1, ¶ 1; *See generally* Kyrgyzstani Resolution, *supra* note 25, ¶ 11; Tajikistani Procedure, *supra* note 27, ¶ 26; Turkmenistani Law, *supra* note 29, art. 14; Uzbekistani Regulations, *supra* note 31, ¶ 3.4.

36 Kazakhstani Rules, *supra* note 22, Annex 1, ¶ 1; *See generally* Kyrgyzstani Resolution, *supra* note 25, ¶ 11; Tajikistani Procedure, *supra* note 27, ¶ 26; Turkmenistani Law, *supra* note 29, art. 18; Uzbekistani Regulations, *supra* note 31, ¶ 3.15.

37 Kazakhstani Rules, *supra* note 22, Annex 1, ¶ 1; *See generally* Kyrgyzstani Resolution, *supra* note 25, ¶ 11; Tajikistani Procedure, *supra* note 27, ¶ 26; Turkmenistani Law, *supra* note 29, arts. 15, 16, 19; Uzbekistani Regulations, *supra* note 31, ¶¶ 3.10–3.12.

38 Kazakhstani Rules, *supra* note 22, Annex 1, ¶ 1; *See generally* Kyrgyzstani Resolution, *supra* note 25, ¶ 11; Tajikistani Procedure, *supra* note 27, ¶ 26. Turkmenistan and Uzbekistan have not specifically implemented this particular provision of the VCDR; Author suggests that the absence of a separate implementing provision in Turkmenistan and Uzbekistan regulations may be explained by the fact that the domestic (constitutional) law in the Central Asian countries already exempts all foreign nationals from public and military duties.

are also observed as demonstrated and cited further below. This is true for Tajikistan, Turkmenistan and Uzbekistan. Out of these three states, Tajikistani "Procedure for Accreditation of Personnel of Diplomatic Missions, Consular Offices, International Organizations and Their Representative Offices, as well as Members of Their Families in the Ministry of Foreign Affairs of the Republic of Tajikistan" stipulates the most comprehensive list of duties and obligations of diplomatic agents (i.e., holders of accreditation cards):

> The owner of the accreditation card, regardless of the status of stay, is obliged to:
> a) Respect the laws and regulations of the receiving state;
> b) Not interfere in the internal affairs of the Republic of Tajikistan;
> c) Use the premises of the representative office, residences and vehicles only for purposes compatible with the functions of the representative office;
> d) Respect the culture, customs, traditions and way of life of the peoples living in the Republic of Tajikistan, and not show intolerance towards a particular nationality or religion;
> e) Treat the issued accreditation card with care;
> f) Upon final departure from the Republic of Tajikistan or dismissal from office, regardless of the validity period, return the accreditation card to the Ministry of Foreign Affairs of the Republic of Tajikistan.[39]

In Turkmenistan, a separate article in its Law "On Diplomatic Missions of Foreign States in Turkmenistan" provides that "Persons enjoying the privileges and immunities specified in this Law are obliged to respect the Constitution, laws and other normative legal acts of Turkmenistan, the culture, traditions and customs of its people."[40] In Uzbekistan, the Regulations "On Diplomatic Missions and Consular Offices of Foreign States in the Republic of Uzbekistan" contain a provision according to which the "employees of diplomatic missions and employees of consular institutions, who are granted the privileges and immunities provided for by the Regulations, are obliged to respect the laws and rules of the Republic of Uzbekistan, the culture, traditions and customs of its people."[41]

This *status quo* confirms the authorities' understandable desire to make sure that together with obtaining certain professional immunities and privileges

39 Tajikistani Procedure, *supra* note 27, ¶ 32. Translated from Russian by the author.
40 Turkmenistani Law, *supra* note 29, art. 3. Translated from Russian by the author.
41 Uzbekistani Regulations, *supra* note 31, ¶ 1.2.

(in other words, exceptions in law), the diplomatic agents – both diplomatic *per se* and consular officers, are not exempted from the purview of the national law. They still carry general duties and obligations similar to other types of foreigners in the receiving countries. This particular point need not be construed as some sort of an indicator of unjustifiable intention to restrict the actions or freedoms of the agents, or cast doubt upon the significance of the legal institution of immunities and exemptions in diplomatic law. It appears more logical to assume that this rather serves as a reminder that the agents of the sending states still remain subjects of law who are enjoying a particular legal status in the receiving state, due to their professional official assignment, but that status should not be counted as a *carte blanche* to do whatever they may please while they are serving their mission.

The situation with legal regulation of diplomatic exceptions for diplomatic agents in Central Asian states and implementation of their corresponding duties under the applicable treaty law such as the VCDR – as reviewed above, suggests that they (i.e., states) (1) all opted to adopt / include necessary norms in the relevant legislation – again, as cited in the preceding paragraphs; (2) they did it during different periods of time; (3) the level of integration varies from country to country but (4) in general the extent to which the implementation work was done is more or less full. While certain privileges under the VCDR have not been specifically provided for in some states of the region such as the exemption from public and military services (in Turkmenistan and Uzbekistan), this still does not imply that the diplomatic agents in those contexts will have to serve in the army in the receiving states: national legislation in Central Asia already generally provides for such an exemption for all foreigners.[42]

5 Practice of Granting Diplomatic Privileges and Immunities

When it comes to the state practice in the region concerning the provision of diplomatic immunities to individuals it looks no less interesting than the state of affairs in domestic legal regulation. Perhaps, the most illustrative way to look into it would be to see the way states in Central Asia accord privileges to representatives of international or quazi-international organizations. Judging by how some entities' status has been agreed upon and subsequently

42 *See* On Legal Status of Foreign Citizens and Stateless Persons in the Republic of Uzbekistan, https://lex.uz/docs/5443901#5448262 (containing exemptions and restrictions in articles 24 and 26).

formulated as well as realized, one can draw several general and/or specific inferences. A good example to use would be the status and immunities of the members of the International Committee of the Red Cross (ICRC), a private humanitarian organization with an international mandate under international humanitarian law (IHL),[43] in Kazakhstan, where it opened its representative office the last among all Central Asian states.

Although the "Agreement between the Government of the Republic of Kazakhstan and the International Committee of the Red Cross on the Status, Privileges and Immunities of the Representative Office of the International Committee of the Red Cross in the Republic of Kazakhstan"[44] was concluded back in 2011, the ICRC was able to open its representation in the capital, Astana, only in 2018, after the Agreement passed all the necessary domestic legal procedures.[45] A Kazakhstani law ratifying this Agreement was signed by the first President in 2018[46] allowing for the Red Cross to establish its Office in Astana.[47]

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43 *See* International Committee of the Red Cross, https://www.icrc.org/en (last visited Mar. 8, 2023). *See also* Rustam Atadjanov, *International Committee of the Red Cross and Central Asia*, *in* Encyclopedia of Public International Law in Asia, 187–188 (Seokwoo Lee ed., 2021), for a brief overview and history of the activities of the ICRC in Central Asia.

44 Agreement between the Government of the Republic of Kazakhstan and the International Committee of the Red Cross on the Status, Privileges and Immunities of the Representative Office of the International Committee of the Red Cross in the Republic of Kazakhstan, opened for signature Feb. 25, 2011, (entered into force Nov. 21, 2018), https://online.zakon.kz/Document/?doc_id=30863261 [hereinafter Agreement].

45 *See Id.*; ICRC extensively negotiated the terms of the Agreement since 2003, before concluding the Agreement in 2011. Treaty instruments similar to the Agreement are frequently referred to as "headquarter agreement (HQA)." One of the most significant provisions that was actively negotiated was precisely the one on the personal status of the members of the ICRC Office.

46 Ratification of the Agreement between the Government of the Republic of Kazakhstan and the International Committee of the Red Cross on the Status, Privileges and Immunities of the Representation of the International Committee of the Red Cross in the Republic of Kazakhstan, https://online.zakon.kz/Document/?doc_id=38903451.

47 *International Committee of the Red Cross to open office in Kazakhstan*, Astana Times (Oct. 9, 2018), https://astanatimes.com/2018/10/international-committee-of-the-red-cross-to-open-office-in-kazakhstan/.; *see also Kassym-Jomart Tokayev meets the heads of international organizations*, Official website of the President of the Republic of Kazakhstan (Feb. 15, 2020), https://www.akorda.kz/en/events/international_community/foreign_visits/kassym-jomart-tokayev-meets-the-heads-of-international-organizations.

According to this bilateral Agreement, members of the international staff of ICRC missions, their spouses and their dependent family members are granted the same status as members of diplomatic missions of foreign states accredited in the Republic of Kazakhstan.[48] The same provision grants them a range of protections and immunities as reviewed above in section 4: personal inviolability, protection of residence, transportation, documentation, manuscripts, immunity from judicial (!) and administrative jurisdiction, exemptions from tax, dues, customs and duties, as well as exemptions from certain public and also military services.[49]

Based on this example, one very logical and simple inference would be that not all privileges and immunities are always expressly covered in domestic law: despite the existence of legislative or sublegal normative instruments regulating immunities and privileges for diplomatic agents, for some types of foreign individuals such as members of international or international-like entities bilateral agreements between such an organization and the receiving state need to be pursued. This comes in no way as surprising since states simply cannot name all the organizations – subjects of diplomatic law, in their domestic legislation, and hence they prefer to rely on concrete bilateral instruments in each specific case. This is a well-established state practice. It is true not only for the ICRC but for all international and/or quasi-international organizations whose representatives are entitled to the status of diplomatic agents and may claim the diplomatic immunities similar to the "classical" diplomatic agents.[50]

Another inference would be that granting the legal status and immunities or privileges to international entities and diplomatic agents may well be dependent on political reasons. Again, this should not be a revelation as many decisions states take as subjects of international law are based on or guided by their political and national interests. At the end of the day, the Westphalian system stands on its state subjects' independent and sovereign political will. Correspondingly, this should not be a surprise if not each and every

48 Agreement, *supra* note 44, art. 10, ¶ 1.

49 *Id.* ¶¶ 2–5, 9, 10.

50 *See* UNITED NATIONS KAZAKHSTAN, https://kazakhstan.un.org/en (last visited May 18, 2023); *OSCE Programme Office in Astana*, ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE), https://www.osce.org/programme-office-in-astana (last visited May 18, 2023); SHANGHAI COOPERATION ORGANIZATION (SCO), http://eng.sectsco.org/cooperation/20170110/192193.html (last visited May 18, 2023); *Delegation of the European Union to the Republic of Kazakhstan*, EUROPEAN EXTERNAL ACTION SERVICE (EEAS), https://www.eeas.europa.eu/delegations/kazakhstan_en?s=222 (last visited May 18, 2023); COMMONWEALTH OF INDEPENDENT STATES (CIS), https://e-cis.info/page/3502/ (last visited May 18, 2023); EURASIAN ECONOMIC UNION (EAEU), http://www.eaeunion.org/?lang=en#about-countries (last visited May 18, 2023).

international entities / organizations' members are accorded a diplomatic status and ensuing privileges by a conclusion of specific bilateral treaties.

Difficulties in the process of negotiation of those immunities and exemptions, their scope and volume need to be mentioned, too. The substance of the negotiations may range from the legal status of the organization itself (e.g., similar or equal to that of the intergovernmental or international entities), nuances of its legal personality and capacity, differences in the extent of immunities between the expat members of the organization (equal to diplomatic agents) and nationals of the receiving (i.e., hosting) state, identity documentation, and so on. A lot will depend on to what degree the state authorities will be willing to concede in a given treaty and certainly to the (political) role, relevance and significance of the organization in question. By extension and using the same logic, this will apply to diplomatic agents of any state or institution with whom the hosting state is entering into a diplomatic relationship.

Declaring someone a *non grata* person (article 9 of the VCDR) is a rather extreme step that any hosting state would not take lightly. This applies to Central Asia as well. In order for an agent to be declared *persona non grata*, he or she would have to have committed acts of political nature that would represent a threat to the receiving state's image, or spoken things that put the relationship between the sending and receiving states in danger, and so on. Given the lack of publicly confirmed and reliable information on *non grata* declaration cases in this region – the authorities here tend to keep such information more or less confidential, it appears hard to analyze this particular practice in a scholarly manner in the present article.

6 Conclusion

The foregoing overview discussed, in a succinct way, the law and practice of implementing diplomatic privileges and immunities in the region of Central Asia constituted by five states: Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. It looked into the ratification status of the major diplomatic law treaty instruments such as the VCDR, VCCR and VCLT, then moved to a brief analysis of the national implementation of some of those treaties, namely, the VCDR, and analyzed the *status quo* with the legal regulation in the sphere of immunities and privileges granted to diplomatic agents in Central Asia reviewing the most relevant legal documents in this sphere. The article also gave a quick glance at the practice of granting privileges and immunities using the example of a quazi-international organization in one of the reviewed contexts – Kazakhstan, to be exact. Based on this analysis, certain trends may be observed and the following conclusions may be drawn.

First, all five states of the region have acceded to the major diplomatic and consular law treaty instruments rather early on after their gained their independence in the beginning of the 1990s. This clearly suggests they all wanted – at least at that time – to be part of the world community and play a role in the network of international relations between sovereign state subjects of international law. Their realization of the importance of globalization and risks of isolation from the global community of states may explain the absence of any declarations, reservations or objections on any one of them when they were joining these treaties.

Second, and as stated above in section 4, the authorities in Central Asian countries have relied on both legislative and sub-legal normative acts in their efforts to implement the state obligations under the applicable treaty law on diplomatic immunities. This is in addition to their obvious and explicable tendency to pursue the conclusion of bilateral treaties when it comes to granting privileges and immunities to representatives of particular states. Bilateral treaties constitute a good, reliable and efficient tool for formalizing the relations between two states.[51] As is the case, when it comes to granting privileges to representatives of international or humanitarian organizations, official authorities in the region tend to rely on these, too.

Third, the establishment and implementation of diplomatic immunities and privileges in domestic law appears to have been done to almost full extent in all five Central Asian contexts. This has been carried out at a sufficiently early stage during the last decade of the 20th century. Still, certain express requirements and duties in law for diplomatic agents are also observed which is true for three out of five contexts: Tajikistan, Turkmenistan and Uzbekistan, with Tajikistan stipulating the most comprehensive and detailed list of duties and obligations of diplomatic agents. The latter goes as far as to obliging the diplomatic agents (i.e., holders of accreditation cards) to not interfere with internal affairs of the receiving state. In the author's opinion, this, however, need not be construed as an indicator of unjustifiable intention to restrict the actions or freedoms of the agents. It merely serves as a reminder that the agents of the sending states still remain subjects of law who are enjoying a particular legal status in the receiving state, but that status should not be counted as a *carte blanche* to do whatever they may please while they are serving their official mission.

Fourth, not all privileges and immunities are always expressly covered in domestic law, so for some types of foreign individuals such as members of

51 *See* Anthony Aust, Modern Treaty Law and Practice 10 (2d ed. 2007) (stating that bilateral treaties may be formed by two or more states forming one party, and another state or states forming the other party).

international or international-like entities bilateral agreements with the receiving state are pursued. This is not surprising because states simply cannot name all the organizations in their domestic legislation, and therefore they prefer to rely on concrete bilateral instruments in each specific case. This does not contradict a well-established state practice.

Fifth, granting the legal status and immunities / privileges to international entities and diplomatic agents can be dependent on political reasons. This is not a secret since many decisions states take as subjects of international law are based on or guided by their political and national interests. At the end of the day, the Westphalian system stands on its state subjects' independent and sovereign political will. Correspondingly, this should not be a surprise if not each and every international entities / organizations' members are accorded a diplomatic status and ensuing privileges by a conclusion of specific bilateral treaties.

The study of diplomatic law and practice, especially when it deals with such a pivotal part of that law as diplomatic immunities and exemptions, is never an empty or useless exercise. It helps in the determination of how domestic norms and practices adapt international legal principles and rules in a particular given (regional) context. Moreover, it may also assist in better understanding what direction or directions the states, including the states in Central Asia, are taking in terms of national implementation of international law overall. For the time being, the states in this part of the world appear to be well established in what concerns granting immunities to diplomatic agents, either "classical" – representing their respective states, or their "equals" from international organizations, with a more or less comprehensive integrative legislation and bilateral treaty frameworks. Even if this particular topic has apparently not attracted much scholarly attention – judging by lack or scarcity of academic literature on it – that is not indicative of its irrelevance or vapidity. Rather, it is quite the reverse: for example, undergraduate students in Central Asian universities who take classes on diplomatic and consular law appear to be most interested in this particular topic. At the end of the day, according immunities to diplomats and consular officers represents one of the crucial questions of diplomatic law that emphasizes just how important the role of diplomacy and its international legal codification, regulation as well as domestic implementation are. If this is the case for all other regions of the world – Asian and non-Asian alike – then this is no less true for Central Asia.

Diplomatic Privileges and Immunities: Australian Practice

*Dorothea Anthony**

1 Introduction

Australian practice on diplomatic privileges and immunities is generally influenced by the foreign diplomatic presence in Australia, the level of commitment Australia shows to international law and to the specific principles of diplomatic law, and the relationships that Australia has with other nations.

On the first matter, Australia hosts a fair number of foreign diplomats and diplomatic missions. It has 112 embassies and high commissions in its capital city of Canberra, Australian Capital Territory (ACT),[1] including missions of States from all regional groups in the United Nations (UN). Australia also has missions of various international organisations and some overseas territories not formally recognised as States, and many consular posts, mainly in Sydney and Melbourne.[2] Often sending States use their missions in Australia as a base for relations with not only Australia but New Zealand and small nations in the Pacific region. The assumption is that Australia shall accord them the usual privileges and immunities.

On the second matter, Australia has played a relatively active role in contributing to the development of legal norms at the UN, although its level of commitment to international law has varied under different governments.[3] With a supposedly "dormant" conservative government holding power in the 1960s, Australia was, according to the opposition government, "tardy" in ratifying the *Vienna Convention on Diplomatic Relations* (Vienna Convention) after 65 States.[4] It had nevertheless inherited from its coloniser a framework for

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1 List of Foreign Embassies in Australia, *Foreign Embassies and Consulates in Australia*, Australian Government Department of Foreign Affairs & Trade, https://protocol.dfat.gov.au/Public/MissionsInAustralia (last visited May 22, 2023).

2 List of Consulates in Australia, *Foreign Embassies and Consulates in Australia*, Australian Government Department of Foreign Affairs & Trade, https://protocol.dfat.gov.au/Public/ConsulatesInAustralia (last visited May 22, 2023).

3 Alison Pert, Australia as a Good International Citizen (2014).

4 Rex Connor, *Parliamentary Debates*, Australian House of Representatives, Mar. 16, 1967, at 763 (Austl.), http://historichansard.net/hofreps/1967/19670316_reps_26_hor54/#debate-21.

providing diplomatic privileges and immunities, influenced by the emphasis of the early world powers on executive government which features in diplomatic law.

On the third matter, Australia is not generally known for having the status of a politically neutral or unattached State. While a British colonial outpost, it paid allegiance to Great Britain. It then developed a dependence on the United States (US), which established the first embassy in Australia in 1946.[5] These alliances and the political predispositions expected of a Western democracy have helped define Australia's activity in relation to other nations, including its style of according their diplomatic corps privileges and immunities.

This article discusses the nature of these privileges and immunities, together with Australian perspectives that have been a defining influence. It does so in relation to the thematic areas of taxation, vehicle infringements, protests, serious crime, employment disputes, applicable missions, and applicable persons.

2 Enactment

First, however, an overview of the evolution of Australia's obligations in the diplomatic sphere is in order. Since British colonisation, Australia has been an adherent of customary international law on diplomatic privileges and immunities, as international custom is embodied in the common law system, albeit with less certainty than when enshrined in statute. Patrick O'Keefe poses the possibility that Australia was also bound in its early colonial history by the *Diplomatic Privileges Act 1708* belonging to the United Kingdom (UK).[6]

By the mid-20th century, Australia ensured that recognition of the rights of high commissioners would correspond with that of ambassadors by enacting the *Diplomatic Immunities Act 1952/1958*.[7] But this statute only conferred immunities and not privileges on these dignitaries and their high commissions, which are the equivalent of embassies for Britain and its dominions, while concessions relating to taxation and customs were granted by Australia's fiscal legislation. During the parliamentary debate on the law, a politician lamented

5 *Embassy History*, U.S. Embassy & Consulates in Australia, https://au.usembassy.gov/u-s-embassy-canberra/ (last visited May 22, 2023).

6 Patrick J. O'Keefe, *International Privileges and Immunities in Australia – The Legislative Framework*, 8 Federal Law Review 265, 265 (1977).

7 Minister for External Affairs Richard Casey, *Parliamentary Debates*, Parliament of Australia, Sept. 16, 1952, at 1466 (Austl.), https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22hansard80%2Fhansardr80%2F1952-09-16%2F0079%22;src1=sm1.

that it represented "one more step in what might be described as the dissolution of the Empire," in that it was predicated on there being disputes between nations that could warrant the protection of diplomats, which he considered redundant under a robust empire with "common bonds" and unitary nationality, citizenry, and laws.[8]

The Act was soon rendered obsolete as Australia brought its legislation into line with the international treaty system. In 1967, Australia introduced the *Diplomatic Privileges and Immunities Act* (DPI Act), giving effect to the Vienna Convention, which was adopted by the UN in 1961 and ratified by the dualist nation in 1968 on the same day that it acceded to the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes*. Australia entered into these treaties without reservation, while objecting from the 1960s to the 1980s to the reservations of other States, mostly socialist and Middle Eastern.[9] However, it has failed to subscribe to the contemporaneous *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, and purportedly exhibited "some reluctance" to ratify the international conventions on diplomatic and consular relations, special missions, and specialised agencies.[10]

Australia's DPI Act states in section 7(1) that it gives only articles 1, 22–24, and 27–40 of the 53-article Convention the force of law. This provision mirrors that of the UK and some other Commonwealth nations. Australia does not oppose the remaining articles of the Convention but rather maintains that they are accounted for by Australian administrative policies and provisions in statutes on other topics of law, such as taxation, customs, public order, and crime.[11] Limited enactment can cause practical difficulty for people bringing cases in the area. However, the courts may acknowledge that the entire Vienna Convention is reproduced in a schedule in the implementing legislation, which differs from the UK custom of appending only the enacted articles.[12]

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8 Frederick Osborne, *Parliamentary Debates*, PARLIAMENT OF AUSTRALIA, Sept. 19, 1952, at 1790 (Austl.), https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22hansard80%2Fhansardr80%2F1952-09-19%2F0040%22;src1=sm1.

9 Declarations and Reservations, Vienna Convention on Diplomatic Relations, opened for signature Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en#EndDec.

10 H.B. Connell, *Commonwealth Practice – 1 International Law*, 4 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 180, 183–184 (1968–1969/1971).

11 Minister for External Affairs Paul Hasluck, *Parliamentary Debates*, AUSTRALIAN HOUSE OF REPRESENTATIVES, Mar. 9, 1967, at 504 (Austl.), http://historichansard.net/hofreps/1967/19670309_reps_26_hor54/#debate-25.

12 O'Keefe, *supra* note 6, at 268–269.

3 Taxation

In relation to privileges, the legislation briefly departs from the Convention. It gives diplomats some concessions regarding sales tax and customs and excise duties not provided for by international law. For example, Australia has indirect taxes incorporated into the price of almost all goods and services. The Vienna Convention states that diplomatic agents are not exempt from indirect taxes (art. 34(a)). Yet the DPI Act permits exemption under an "indirect tax concession scheme" (DPI Act s. 10B). The government believes that this provision ensures reciprocity for States without indirect tax, as permitted under Article 47 of the Vienna Convention, and has nevertheless calculated that it still benefits financially overall.[13] Consequently, Australia has an intricate system of different levels of tax exemptions for different missions of different countries with different tax regimes, and a complex claims process.[14]

The Australian Government presents the tax entitlement as exceeding its international obligations, imparting the impression that it is a model international citizen.[15] Yet diplomatic privileges and immunities form a curious area of international law, requiring a fine balance. Providing fewer entitlements for a sending State's diplomats can endanger the receiving State's diplomats overseas and undermine international and commercial relations, whereas providing more entitlements can give undue authority to the executive arm of foreign governments and thereby compromise the local population's human rights, which have progressively become a centrepiece of international law. One Australian politician stated as early as the 1950s that immunity from civil process is "outmoded" in "modern times,"[16] and another explained in the following decade:

> We live in a modern age and many diplomatic immunities and privileges are delineal descendants of the traditions of sovereign monarchs in a former age when they were untrammelled by considerations of

13 Jonathan Brown, *Australian Practice in International Law 1988 and 1989: x – Diplomatic and Consular Relations*, 12 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 444, 450 (1988–1989/1992).

14 *Indirect Tax Concession Scheme: Entitlements by Country*, AUSTRALIAN TAXATION OFFICE, https://www.ato.gov.au/general/indirect-tax-concession-scheme/entitlements-by-country/ (last visited May 22, 2023).

15 Minister for Foreign Affairs Nigel Bowen, *Parliamentary Debates*, PARLIAMENT OF AUSTRALIA, May 24, 1972, at 3007 (Austl.) https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22hansard80%2Fhansardr80%2F1972-05-24%2F0065%22;src1=sm1.

16 Osborne, *supra* note 8.

> parliamentary government. Centuries ago it was the custom in the exchange of courtesies and of emissaries as between the absolute monarchs of various states to accord to one another very great privileges indeed. Conversely, when there was a need to stir up trouble and perhaps to provide good cause for aggression and war envoys could be treated most contumeliously, and with consequences that were well calculated in advance. But today we live in a period when, with the temper of a democratic community we must necessarily expect the continual whittling away of diplomatic privileges.[17]

Accordingly, despite its tax concessions, the DPI Act ended up reflecting a subtle shift in Australian law away from providing broad privileges and immunities that could lead to hardship for Australian citizens. As with Article 37 of the Vienna Convention, exemption from certain taxes and duties are curtailed under the Act for administrative, technical, and service staff at missions, as opposed to the core diplomatic community. In further keeping with the Convention, these peripheral staff can only receive immunity from jurisdiction for "official acts," or those "performed in the course of their duties."[18] In addition, service staff are not entitled to immunity from criminal (as opposed to civil and administrative) jurisdiction, giving evidence, random breath testing, and most searches, and their dependants have no immunities, unlike those of other staff.[19]

4 Vehicle Infringements

While the legislature has shown resolve in determining taxation issues, it has recognised a persistent dilemma concerning driving and parking infringements. When the DPI legislation was being debated in the 1960s, one of the main points of concern was the protection of the public from these infringements. There was particular concern about drivers of diplomatic vehicles causing injury or death or simply contravening the road rules, not being accountable through prosecution or civil suit, and leaving victims without a

17 Connor, *supra* note 4.

18 *Id.*; *Diplomatic Privileges and Immunities Act* 1967 (Cth) s. 11 (Austl.); *Immunities of Foreign Representatives*, Australian Government Department of Foreign Affairs & Trade, https://www.dfat.gov.au/about-us/foreign-embassies/foreign-embassies-and-consulates-in-australia (last visited May 22, 2023).

19 *Immunities of Foreign Representatives*, *supra* note 18.

remedy from an insurance policy, just as some politicians feared that employees at missions would not be able to access workers compensation.[20]

Various incidents were related in parliament. One concerned a French diplomat with a passion for sports cars and a history of racing around a famous ring road and thoroughfare in Canberra at 70 miles per hour and making record time between a hotel in Sydney and a hotel in Canberra.[21] Another concerned a "wife of an Asian diplomat" who was refused a driver's licence due to poor eyesight but was permitted to drive anyway.[22] Yet another incident involved a 13-year-old daughter of a diplomat of unnamed nationality tearing across Canberra in a "high-powered American car."[23]

The government ultimately decided not to make an issue of misdemeanours that it considered could be managed through diplomacy. But since the parliamentary debate, road rules and penalties have increased, such that there is starker contrast between these rules and the immunity enjoyed from them. It is not uncommon, therefore, to see concerns aired in the press about diplomatic staff and their families – who comprise a relatively high percentage of the population in Canberra[24] – flouting the road rules without consequence.[25]

Contraventions continue despite there now being Protocol Guidelines issued by the Department of Foreign Affairs and Trade (DFAT). These guidelines require that diplomatic staff and their dependants hold a driver's licence and learn the road rules; they expect compliance with random breath tests; they expect payment of driving and parking fines; and they warn that licences can be suspended for significant infringements and unpaid fines and that cars with diplomatic or consular plates can be towed if parked dangerously.[26] The guidelines also state that the government can request that persons withdraw

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20 *See, e.g.*, Kenneth James Morris, *Parliamentary Debates*, Australian Senate, May 3, 1967, at 1090 (Austl.), http://historichansard.net/senate/1967/19670503_senate_26_s34/#debate-16; James Reay Fraser, *Parliamentary Debates*, Australian House of Representatives, Mar. 16, 1967, at 771 (Austl.), http://historichansard.net/hofreps/1967/19670316_reps_26_hor54/#debate-21.

21 Fraser, *supra* note 20.

22 *Id.* at 772.

23 *Id.*

24 D.W. Greig, *Commonwealth Practice: 1. International Law*, 3 Australian Year Book of International Law 237, 246 (1967/1970).

25 Jennifer Bechwati, 7 News Australia, *Foreign Diplomats Disregard for Australian Laws Going Unpunished Due to Diplomatic Immunity*, YouTube (Jan. 29, 2022), https://www.youtube.com/watch?v=f7qAGAyoKYk.

26 *Protocol Guidelines*, Australian Government Department of Foreign Affairs & Trade, ch. 8, https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines (last visited May 22, 2023).

from Australia for driving with a suspended licence.[27] While most missions comply with the guidelines, over 400 parking fines from embassies remain unpaid as of 2019, worth nearly AUD$60,000.[28] In contrast, the global diplomatic centre of Manhattan has allowed authorities to confiscate diplomatic plates for parking violations since 2002, reducing violations by over 98%.[29]

Although the Vienna Convention implies a balance, if not a tension, between diplomatic immunity and law abidance by diplomats, Australia follows a traditional line of thinking by interpreting this balance as tilting towards immunity. Indeed, Article 31, which provides immunity from criminal and most civil jurisdiction of receiving States, is directly enacted in Australia, whereas Article 41, which states that persons enjoying privileges and immunities have a duty to respect local laws and regulations, is not. Inevitably, then, with the expanding number of diplomats in Canberra, and the world, driving and parking infringements remain a vexed question.

5 Protests

Another aspect of diplomatic immunities law that has captured public attention in Australia concerns the principle of the inviolability of missions. The Vienna Convention provides in Article 22 that "[t]he receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." The word "appropriate" here allows the government some discretion in dealing with political protests at the doorstep of missions. This section of the article outlines prominent cases in which this discretion has been exercised in Australia.

The case of *The Queen v. Turnbull and Others; Ex parte Petroff*, heard by the ACT Supreme Court in 1971, concerns an incident in which a man named Peter Nikoloff Petroff and others threw an explosive substance, gelignite, near a building of the former Embassy of the Union of Soviet Socialist Republics

27 *Id.* at ch. 8.2.1.

28 Markus Mannheim, *Foreign Embassies Flout Canberra Parking Laws, Amassing Thousands of Dollars in Unpaid Fines*, ABC NEWS (Sept. 25, 2019, 2:08 PM), https://www.abc.net.au/news/2019-09-23/diplomatic-drivers-ignore-parking-laws/11537306.

29 Raymond Fisman & Edward Miguel, *Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets*, 115 JOURNAL OF POLITICAL ECONOMY 1020, 1045 (2007).

(USSR).[30] Mr Petroff argued that the conduct in question occurred on USSR territory rather than ACT territory and that the court, therefore, did not have jurisdiction. However, the court maintained its competence to preside over the matter, reasoning that missions are on the territory of the receiving State, not the sending State. It referred to overseas authority on "the fiction of extraterritoriality" as "an inroad into the common law" and "confined to an ambassador or minister"[31] and not more generally their mission, akin to the doctrine of representation in which diplomatic representatives per se are deemed inviolable.[32] Hence, the ruling restricted the independence of missions, but did so to enable their protection by the local State. It also preserved the authority of Australian law – in this circumstance, over Soviet law.

In terms of the other participant in the Cold War, the US, the Australian Government has tended to be sympathetic towards its mission, even where freedoms of expression and peaceful assembly, provided for in the *International Covenant on Civil and Political Rights* (arts 19, 21), have been at stake. For example, in the 1970 case of *Wright v. McQualter*, the ACT Supreme Court held that while sitting on the lawn outside the US Embassy in Canberra, shouting anti-Vietnam War slogans, and holding placards did not impair the mission's dignity, police were justified firstly in taking action against a demonstrator who refused to leave upon request and secondly in dealing, as the Vienna Convention stipulates, with "risk of damage or intrusion" rather than simply actual disturbance.[33]

In accordance with this position, the federal legislature enacted public order legislation the following year, which relates, among other things, to "the Premises and Personnel of Diplomatic and Special Missions, Consular Posts, Designated Overseas Missions and International Organizations" (*Public Order* (*Protection of Persons and Property*) *Act 1971* long title), as well as the *Crimes* (*Internationally Protected Persons*) *Act 1976* five years later, which gives effect to the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*.

Australia nevertheless does not have as stringent controls on demonstrations as the US, which observes a Joint Resolution sanctioned in 1938 by both Houses of Congress, codified in 1981, deemed constitutional in 1939 and 1981 by the US Court of Appeals, and modified by the US Supreme Court in

30 *The Queen v. Turnbull and Others; Ex parte Petroff*, 17 Federal Law Reports 438 (1971) (Austl.).

31 *Id.* at 443.

32 *See* Wilfried Bolewski, *Diplomatic Privileges in Practice*, 78 Australian Law Journal 788, 790 (2004).

33 *Wright v. McQualter*, 17 Federal Law Reports 305, 312, 318, 321 (1970) (Austl.).

1988.[34] Originally, the Resolution prohibited political flags, banners, placards and devices, and the act of congregating within 500 feet of diplomatic premises in the District of Columbia. The Supreme Court upheld the ban only on congregations, even though political displays are not likely to be as effective without an assembly of people. Therefore, the expectation of police in *Wright v. McQualter* that the gathering would be moved from the lawn to the footpath opposite the US Embassy, while constituting "selective law-enforcement,"[35] was still short of the reciprocity that the US might expect from other nations especially given that its embassies are subjected to a great many protests across the world – recently, for example, in response to the US Supreme Court's ruling on abortion.

Australia has since further narrowed its model. In a case from 1992, *Minister for Foreign Affairs and Trade and Others v. Magno and Another*, the Federal Court of Australia permitted the executive to make regulations stating that a Minister may issue certificates, effective for 30 days, that empower police officers to remove "prescribed objects," effectively taking the momentum out of a protest reliant on these objects.[36] The certificate in question authorised the removal of 124 wooden crosses, measuring 50 cm, planted on public land outside the Indonesian Embassy for several months in protest at the killing of East Timorese people by the Indonesian military. It was issued by the Minister for Foreign Affairs and Trade, Gareth Evans, who, prior to his political career, had been an academic specialising in civil liberties.[37] Justice Marcus Einfeld delivered a vigorous dissenting opinion on appeal, stating that "Australia's values … will certainly not be guided by the nations whose reprehensible actions are being highlighted by particular protests" and indicating that the regulations were applied retrospectively.[38]

Another mission that has been an unwilling subject of public dissent is that of China, Australia's primary trading partner. Australia initially came to the defence of the Chinese Embassy by signing 39 certificates between 2002 and 2005 permitting police to prohibit large staked banners and the broadcasting

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34 Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 141–142 (4th ed. 2016).

35 *Wright v. McQualter, supra* note 33, at 319–320.

36 *Re Minister of Foreign Affairs and Trade; the Commissioner of the Australian Federal Police and Commonwealth v. Geraldo Magno and Ines Almeid* [1992] Federal Court of Australia 566 (Austl.) [hereinafter *Magno Case*]; *Diplomatic Privileges and Immunities Regulations 1989* (Cth) reg. 5A (Austl.).

37 Mary Rose Liverani, *Falun Gong and the Dignity of the Chinese Mission: Lone Precedent Comments on Use of Minister's Certificate*, 40 Law Society Journal 26, 26 (2002).

38 *Magno Case*, *supra* note 36, ¶¶ 84, 87.

of amplified taped announcements and music to passing busloads of Chinese tourists by Falun Gong, a movement outlawed in China and various other countries.[39] In 2005, some Falun Gong practitioners sued Foreign Affairs Minister Alexander Downer in the ACT Supreme Court but withdrew their case in 2006 when he ceased signing certificates on the understanding that Falun Gong would contain its protests within defined parameters.[40] Thus, Australia compromised, reflecting its broader positioning on China, which it relies on economically but is not allied to politically.

At the same time, the Australian Government has itself intruded on the Chinese Embassy and compromised its inviolability. In the 1990s, it was revealed that Australian and American intelligence officers and technicians planted listening devices in the Chinese Embassy in the 1980s during its construction and transmitted the content of these devices to the US via the UK, both of which have a history of intercepting communications from embassies, contrary to Articles 22 and 27 of the Vienna Convention.[41] To the chagrin of Australia, it transpired that the US used the information to gain an advantage over Australia in trade agreements with China.[42]

Further examples exist of reluctance by Australia to assist embassies. Australia's communication with the Embassy of France regarding a public protest was terse against a backdrop of environmental disputes between the countries. In 1995, France resumed nuclear testing in the Pacific Ocean, which was the same conduct that had led Australia and New Zealand to institute proceedings against France at the International Court of Justice in 1973. In response to the nuclear testing, a union picket appeared in front of the French Embassy and a series of diplomatic notes between France and Australia ensued. France complained that the picket obstructed the post office from delivering mail to the Embassy and that protestors were filming staff leaving the mission. Australia replied that it was sorry for the inconvenience but that there was no report from police of laws being broken or persons threatened, that it was not illegal for picketers to explain their presence to visitors, that the Embassy was still functioning, that it was able to collect its mail from the post

39 Denza, *supra* note 34, at 145; Liverani, *supra* note 37, at 26; Edmond Roy, *Falun Gong Takes Downer to Court*, ABC News (June 10, 2005), https://www.abc.net.au/radio/programs/pm/falun-gong-takes-downer-to-court/1590682.

40 *Falun Gong Drops Downer Case*, The Sydney Morning Herald (Apr. 3, 2006, 10:59 PM), https://www.smh.com.au/national/falun-gong-drops-downer-case-20060403-gdna07.html.

41 Mark Corcoran, *The Chinese Embassy Bugging Controversy*, ABC News (Nov. 8, 2013, 4:42 PM), https://www.abc.net.au/news/2013-11-08/the-chinese-embassy-bugging-controversy/5079148; Peter Wright & Paul Greengrass, Spycatcher (1987); Denza, *supra* note 34, at 183–188.

42 Corcoran, *supra* note 41.

office if the mail carrier was blocked, that the picket had not been continuous, and that it was the place of the receiving State, not the sending State, to judge the appropriate level of protection.[43]

Australia has also tolerated fervent protests outside the Russian Embassy since Russia annexed the Crimean Peninsula in 2014 and began its invasion of Ukraine in 2022, with the media reporting that police had removed only persons supporting Russia who descended on the protests. In the meantime, the Australian Government has provided Ukraine with substantial military assistance, sanctioned Russia, expelled two of its diplomats suspected of being "undeclared intelligence officers," and considered expelling its Ambassador to Australia.[44] Moreover, in 2022, Australia's National Capital Authority (NCA) terminated the Russian Government's 99-year lease of land where a new Russian Embassy was being built and which the Ukrainian Government had expressed an interest in acquiring, claiming that unfinished building works detracted from the aesthetic of the area.[45] However, when this decision was challenged at the Federal Court, the judge described the NCA's submissions as "an absolute disgrace" and "embarrassing" and awarded the Russian Embassy a stay of execution.[46] Purportedly owing to national security concerns about the proximity of the Embassy to Parliament House, the federal parliament then terminated the lease by enacting the *Home Affairs Act 2023*. The High Court of Australia subsequently dismissed a constitutional challenge to this legislation brought by Russia.

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43 Sarah Roberts, *Australian Practice in International Law 1995: x. Diplomatic and Consular Relations*, 17 Australian Year Book of International Law 543, 546–547 (1995–1996/1997).

44 Alex Mitchell, *Expulsion Threat to Russian Embassy Battle*, The Canberra Times (Oct. 6, 2022, 11:23 am), https://www.canberratimes.com.au/story/7931908/expulsion-threat-to-russian-embassy-battle/; Department of Foreign Affairs and Trade, *Australian Practice in International Law 2018: 3 Accountability*, 37 Australian Year Book of International Law 385, 410 (2019).

45 Andrew Brown, *Lease Terminated for New Russian Embassy*, The Canberra Times (Aug. 17, 2022, 3:28 pm), https://www.canberratimes.com.au/story/7865071/lease-terminated-for-new-russian-embassy/; Tory Shepherd & Christopher Knaus, *Ukraine Makes Bid for Russian Embassy Land in Canberra After Lease Terminated*, The Guardian (Aug. 19, 2022, 7:09 pm), https://www.theguardian.com/australia-news/2022/aug/19/ukraine-eyeing-embassy-land-after-canberra-authority-terminates-russias-lease; Christopher Knaus, *Russian Embassy Confirms Legal Action over Its Expulsion from Canberra Site*, The Guardian (Sept. 14, 2022, 6:51 pm), https://www.theguardian.com/australia-news/2022/sep/14/russian-embassy-confirms-legal-action-over-its-expulsion-from-canberra-site.

46 Steve Evans, *National Capital Authority and Russian Embassy Have until March to Resolve Their Differences*, The Canberra Times (Dec. 7, 2022, 1:44 pm), https://www.canberratimes.com.au/story/8010370/reprieve-for-russian-embassy-in-stoush-with-national-capital-authority/.

Yet the Australian Government, as with others in the Asia–Pacific region, has not gone so far as to rename the streets on which the Russian Embassy and Consulates stand. In contrast, several States, mainly in Europe, have decided to call such streets "Free Ukraine Street," "Ukrainian Heroes' Street," "Ukrainian Independence Street," and so forth, including Albania, Bulgaria, Canada, the Czech Republic, Iceland, Latvia, Lithuania, Norway, Poland, Spain, and Sweden. While a local council in Sydney initially voted to follow suit in relation to a Russian Consulate, community opposition halted the plan that could have technically undermined Russia's dignity provided for under the Vienna Convention (arts 22(2), 29).[47]

6 Serious Crime

A week after Russia invaded Ukraine, the Russian Embassy in Canberra was evacuated when a package containing white powder arrived.[48] Although no crime was uncovered, *Duff v. The Queen* provides a precedent for prosecuting those who harm or attempt to harm diplomatic agents and who thereby contravene the principle that diplomatic agents are inviolable and must not be subject to "attack," which coincides with expectations for the treatment of all persons.[49]

Conversely, where diplomatic personnel have themselves engaged in serious criminal conduct, international law provides them with a unique avenue of immunity. In some cases in Australia, where they have not surrendered, the head of the mission of the sending State has expressly waived immunity, such as when a bookkeeper of the Greek Embassy was accused of embezzlement.[50] Or the Australian Government has expelled the staff and closed the mission, with the offender given safe passage, such as when a security guard at the Yugoslav Consulate-General wounded a teenager at a protest while others intruded on the premises in an attempt to bring down the Yugoslav flag, having

47 Your Say Woollahra, *Proposed Renaming of Fullerton Street*, https://yoursay.woollahra.nsw.gov.au/fullerton#:~:text=On%20the%209th%20of%20May,of%20the%20meeting%20agenda%20here%20 (last visited May 22, 2023).

48 Courtney Gould, *Police and Hazmat Crews on Scene at Russian Embassy in Canberra*, The Australian (Mar. 3, 2022, 3:39 pm), https://www.theaustralian.com.au/breaking-news/police-and-hazmat-crews-on-scene-at-russian-embassy/news-story/0177698c725a7af45aa64ba32866b69.

49 *Duff v. The Queen*, 39 Federal Law Reports 315 (1979) (Austl.).

50 Jonathan Brown, *Australian Practice in International Law 1990 and 1991: x Diplomatic and Consular Relations*, 13 Australian Year Book of International Law 367, 369–371 (1990–1991/1992).

allegedly fired a warning shot.[51] The Consulate in the latter case was allowed to reopen 19 months later, but by then the government had imposed restrictions on firearms in diplomatic and consular communities.[52]

One may notice a parallel between the Yugoslav case and events in the UK four years earlier, in 1984. Infamously, someone inside the Libyan Embassy in London fatally shot a police officer monitoring a demonstration against the Libyan Government. The British Government reacted by severing diplomatic ties with Libya and requiring its embassy staff to leave the premises in single file. Two years later, it permitted the US to bomb Libya from British bases, citing the police officer's murder as a factor behind the decision, although it had also disapproved of socialist elements of the regime. Similarly, Australia was critical of the Yugoslav Government's retention of features of socialism and supported NATO's bombing of Yugoslavia in 1999. While it was mindful of the importance of diplomatic relations, particularly given the significant Yugoslav population in Australia, its diplomatic conduct around the expulsion was probably influenced to some degree by its broader political posture on Yugoslavia.

7 Employment Disputes

Unlike criminal conduct, the Australian Government may be less inclined to react strongly to breaches of civil law. Civil matters in the diplomatic sphere can nevertheless have political overtones, especially where they concern the exploitation or mistreatment of embassy workers subordinate to diplomats and senior civil servants, who may form part of a less privileged class. Hence, it is important to raise the question of diplomatic privileges and immunities in relation to employment.

There are various types of non-diplomatic embassy workers, including those who perform domestic duties – such as cooks and cleaners needed for receptions hosted by diplomats, and carers who mind the children of diplomats – and those who perform administrative and technical jobs – such

51 Brown, *supra* note 13, at 455–463; Minister for Foreign Affairs and Trade Gareth Evans, *Parliamentary Debates*, AUSTRALIAN SENATE, Nov. 30, 1988, at 3167 (Austl.), https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1988-11-30%2F0049%22;src1=sm1; Katherine Cook, *Diplomatic and Consular Immunities and Privileges in Australia*, *in* INTERNATIONAL LAW IN AUSTRALIA 389, 404–405 (Donald R. Rothwell & Emily Crawford eds., 3rd ed. 2017).

52 Brown, *supra* note 50, at 372–374.

as secretaries, security staff, and translators.[53] They are often nationals or residents of the State where the embassy is located.[54] The employment issues they may encounter include unfair dismissal, unpaid wages and entitlements, discrimination, abuse, and, in extreme circumstances, modern slavery.[55]

As the Vienna Convention does not specifically exclude immunity for employment matters, unlike the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (art. 11), and as heads of missions rarely choose to waive immunity in the context of employment,[56] attempts have been made to eschew the blanket operation of immunity.[57] Many jurisdictions have reframed the legal position of the employer at missions so it no longer enjoys absolute immunity and so restrictive immunity is less of a barrier.[58]

In this way, Australia followed the 1970s example of European and anglophone countries by introducing the *Foreign State Immunities Act* in 1985. This Act complements the contemporaneously modified common law doctrine of sovereign immunity, which suspends immunity of foreign State employers for non-sovereign (i.e., private or commercial) matters, thereby replacing absolute immunity with restrictive immunity.[59] Moreover, while section 9 of the Act provides general immunity to foreign States, section 12 removes it for foreign State employers in both commercial and non-commercial contexts. However, employees under a contract with a foreign State employer must have Australian citizenship or permanent residency (s. 12(3)). They must also be employed by a State (or mission acting on behalf of a State), as with administrative and technical staff (Vienna Convention art. 1(f)) and service staff (art. 1(g)), as distinct from private servants of individual diplomats, who are, by definition, "in the domestic service of a member of the mission and … not an employee of the sending State" (art. 1(h)). Moreover, the remedy cannot include employment or

53 Wolfgang Spadinger, *Private Domestic Staff: A Risk Group on the Fringe of the Convention*, *in* Diplomatic Law in a New Millennium 132, 142 (Paul Behrens ed., 2017); Richard Garnett, *The Precarious Position of Embassy and Consular Employees in the United Kingdom*, 54 International & Comparative Law Quarterly 705, 705 (2005).

54 Garnett, *supra* note 53, at 705.

55 *See* Richard Garnett, *Precarious Employment: Varying Approaches to Foreign Sovereign Immunity in Labor Disputes*, 51 International Lawyer 25, 25 (2018).

56 Garnett, *supra* note 53, at 709.

57 *See* Garnett, *supra* note 55, at 26–27.

58 *See* Garnett, *supra* note 53, at 705.

59 *Reid v. Republic of Nauru*, 1 Victorian Reports 251, 254 (1993) (Austl.); Christopher Staker, *Australian Cases Involving Questions of Public International Law 1992*, 14 Australian Year Book of International Law 321, 328–332 (1992/1993).

reinstatement (s. 29(2)), in line with State practice, and will typically consist of compensation.[60]

The Act extends beyond employment claims under contract law to those under Australian law in general.[61] It applies to cases heard not only in courts but also in industrial relations commissions and tribunals, which are taken to exercise judicial-like powers.[62] Furthermore, according to the former Australian Industrial Relations Commission, it permits an embassy and not simply a foreign State to be sued.[63] In *Robin Saville v. Embassy of the Republic of Korea*, the respondent argued, relying on an obiter dictum of a Chief Justice of the ACT Supreme Court, that an embassy does not exist as a legal entity.[64] However, the Commission was unconvinced, stating that the Republic of Korea was the legitimate employer and that its embassy was part of that nation.[65]

Most employment cases regarding missions have been concerned with unfair dismissal. In a 1997 lawsuit brought by a gardener, the Kuwait Liaison Office (upgraded to the Kuwait Embassy in 2002) was found to be not immune from jurisdiction for the cognate law on unlawful termination.[66] In a 2006 case against the Libyan Embassy, a driver-cum-receptionist, dismissed under the Libyan policy of capping employment at three years, successfully argued unfair dismissal and was awarded compensation.[67] In the abovementioned 2006 case against the Korean Embassy, the Commission found that it had jurisdiction to hear the unfair dismissal claim of a member of the administrative and technical staff who had purportedly been stood down for being "uncooperative" and "rude."[68] In a 2016 suit against the Algerian Embassy, a 77-year-old housekeeper successfully argued unfair dismissal and was awarded compensation.[69] Finally,

60 Richard Garnett, *The Rights of Diplomatic and Consular Employees in Australia*, 31 Australian Journal of Labour Law 1, 6 (2018).

61 *Robinson v. Kuwait Liaison Office*, 145 Australian Law Reports 68, 77–78 (1997) (Austl.).

62 *Robin Saville v. Embassy of the Republic of Korea* [2006] Australian Industrial Relations Commission 598, ¶¶ 35–37 (Austl.).

63 *Id.* at ¶¶ 22–26.

64 *Id.* at ¶ 23; *Mohamad Saab v. Embassy of Arabic Republic of Egypt* [1997] Supreme Court of the Australian Capital Territory 80 (Austl.).

65 *Robin Saville v. Embassy of the Republic of Korea*, *supra* note 62, at ¶ 26.

66 *Robinson v. Kuwait Liaison Office*, *supra* note 61, at 78.

67 *Adil Faisal Hussein v. The People's Bureau of the Great Socialist People's Libyan Arab Jamahiriya* [2006] Australian Industrial Relations Commission 486, ¶¶ 21–23 (Austl.).

68 *Robin Saville v. Embassy of the Republic of Korea*, *supra* note 62, at ¶¶ 16–17.

69 *Kim v. Embassy of Algeria* [2016] Fair Work commission 4726, ¶ 48 (Austl.).

in a 2018 case against the Iraqi Embassy, a driver with a back injury was found to be unfairly dismissed and was duly compensated.[70]

The requirement in cases like this not to award reinstatement or the return to work, provided for under Australian foreign State immunities law, is intended to respect the sensitive nature of diplomatic work. Yet it inevitably underlines the interests of the employer. By contrast, in setting reinstatement as the default position and stating that compensation may only be ordered where reinstatement is "inappropriate" and where "compensation is appropriate in all the circumstances of the case," the Australian *Fair Work Act 2009* (s. 390(3)) emphasises the interests of employees and their future prospects, even though the Fair Work Commission rarely awards reinstatement in practice.[71] So, the restriction on reinstatement in foreign State immunities law goes against the grain and the equitable nature of Australian statutory unfair dismissal law, which not only provides for the specific performance of reinstatement, unlike the common law, but situates it as the primary remedy with a presumption in favour of it. The restriction also diverges from the International Labour Organization's *Termination of Employment Convention, 1982* (*No. 158*), which provides for both remedies and shows an understanding that compensation could, unlike reinstatement, validate termination of employment (art. 10).

Another question concerns pay rates and working conditions for mission employees. In Australia, pay and conditions set out in individual contracts cannot be less than safety nets in the National Employment Standards decided by the legislature; in Modern Awards, which apply to a range of industries and occupations and are determined by the Fair Work Commission; and in enterprise agreements between an employer and employees. In the case of *Kumar v. Consulate General of India*, albeit in relation to a consulate worker, the Federal Circuit Court of Australia decided that the applicant, who was a chauffeur-cum-messenger, could not rely on the *Clerks – Private Sector Award 2010* because a consulate is not part of the private sector, just as it does not sit comfortably within the public sector; it is a *sui generis* entity not clearly captured by standard employment classifications.[72] While it might be suggested that the *Miscellaneous Award*, with its more generic terms, could

70 *Ahmed Kenawy v. Embassy of the Republic of Iraq* [2018] Fair Work Commission 40, ¶ 67 (Austl.).

71 *Reinstatement after Unfair Dismissal*, Fair Work Commission, https://www.fwc.gov.au/job-loss-or-dismissal/unfair-dismissal/about-unfair-dismissal/possible-results-unfair-dismissal-1 (last visited May 22, 2023).

72 *Kumar v. Consulate General of India, Sydney* [2018] Federal Circuit Court of Australia 7 (Austl.).

apply,[73] the decision highlights the difficulty employees in missions can face in accessing established pay and conditions.

These workers are also less likely to be organised in trade unions. Although unions have been known to picket embassies to highlight political and human rights issues and stand in solidarity with workers being mistreated overseas, including in Asian countries,[74] they are less known for representing workers at embassies, who are yet to have their collective claims tested in Australia.[75] The unionisation of mission employees faces challenges in a country like Australia, where even standard industries struggle to gain members and where the legal scope that unions have to help workers through collective bargaining and industrial action is limited compared with standards prescribed under international law.

At the same time, certain workers at missions are constrained by loopholes in Australian law that continue to extend immunity to employers. These workers include non-Australian workers, such as persons from developing countries who perform "cheap labour" at missions, and workers retained privately by a diplomat rather than by the mission itself, often for domestic labour. As with many other jurisdictions, Australia does not recognise that they fall under the Vienna Convention's professional and commercial exception to immunity (art. 31(c)), and they do not benefit from foreign State immunity exemptions. Consequently, legal action by such workers against their employer has had little success.[76] Being typically from disadvantaged backgrounds, put to work in a relatively isolated setting, and situated beyond the purview of employment law, these workers are particularly vulnerable. Moreover, their employers need not turn their minds to the Australian *Modern Slavery Act 2018*, which merely concerns reporting on risks of forced labour and only pertains to large businesses in Australia.

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73 *Award Coverage for Employees of Embassies & Consulates*, Fair Work Ombudsman, https://www.fairwork.gov.au/tools-and-resources/library/K600567_Award-coverage-for-employees-of-embassies-consulates (last visited May 22, 2023).

74 *See, e.g.*, *Solidarity with Nagaworld Unionists*, Union Aid Abroad – apheda, https://www.apheda.org.au/solidarity-with-nagaworld-unionists/ (last visited May 22, 2023); *A.C.T. Trades and Labour Council Places 12 Hours Goods and Services Picket on Burmese Embassy*, Trades and Labour Council of the Australian Capital Territory Inc. (June 11, 1996), https://www.burmalibrary.org/reg.burma/archives/199606/msg00145.html; Jerome Small, *Why Palestine is Union Business*, Red Flag (Aug. 29, 2014), https://redflag.org.au/article/why-palestine-union-business.

75 *See* Garnett, *supra* note 60, at 14–15.

76 *See, e.g.*, *Paz Mori v. Embassy of Peru* [2014] Fair Work Commission 5023, ¶ 28 (Austl.).

8 Applicable Missions

This article has thus far discussed various areas in which diplomatic privileges and immunities are applied in Australia. It will now consider Australia's position on the types of missions that can be included in this discussion.

The government has declared that only bona fide missions may enjoy privileges and immunities. This issue arose in 1978 in response to a "so-called Croatian Embassy" that was established when Croatia was not yet a sovereign State and still part of Yugoslavia.[77] It prompted the passage in Australia of the *Diplomatic and Consular Missions Act 1978*, which restrains people from making false representations about missions (s. 4). Foreign Affairs Minister Andrew Peacock said that the unofficial embassy impaired the dignity of the Yugoslav Embassy in Australia and Australia's ability to conduct international relations and contributed to ethnic tensions.[78] He added that the Aboriginal Tent Embassy, stationed on the lawn opposite the (now Old) Parliament House in Canberra since 1972 to draw attention to the plight of Australia's First Nations peoples, did not fall in the same category.

However, Australia has since permitted missions of certain territories not recognised as States by Australia and other nations, through its *Overseas Missions* (*Privileges and Immunities*) *Act 1995*. The government stated in its second reading speech that the DPI Act and corresponding consular Act were "deficient" in not recognising such missions, and that the new legislation would provide privileges and immunities of an "upper limit" but not beyond the Vienna Conventions on diplomatic and consular relations.[79]

While originally suggesting that the new legislation be aimed at Hong Kong, New Caledonia, and the Cook Islands "to accommodate the changing political climate in our region" and promote bilateral economic relations,[80] the Australian Government subsequently applied the law via regulations to Hong Kong and Taipei representative offices in Australia, in tacit support of the autonomy of these societies and in recognition of the importance of their economies to Australian trade, at the same time that it has officially endorsed

77 Minister for Foreign Affairs Andrew Peacock, *Parliamentary Debates*, PARLIAMENT OF AUSTRALIA, Apr. 5, 1978, at 993 (Austl.), https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=HANSARD80;id=hansard80%2Fhansardr80%2F1978-04-05%2F0034;query=Id%3A%22hansard80%2Fhansardr80%2F1978-04-05%2F0150%22.

78 *Id.*

79 Roberts, *supra* note 43, at 543–544.

80 *Id.* at 543.

a one-China policy.[81] It has accorded foreign representatives at the Taipei Economic and Cultural Office in Canberra and their dependants the same level of immunity as standard diplomats, despite not formally recognising that the Office has "diplomatic status."[82] But it has given less immunity to the administrative and technical staff at this Office and to all officials and staff at its state branches and the Hong Kong Economic and Trade Office, and no immunity to their dependants.[83]

Notably, the government has specified that the law does not apply to the Palestine Liberation Organisation, which it deems "purely political," even though this entity has diplomatic relations with over 100 other nations.[84] Minister Evans directed the following comment at the Palestine Information Office in the ACT:

> Let me make it absolutely clear, however, that since the Government does not recognise the "State of Palestine," your office will not be accorded diplomatic or consular status nor any privileges and immunities. As I have said previously, the question of Australian recognition of a "Palestinian State" will arise only in the context of an overall peace settlement.[85]

In relation to international organisations, Australia has enacted the *International Organisations* (*Privileges and Immunities*) *Act 1963* and numerous regulations for specific international organisations, whose terms depend on individual agreements with the organisations. The level of privileges and immunities accorded to international organisations and their staff varies; some receive maximal privileges and immunities, while others are given barely any. For example, the Asian and Pacific Development Centre is merely accorded legal personality in the relevant instrument, with the standard capacity to contract, deal in property, and institute legal proceedings.[86] Although, according

81 *Hong Kong Economic and Trade Office* (*Privileges and Immunities*) *Regulations 1996* (Cth) reg. 3 (Austl.); *Taipei Economic and Cultural Office* (*Privileges and Immunities*) *Regulations 1998* (Cth) reg. 4 (Austl.); Brown, *supra* note 50, at 376.

82 *Australia – Taiwan Relationship*, AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS & TRADE, https://www.dfat.gov.au/geo/taiwan/australia-taiwan-relationship (last visited May 22, 2023).

83 *Immunities of Foreign Representatives*, *supra* note 18.

84 Roberts, *supra* note 43, at 544.

85 Brown, *supra* note 13, at 466.

86 *Asian and Pacific Development Centre* (*Privileges and Immunities*) *Regulations 1983* (Cth) reg. 4 (Austl.).

to DFAT, all international organisations are immune from searches of their official premises.[87]

Regarding cases on privileges of international organisations, in *Macoun v. Commissioner of Taxation*, the High Court of Australia decided that, for want of consistent State practice, the respondent's pension from the International Bank for Reconstruction and Development (IBRD) could be taxed.[88] In *Commissioner of Taxation v. Jayasinghe*, the High Court held that while the applicant had an independent contract in name, he could be classed as an employee, but that, regardless of this classification, he did not hold an office in the organisation to be exempt from paying tax.[89] However, the *Specialized Agencies* (*Privileges and Immunities*) *Amendment Regulations 2022* have since provided exemption from tax in relation to "salaries and emoluments" received from various specialised agencies, including the IBRD, with a retrospective period of five years (sch. 1).

Regarding cases on immunities of international organisations, *von Arnim v. Federal Republic of Germany* and *Castle v. United States* each concern claims of immunity from extradition for fraud-related crimes. In the first case, the Federal Court decided that the applicant was not a diplomatic agent, relying on Ministerial certification rather than equivocal evidence connected with the World Health Organisation.[90] In the second case, it found that the international organisation itself, which the applicant claimed to lead, was not legally recognised.[91] It also raised the potential argument, with reference to Article 31(4) of the Vienna Convention, that immunity, in any case, pertains to the jurisdiction of the receiving State, not the sending State seeking extradition.[92]

87 *Immunities of Foreign Representatives*, *supra* note 18.

88 *Macoun v. Commissioner of Taxation* [2015] HIGH COURT OF AUSTRALIA 44, ¶ 82 (Austl.).

89 *Commissioner of Taxation v. Jayasinghe* [2017] HIGH COURT OF AUSTRALIA 26, ¶¶ 42–43 (Austl.). *See also Hamilton and Commissioner of Taxation* [2020] ADMINISTRATIVE APPEALS TRIBUNAL OF AUSTRALIA 1812 (Austl.).

90 *von Arnim v. Federal Republic of Germany* [1999] FEDERAL COURT OF AUSTRALIA 1747, ¶ 27 (Austl.); *von Arnim v. Federal Republic of Germany* [1999] FEDERAL COURT OF AUSTRALIA 1159, ¶ 21 (Austl.). *See also R v. Kerry Ann Browning Scc* [1991] SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY 37, ¶ 48 ff (Austl.).

91 *Castle v. United States* [2018] FEDERAL COURT OF AUSTRALIA 931, ¶¶ 80, 85 (Austl.).

92 *Id.* at ¶¶ 92–94.

9 Applicable Persons

A final question in this article concerns the persons to whom Australia extends diplomatic privileges and immunities. DFAT's Protocol Guidelines define these as "[f]oreign government employees assigned to diplomatic missions" and their foreign dependants.[93] Australians with dual citizenship, which is permitted in Australia, may encounter a problem when attempting to enter another State's diplomatic corps that is situated in Australia.[94] Consistent with Article 8 of the Vienna Convention, the Protocol Guidelines state:

> The Australian Government does not accept the appointment of Australian citizens or permanent residents as diplomatic or consular representatives of another country unless there are exceptional circumstances. If consent is given, privileges and immunities will be strictly limited in accordance with Article 38.1 of the Vienna Convention on Diplomatic Relations or Article 71 of the Vienna Convention on Consular Relations.[95]

The Protocol Guidelines continue that where persons with Australian citizenship or permanent residency elect to renounce this status to assume a diplomatic post for another country, they cannot be guaranteed reinstatement of their citizenship or permanent residency by the Department of Home Affairs – that is, they cannot expect to enjoy different beneficial statuses in succession. However, a circular note issued to diplomatic missions in 1989 states that members of missions who have been in Australia for over six years, which is two years longer than the length of a diplomatic visa, may be taken to be "permanently resident in Australia," unless they can otherwise satisfy DFAT.[96] Further, diplomats can have their visas renewed up to 10-years, decided on a case-by-case basis.[97]

Regarding foreign dependants of diplomatic agents, the Protocol Guidelines state:

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93 *Protocol Guidelines*, *supra* note 26, at ch. 4.6.

94 Cook, *supra* note 51, at 409.

95 *Protocol Guidelines*, *supra* note 26, at ch. 4.

96 DENZA, *supra* note 34, at 344; *Protocol Guidelines*, *supra* note 26, at ch. 4.2.

97 *Protocol Guidelines*, *supra* note 26, at ch. 4.2.

> The Australian Government will accept as a dependant a spouse, de facto or same sex partner provided they are formally nominated by the sending government or international organisation, and that reciprocal recognition would be given by the sending state. Unmarried children up to 21 years of age who are full time members of the official's household and formally nominated are also accepted as dependants and are eligible for diplomatic visas.[98]

Family members "such as adult children or aged parents" who have "an established history of dependence for medical reasons" may be granted a diplomatic visa but not diplomatic privileges and immunities.[99] Parents, dependants who leave the household, and other family members are otherwise ineligible but may be granted a visitor visa or student visa where appropriate for up to 12 months.[100] Children of diplomats who are born in Australia receive a diplomatic visa and privileges and immunities referred to in Article 37(1) of the Vienna Convention, instead of being naturalised, as indicated by the Optional Protocol on nationality (art. 2); however, the birth is required to be registered in Australia with the Registrar of Births, Deaths and Marriages.[101]

Australia defines a family in the diplomatic context according to relatively liberal values. As stated, Australia permits same-sex partners. This policy exists against a backdrop of legal recognition of same-sex marriage since 2017, even though Australia's last state to decriminalise homosexuality, Tasmania, only did so as late as 1997.[102]

Regarding diplomats in polygamous arrangements, a 2019 global study by Peter Rosputinský has shown that Australia extends privileges and immunities only to one wife and the children of that wife, and that this is currently the most common practice in the world.[103] By contrast, Australia's neighbour, New Zealand, grants all wives and their children diplomatic status. This difference may be considered unusual given the parallels that otherwise exist between the two countries – for example, both of their Indigenous peoples have historically engaged in polygamy to a limited extent through their customary law,

98 *Id.* at ch. 4.1.

99 *Id.* at chs 4.1, 4.6.

100 *Id.* at chs 4.1–4.2.

101 *Id.* at ch. 4.2; Patrick J. O'Keefe, *Privileges and Immunities of the Diplomatic Family*, 25 International and Comparative Law Quarterly 329, 341 (1976).

102 *Marriage Amendment* (*Definition and Religious Freedoms*) *Act 2017* (Cth) (Austl.).

103 Peter Rosputinský, *Current Diplomatic Practice on Partners of Homosexual Members of Diplomatic Missions and Wives of Polygamous Members of Diplomatic Missions*, 22(4) Politické Vedy 172, Table at 204–207 (2019) (Slovk.).

while both of their governments have outlawed bigamy. In addition, the Full Court of the Family Court of Australia held in 2016 that foreign polygamous marriages can be recognised in Australia,[104] and Australia is a party to the Hague *Convention on Celebration and Recognition of the Validity of Marriages*, which does not decline recognition of such marriages.

It is open to debate whether Australia has appropriately negotiated the competing perspectives of, on the one hand, respect for women who may be disadvantaged by polygamy and, on the other hand, respect for cultural differences and the Vienna Convention's preambular objective of friendly relations. This is a question that goes to comity as well as diplomats' personal circumstances that may not be expected to have a great bearing on political matters.

10 Conclusion

This article has presented an outline of current Australian practice on diplomatic privileges and immunities. While this practice generally follows international norms and customs, it has some individual characteristics due to the Vienna Convention's scope for discretion and Australia's political and economic priorities. In addition, it has significant implications for not only diplomatic relations but also for the Australian people and other parties, not least in the areas of protest activity and employment.

Regarding protests in the vicinity of missions, Australia's approach to safeguarding the dignity of missions has varied, with different ramifications for freedom of speech. The government has tended to be cautious with respect to States on whom it relies economically – including those in Asia, which is the only region Australia has granted special missions for territories not internationally recognised as sovereign nations – and whom it supports politically, and less so in relation to States that Australia perceives as compromising its sovereignty and the international order.

Regarding employees at missions, Australia has kept pace with international developments that have extended their rights. However, these developments do not provide for all workers, including many low-paid domestic workers, whose legal protection is well below the standard for other workers in Australia, and those who have been unfairly dismissed and wish to continue their employment. There are increasing calls among human rights activists to rectify this lacuna, which exists in many countries. Yet Australia continues

104 *Ghazel & Ghazel and Anor* [2016] Family Court of Australia – Full Court 31, ¶ 53 (Austl.).

to negotiate its industrial relations system around its diplomatic responsibilities and what it identifies as a unique class of employees rather than ensuring that the system meets their needs. Its effective suspension of some workers' rights is coupled with a perception that taking strict measures to protect diplomatic relations and sensitive diplomatic information is a virtuous sacrifice, even though this suspension may not constitute a solid foundation for diplomatic relationships, and even though diplomatic information is commonly used in the modern age towards international competition rather than cooperation.

Whereas an Australian politician once mused on the problem that diplomatic immunities and privileges are "descendants" of the "untrammelled" power of the executive sphere, referred to above, the Australian Government is yet to pursue this proposition in a fundamental way, if indeed it is possible to do so while fulfilling its international obligations. A change in policy at the international level may be needed before the interests of less privileged people can be better served.

Diplomatic Immunity and Privileges: Bangladesh State Practice

Muhammad Ekramul Haque and Azhar Uddin Bhuiyan***

1 Introduction

Bangladesh is a constitutional democracy founded in 1971 by exercising people's right to self-determination.[1] Since its inception, the country has had a diplomatic immunity regime through the Laws Continuance Enforcement Order 1971, albeit on a limited scale. This paper aims at bringing to the forefront the state practice of diplomatic immunity in Bangladesh. In doing so, we will discuss the constitutional framework, succession of the Vienna Convention on Diplomatic Relations (VCDR) 1961, and the current domestic legal framework leading towards a conclusion preceded by some case studies. The novelty of this article lies in discovering the applicable law on diplomatic immunity and privileges in Bangladesh and the recommendations towards making a complete legal regime on diplomatic immunity and privileges in Bangladesh.

2 International Obligation of the State

Bangladesh is a dualist country, although there is an opinion that the judiciary of Bangladesh is demonstrating a creeping monist tendency in some cases.[2] There is empirical evidence dating from the foundational days of the state to present days, the executive and the legislature have shown a dualist attitude in dealing with international law. For example, in 1973, Bangladesh enacted the Asian Development Bank Order 1973 for the implementation of the Agreement establishing the Asian Development Bank in 1965. An example of recent

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1 Muhammad Ekramul Haque, *Formation of The Constitution and the Legal System in Bangladesh: From 1971 to 1972: A Critical Legal Analysis*, 27 Dhaka University Law Journal, 41, 41, 43 (2016).

2 *Hussain Muhammad Ershad v. Bangladesh*, (2001) 21 BLD (AD) 69 (Bangl.); *see* Ekramul Haque, *Application of International Law in the Supreme Court of Bangladesh*, *in* 3 Encyclopedia of Public International Law in Asia: Bangladesh (Seokwoo Lee ed., 2021), for a discussion on a series of cases on the issue.

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such practice is the enactment of the Carriage by Air (Montreal Convention) Act 2020. It is true that in several instances the parliament made implementing legislation for transformation of an international law instrument into the domestic laws of Bangladesh. However, it is interesting to note that in a few stray cases, the judiciary applied international law obligations directly without such transformation.

The Vienna Convention on Diplomatic Relations 1961 predates the birth of Bangladesh. Only in 1978, the state succeeded the convention. However, being a dualist country in practice, it is important to see whether there is any implementing legislation prescribing diplomatic immunity. But before that it is also important to see whether the supreme law of the land, the Constitution of Bangladesh, allows the parliament to make any such law that anticipatorily grants immunity to a non-citizen.

3 Constitutional Framework

The Proclamation of Independence, the first constitution of Bangladesh, undertook to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and under the Charter of the United Nations.[3] The monist pattern of wording, 'undertake to observe the UN Charter,' in the Proclamation of Independence was later toned down when the constituent assembly of Bangladesh adopted the Constitution of the People's Republic of Bangladesh 1972.[4] The current Constitution of Bangladesh, in its preamble, affirms that it is the responsibility of the people of Bangladesh to "… maintain its (the constitution) supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and cooperation in keeping with the progressive aspirations of mankind."[5] The preamble being very much an operative and enforceable part of the constitution has the supremacy of legal status in Bangladesh over any other laws including the international

3 Muhammad Ekramul Haque, *The Proclamation of Independence, 1971: Unilateral Declaration of Independence of Bangladesh*, 3 Encyclopedia of Public International Law in Asia: Bangladesh (Seokwoo Lee ed., 2021).

4 Muhammad Ekramul Haque, '*Status of International law in the Legal System of Bangladesh: Dualism vs. Monsim*,' 3 Encyclopedia of Public International Law in Asia: Bangladesh (Seokwoo Lee ed., 2021).

5 Bangladesher Sambidhāna [constitution] Nov. 4, 1972, Preamble (Bangl.).

laws the state may subscribe from time to time.[6] In case of legal regime of diplomatic immunity in Bangladesh, the situation becomes much more complex given the very nature of diplomatic immunity that it anticipatorily grants indemnity to a non-citizen.

As mentioned earlier, in the territory of Bangladesh, it is the constitution which is supreme. Even international legal documents it subscribes to must adhere to the constitutional provisions for them to be applicable in Bangladesh. The only constitutional provision that speaks about a possible immunity/indemnity legislation is Article 46. Notably, the provision is very narrow and does not cover ground for diplomatic immunity. The article is as follows:

> Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area.[7]

More importantly, indemnity and immunity- these two terms cannot be used interchangeably. The idea of indemnity in Article 46 is applicable only after an act has been committed. But the diplomatic immunity, as an idea, grants anticipatory indemnity only to the diplomats which is essential for fulfilling the requirement of 'respect for international law' under Article 25 of the Constitution. Because the concept of 'diplomatic immunity' on the basis of reciprocity has attained the status of customary international law. In addition, the purview of Article 46 is not exhaustive. Thus, it cannot be said that no immunity legislation can be made beyond Article 46. The only thing the legislators need to be careful about is that it is not inconsistent with any provision of the constitution.

Again, Article 25 of the Constitution provides that:

> The State shall base its international relations on the principles of respect for national sovereignty and equality, non interference in the internal

6 Muhammad Ekramul Haque, *The Preamble of the Constitution of the People's Republic of Bangladesh: An Analysis from Legal Perspective*, 15(2) Dhaka University Law Journal 107, 110 (2004).

7 *Supra* note 5, art. 46.

> affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter.[8]

Now, the Vienna Convention on Diplomatic Relations 1961 is considered as one of the most successful legal instruments after the establishment of the United Nations. Till date, 193 states are party to the conventions. In addition, scholars are of the view that the provisions for diplomatic immunity on the basis of reciprocity have attained the status of customary international law.[9]

The *travaux préparatoires* of the Vienna Convention on Diplomatic Relations 1961 reveals that the convention codified to a large extent the existing customary rules on bilateral diplomatic relations between states.[10] Even if a provision of VCDR is considered as customary international law in the absence of an implementing legislation, the court can only enforce such a provision being certain that the provision has attained the status of international custom. It is argued that although the 'textual interpretation of the Constitution has made it evident that the Bangladesh Constitution does not contain any provision directly articulating the status of customary principles of international law,' 'it could be fairly said that the content-specific recognition of relevant customary principles in rulemaking of the Constitution is a clear proof of Bangladesh's position of accepting or respecting the generally recognised international law principle leading to the right-based and people-participated democratic republic.'[11] To do so, the Supreme Court of Bangladesh will need to develop a methodology to ascertain the existence of any international custom.[12] Notably, the identification of the existence of international custom is one of the most complex tasks before international courts and tribunals. It would be more complex for a domestic court that does not frequently deal with such customs. The Evidence Act 1872 may be of particular guidance at this point.[13]

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8 *Supra* note 5, art. 25.

9 Maurice H. Mendelson, *Collected Courses of the Hague Academy of International Law*, 272 The Formation of Customary International Law (1998), http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789041112378_02.

10 Jan Wouters et al., *The Vienna Conventions on Diplomatic and Consular Relations*, *in* The Oxford Handbook of Modern. Diplomacy. 1 (Andrew F. Cooper et al. eds., 2013).

11 Nakib M. Nasrullah, The Constitutional Law of Bangladesh: Progression and Transformation at Its 50th Anniversary (M. Rafiqul Islam & Muhammad Ekramul Haque eds., 2023).

12 Kawser Ahmed, A History of the Constitution of Bangladesh: The Founding, Development, and Way Ahead (Ridwanul Hoque & Rokeya Chowdhury eds., 2023).

13 The Evidence Act, §§ 13, 32, 48 (1872) (Bangl.).

Thus, although the constitution is silent about making legislation on diplomatic immunities, there is no barrier to do so. On the other hand, an implementing legislation is required to uphold the mandate of Article 25 of the Constitution. Because without an implementing legislation, the international law – VCDR 1961 does not automatically apply in Bangladesh. Now it is perhaps time to check the domestic legal framework to see whether any domestic law has been enacted for the same purpose.

4 Domestic Legal Framework

There is one domestic law namely, The Diplomatic Immunities (Commonwealth Countries Representatives) Act 1957 [DICCRA] that predates not only the establishment of Bangladesh but also the adoption of the Vienna Convention on Diplomatic Relations 1961. It is not essential for an implementing legislation to be enacted after the subscription to the international legal instrument. Rather pre-existing law can also be considered as an implementing legislation. Although the preamble of DICCRA gives the impression that the protection offered by the DICCRA may be extended, notably, the DICCRA is only applicable for commonwealth countries' diplomats. Thus, the question is how is Bangladesh granting diplomatic immunity to diplomats of non-commonwealth countries?

The custom practiced by the Bangladesh foreign ministry is when a sending state decides that they want to send a particular person in Bangladesh as a diplomat, they initially send a letter to the Ministry of Foreign Affairs informing about such selection. If the foreign ministry has no objection, they inform the sending state about their decision. The sending state's diplomat is then required to present his credentials before the President of Bangladesh. Under section 7 of the DICCRA, the Bangladesh government is supposed to provide the diplomat with a certificate regarding his immunity. This certificate will be conclusive evidence, in any legal proceeding, of the facts certified in the certificate as regards his immunity in Bangladesh. In addition, there has been a practice of providing the diplomatic agents a diplomatic identification card.[14] However, whether the same process is followed for diplomats of non-commonwealth countries needs to be confirmed. And if yes, under what law?

14 *Pakistani Diplomat Withdrawn*, THE DAILY STAR, (Feb. 3, 2015) https://www.thedailystar.net/pakistani-diplomat-withdrawn-63000.

This 1970 amendment to the Code of Civil Procedure 1908 provides diplomatic agents a general diplomatic immunity from civil proceedings. This is equally applicable for both commonwealth and non-commonwealth country diplomats. However, it prescribes three grounds for which a proceeding may be lodged against a diplomatic agent, i.e., provisions of diplomatic immunity shall not be applicable. These three specific types of proceedings are related to the followings:

a. any private immovable property situated in Bangladesh held by him in his private capacity and not on behalf of the sending State for the purpose of the mission;
b. a succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
c. any professional or commercial activity exercised by the diplomatic agent in Bangladesh outside his official functions.

Even if a possible action is grounded on any of the above three conditions, such action cannot be undertaken in which the inviolability of his person or of his residence does not remain protected. Notably, in the last 50 years, no civil case has been reported to be lodged against any diplomatic agent. On the other hand, the law of criminal procedure in Bangladesh, Code of Criminal Procedure 1898 is silent about any possible action against a diplomat. Since DICCRA gives immunity to the commonwealth countries' diplomats, the door remains open for the state to prosecute non-commonwealth country diplomats for commission of a crime. In the absence of an implementing legislation of VCDR, this is totally contrary to the spirit of VCDR.

5 Seizing Diplomatic Immunity: Case Studies

5.1 *Irfan Raza*[15]

The government of Bangladesh on 16 December 2000 declared Pakistan's Deputy High Commissioner Irfan Raja persona non grata for his indecorous remarks against the Liberation War and unfriendly activities against the host country. Earlier, his derogatory remarks against the liberation war, independence and sovereignty of Bangladesh at a seminar in Dhaka on November 27 triggered a wave of countrywide protest and a demand was

15 *Pak Diplomat Declared Persona Non Grata, Leaves Bangladesh*, ZEENEWS (Dec. 17, 2000) https://zeenews.india.com/news/south-asia/pak-diplomat-declared-persona-non-grata-leaves-bangladesh_5917.html.

made for his immediate expulsion from the country. In the face of mounting pressure, the Pakistan government on November 30 conveyed its decision to withdraw the errant diplomat but did not indicate when he would leave.

That decision was not translated into action even after two weeks leaving Bangladesh with no alternative but to take its own action. Incidentally, Irfan Raza became the first diplomat to be declared persona non grata by the government of Bangladesh. Although the legal instrument declaring him persona non grata is not publicly available, the only explanation that may be contemplated is that such was done under the authority of the section 8 of the DICCRA, Pakistan being a commonwealth country. However, it remains to be seen how the foreign ministry would have dealt with it if similar comments were made by someone from a non-commonwealth country since the DICCRA is only applicable for commonwealth countries' diplomats.

5.2 *Mohammad Mazhar Khan*

Another Pakistani diplomat named Mohammad Mazhar Khan was withdrawn from Bangladesh after intelligence dug out his involvement in terror financing and currency forgery racket. He had set up a wide network of producing and distributing fake Indian currency. Allegedly, the intelligence report said Mazhar in collaboration with some colleagues at the high commission used to channel the money earned through his currency scam to Hizb ut-Tahir, Ansarullah Bangla Team and Jamaat-e-Islami. He was immediately withdrawn by the Pakistan government. Before leaving he surrendered the diplomatic identification card. However, questions were raised as to why a diplomat found involved in such grave crimes was let go without being expelled or declared persona non grata.

5.3 *Searching the Bag of a North Korean Ambassador*

A North Korean Diplomat named Son Young Nam refused to let the immigration authorities check the bag he was carrying as soon as he entered Bangladesh. He reasoned that he had a red passport and was entitled to diplomatic immunity and privileges that protect his bag. However, there were information that the diplomat was smuggling 27 kg of gold in his bag. If such happened, it would have violated the national law of Bangladesh that nobody can carry jewelry more than 2 kg. Notably, the idea of a 'diplomatic bag' is different from a 'diplomat's bag.' Because in case of a diplomatic bag, there should be designated sticker placed on it, which will not be present in case of a diplomat's bag. The attempt to use the protection afforded to 'diplomatic bag' to smuggle only made him an abuser of the diplomatic immunities and privileges he was entitled to. Since it was not a diplomatic bag in legal parlance, the

search carried out was deemed to have been in accordance with the procedure and Son Young Nam was found guilty of abusing the diplomatic rights given to him for the smooth running of his diplomatic mission.[16] The Bangladeshi law prescribes fine, life imprisonment or death penalty for such smuggling. However, given the fact that he was a diplomat of the North Korean Embassy, he could not be subject to these penalties. As a result, Bangladesh asked the North Korean authorities to sue him and report the charges brought against him. On the other hand, Bangladesh declared him persona non grata. North Korean authorities officially apologized for such an incident.

6 Extension of Diplomatic Immunity by Court by a Certificate from an Embassy

In *Kazi M. Delwar Hossain Baig v. The Chairman, 1st Labour Court, Dhaka and Ors*.[17] this case before the Labor Court, Dhaka, one Mr. Kazi M. Delwar Hossain Baig challenged a decision of the Labor court that declared such a certificate entitles the person to diplomatic immunity. This case from 1990 involves a question of law as to whether a document issued by an embassy in Bangladesh certifying that someone is part of the diplomatic mission entitles him to diplomatic immunity under the Vienna Convention on Diplomatic Relations 1961. It was submitted that the 'Labour Court acted illegally in dismissing the case on an erroneous view that the employee respondents were entitled to diplomatic immunities.'[18]

A closer look at the facts of the case reveal that the petitioner was appointed as a driver in March 1975 by the Manager U.S. Commissary. The service of the driver was terminated vide letter in March 1987 with effect from December 1986 without paying him termination benefits. So, the petitioner filed a case in the Labour Court praying for re-instatement in service with back wages. Thereafter respondents entered appearance before the Labor Court and filed an application praying for rejecting the plaint. The employer respondent produced a certificate issued by the United States Embassy in Bangladesh in February 1990 stating that the United States Commissary is a part of the United States Diplomatic Mission. Relying upon the document, the Labor Court held

16 Zeffa Alifah Pangestu, *Analysis of Diplomatic Immunities and Privileges: Case Study of Abuse of Diplomatic Rights by Representatives of North Korean Diplomats*, 3 Journal of Asean Dynamics & Beyond 42, 44 (2022).

17 *Kazi M. Delwar Hossain Baig v. The Chairman*, (1996) 1 MLR (HCD) (Bangl.).

18 *Id.* ¶ 2.

that the employer respondents were enjoying Diplomatic Immunities from civil jurisdiction under the Vienna Convention. When a writ petition was filed against the judgment of the Labor Court, the court discharged the petition on a technical ground and avoided a discussion as to whether diplomatic immunity shall be extended to a commercial entity under the garb of an embassy. The Court said that the petition stated that the

> U.S. Commissary is a Contractor and supplies food hard liquor, beer, cigarettes, cosmetics etc. to different diplomatic missions and used to show commercial films and runs three canteens. Thus it appears that respondents are engaged in business in this country under the name of U.S. Commissary and its office is located in Magh Bazar. It is not understood how an ordinary business organization carrying on business using the name of U.S. Commissary outside the Diplomatic premises can claim diplomatic immunity on the basis of a certificate issued by the counsellor for Administrative Affairs of the U.S. Embassy. But the petitioner did not raise this question before the Labour Court by filing any objection against the application dated 17.6.1987 filed by the respondent Nos. 2–7 stating that U.S. Commissary is not a commercial or business establishment. Petitioner having not raised this question before the Labour Court there is no scope for deciding the same in this petition. Since the Labour Court relied upon the certificate issued by the counsellor of the U.S. Embassy on 5.2.90 stating that U.S. Commissary is a part of the U.S. Diplomatic Mission, we find no ground to interfere with the impugned judgment when clause (g) of Article 1 read with sub-article 3 of Article 37 of the Vienna Convention granted Diplomatic Immunities to the Service Staff of the Mission.[19]

Notably, this decision of the Labor Court does not have precedential status because subordinate courts are not given the authority to create precedents in Bangladesh legal system, and the High Court Division did not decide on the substantive position of law.

There are a number of problems with such a decision in the given fact. Firstly, the Vienna Convention on Diplomatic Relations does not automatically apply in Bangladesh. Then being a dualist country, a subordinate court could not directly apply an international law provision without implementing legislation. Secondly, the DICCRA applies only to commonwealth countries. There is no scope in the law that such a facility could be also extended

19 *Id.* ¶ 5.

to a non-commonwealth country. The author is of the view that if the court engaged in substantive discussion of law, the judgment could be perhaps different from the one that came out. Thirdly, the government of Bangladesh gives a diplomatic id card to diplomats coming to Bangladesh as soon as they arrive. In addition, the government provides them a certificate under the DICCRA in case of diplomats of commonwealth countries. These id card holders can only be considered to have diplomatic immunities, not anyone the embassy certifies to have diplomatic status.

7 Use of Unsecured and Unencrypted Web-Based Software and Possible Violation of the Vienna Convention on Diplomatic Relations, 1961

The petitioners in *Eastern Diplomatic Services Limited and others v. National Board of Revenue and others*[20] challenged the legality of the order which compelled the petitioners to use unsecured and unencrypted web-based software developed by the respondents and argued, inter alia, the violation of the Vienna Convention on Diplomatic Relations, 1961. The facts of the case, 'in brief, are that petitioners are the respective companies incorporated under the Companies Act, 1994 and are engaged in the business of importing duty free goods upon obtaining required permission from the respective government offices. They supply those duty-free goods to the diplomats and privileged person living in Bangladesh, who enjoy benefits for purchase of duty-free goods under different international convention, protocol and treaties. The petitioners companies conduct their respective businesses in compliance with the terms and conditions as set out in the relevant license and the General Order.'[21]

The Court issued the rule

> calling upon the respondents to show cause as to why the action of the respondents in developing an unsecured and unencrypted web based software, by issuing the impugned order bearing Ref. No. 021/2021/Customs/228 dated 14-9-2021 (published in Bangladesh Gazette on 20-9-2021) and thereby compelling use of the said unencrypted software by the respective petitioners from 1-10-2021 without any legal basis under the Customs Act, 1969, without any consultation, vetting and security check by the proforma respondent Nos. 7–9, 9–11

20 *Eastern Diplomatic Services Limited and others v. National Board of Revenue and others*, (2022) 74 DLR 336 (HCD) (Bangl.).

21 *Id.* ¶ 5.

> respectively in violation of the Rules of Business 1996, in complete disregard of the petitioners, representations dated 18-7-2021, 5-9-2021 and 6-9-2021 respectively without ensuring impenetrability/invulnerability of the unencrypted software thus, has caused significant threat of violation of Vienna Convention on Diplomatic Relations, 1961, Information and Communication Technology Act, 2006 and Digital Security Act, 2018 and without having any jurisdiction under the Customs Act, 1969, should not be declared to have been done without lawful authority and hence, of no legal effect.[22]

The petitioners argued, inter alia, that the 'development and subsequent use of the software in question with the disclosure of the information of the diplomats and privileged persons is a violation of Article 30(2) of the Vienna Convention on Diplomatic Relations, 1961.'[23] They also argued that this violated the Customs Act, 1969, and the Rules of Business, 1996, the Communication Technology Act, 2006, and Digital Security Act, 2018.

The court explored 'the National Board of Revenue could introduce the software – Diplomatic Bond Automation System – to regulate the procedural framework of diplomatic bonded warehouses for maintaining transparency and accountability of the services rendered by the government and to provide speedy service to the concerned persons under the Customs Act.' The court held that sections 13, 119A, and 219B of the Customs Act do not empower the National Board of Revenue 'to introduce software for regulating frameworks of the diplomatic bonded warehouses, thereby compelling the respective licensees to use the same.' The court referred to newly amended provisions of the Customs Act, the Income Tax Ordinance, 1984 (via the Finance Act), and the VAT and Supplementary Duty Act, 2012 and finally held the impugned order illegal.

8 Some More Incidents

Owing to diplomatic protocol, Son Young-nam, the first secretary of North Korea's embassy in Dhaka, was released without being charged despite being caught attempting to smuggle high-value contraband into Bangladesh as he made his way into the country via its capital's airport.[24] However, his

22 *Id.* ¶ 1.

23 *Id.* ¶ 16.

24 *Bangladesh Expels North Korea Envoy Over Gold Smuggling*, BBC NEWS (Mar. 10, 2015), https://www.bbc.com/news/world-asia-31810712.

diplomatic status did not shield him from being expelled from the North Korean embassy, tag lined with the Bangladeshi government asking for him to be prosecuted in North Korea and furthermore pledging serious action if any of their embassy officials were to be found to have been involved in such or other crimes in the future. The value of the gold bars and ornaments which made up most of the contraband was estimated to amount to a colossal 1.6 million USD, amassing 27 kilograms of gold which is about 27 kilograms more than the mandated amount by Bangladesh Customs. Domestic laws coupled with strict international sanctions on North Korea in the facet of financial movement made it paramount for there to be strict, stern and stringent actions in this regard.

Another North Korean Diplomat, first secretary of the North Korean Embassy in Dhaka, named Han Son Ik was asked to leave Bangladesh in 2015 when it was found that he tried to smuggle one million cigarettes as well as electronics in a shipping container.[25] He declared that his cargo contained food and soft drinks. But as the custom officials checked the cargo, it was found that he was carrying 1.6 million stalks of expensive cigarettes and electronics.

9 Conclusion

Diplomats are held in high regard around the world for the role they play in maintaining bilateral and multilateral relationship with other states. However, they have also been found in unwanted situations breaking national laws of respective host states. In the absence of a comprehensive diplomatic immunity implementation legislation, that too in a dualist country, the legal regime in Bangladesh is incomplete. Due to the absence of a legal regime, diplomatic immunities and privileges are being operated based on intra ministry customs which are not codified even under any manual unlike its neighboring countries like Nepal, Sri Lanka or even India. It is also problematic to note that a diplomatic immunity legislation is available only for commonwealth countries but so many important development partners of Bangladesh comprise of non-commonwealth countries. How Bangladesh is granting those diplomatic agents immunity remains a question of law. It is recommended that Bangladesh government considers enactment of a comprehensive legislation for implementing the VCDR.

25 *Bangladesh Expels North Korean Diplomat for Smuggling*, AL-JAZEERA (Aug. 6, 2016), https://www.aljazeera.com/news/2016/8/8/bangladesh-expels-north-korean-diplomat-for-smuggling.

Diplomatic Privileges and Immunities: Looking at the Nepalese Approach

*Pranjali Kanel**

1 Introduction

"Diplomacy is the management of international relations by negotiation; the method by which these relations are adjusted and managed by ambassadors and envoys; the business or art of the diplomatist."[1] Diplomacy, an instrument of foreign policy, can be considered an art[2] that allows the conduct of state relationships for gain without conflict. It has ancient roots with existence as early as 2500 BCE.[3] The Egyptians and the Greeks maintained a relationship with other states through trade and political association.[4] While Thucydides wrote about the tactful treatment of ambassadors, Ottoman Empire is known to have not sent diplomatic missions until the 19th century.[5] The expansion and independence of countries brought forth the need for a balance of power among the sovereigns.[6] To maintain this balance, a fundamental approach to maintaining relationships was sought, giving rise to the concept of "classical diplomacy," which was seen as mere state policy.[7] Scholars on diplomacy express a shift to 'new diplomacy'[8] with transparency and parliamentary participation following the First World War. The shift in diplomacy or way of understanding it can be looked at by how a state applies the diplomatic method. Gradual use of soft powers such as organizations and individuals to influence the government and the people of other states is seen as a method that applies to "public diplomacy."[9]

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1 Harold Nicolson, Diplomacy 15 (3rd ed. Oxford University Press 1969).

2 Eduardo Jara Roncati, *Diplomacy*, Max Planck Encyclopedias of International Law (2017), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1974?rskey=ZisyaL&result=1&prd=OPIL.

3 *Id.*

4 Roncati, *supra* note 2, ¶ 9.

5 *Id.* ¶10.

6 *Id.*

7 *Id.* ¶17.

8 *Id.* ¶21.

9 *Id.* ¶29.

Nepal's diplomatic ties with the international community can be traced back to when different dynasties ruled before Nepal was mapped out into what it is today. One of the significant moments in history was when the 7th Century King *Anshuvarma* got his daughter *Bhrikuti* married to the famous Tibetian King *Tsong Tsen Gampo*.[10] This marital relationship established a good relationship with Tibet, considered a "clever stroke" of diplomacy that maintained Nepal's balance with its neighboring countries.[11] Since then, Nepal's interaction with the international community has developed. Its scope has broadened beyond establishing a smooth international relationship through marital relationships. Nepal's interface with diplomacy can be discerned through its approach of relying on soft power, as well as legal instruments.

Despite the evolution of diplomacy and its method, diplomacy is a state-centric regime that relies on legal instruments to suppose the relationship between states. Nepal has a history of interacting with the states of the international community by establishing bilateral relationships. According to government records,[12] one of Nepal's first formal relations was with the United Kingdom (UK) in 1816 with the Treaty of Sugauli. Nepal's willingness to be part of the international community and maintain the relation can be visibly seen to have widened following the end of the Second World War, with Nepal being part of the United Nations (UN) in 1955.[13] Accession to the Vienna Convention on Diplomatic Relations, 1961 (VCDR) solidified Nepal's stance on diplomacy as a legal tool requisite to maintain international peace and friendly relation[14] with other nations.

2 Diplomatic Privilege and Immunity

"Privilege" can be defined as a "right or immunity granted as a special benefit, advantage, or favor, special enjoyment or an exemption from an evil or burden."[15] Diplomats are assigned tasks that need an atmosphere free of pressure and interruption for their completion. The concept of privileges

10 D.B. Shrestha & C.B. Singh, The History of Ancient and Medieval Nepal in a Nutshell With Some Comparative Traces of Foreign History 1972 Book 1 12–13 (1972).

11 *Id.*

12 *Bilateral Relations*, Government of Nepal Ministry of Foreign Affairs, https://mofa.gov.np/nepal-united-kingdom-relations/.

13 Permanent Mission of Nepal to the United Nations, https://www.un.int/nepal/.

14 Vienna Convention on Diplomatic Relations, opened for signature Apr. 18, 1961, Preamble U.N.T.S. 95 (entered into force Apr. 24, 1964) [hereinafter VCDR].

15 *Privilege*, Webster New International Dictionary, https://www.merriam-webster.com/dictionary/privilege (last visited 05. 09. 2023).

and immunities is an ancient one,[16] as can be seen indicated in the opening paragraph of the Vienna Convention on Diplomatic Relations of 1961 that is, "Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents …"[17]

The Vienna Convention is declaratory of existing rules and practices with respect to diplomatic immunities and privileges, which the States reciprocally accord without discrimination. Diplomats are an extension of the sovereign state whose functions represent the states.[18] Thus, special privileges for diplomatic personnel grew partly due to sovereign immunity, independence, and equality of states and partly as an essential requirement of the international system. The prime motive behind extending immunities and privileges by States to their diplomatic representatives is to ensure independence in the performance of their official functions.[19]

Diplomatic privilege and immunity so far are not just treaty law when applicable but also have attained the status of customary international law.[20] The Vienna Convention on Diplomatic Relations provides protection against criminal, civil, and administrative jurisdiction[21] and exemption from paying taxes[22] in the receiving nation to the diplomats. The privileges and immunities are extended to the family of the diplomatic agent if they are part of the diplomat's household and bear no nationality of the receiving state.[23] The Convention provides no exception to the immunity regarding criminal jurisdiction but three exceptions from civil and administrative jurisdiction.[24]

The Vienna Convention specifies that it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state without prejudice to their privileges and immunities.[25] Most

16 Holger P Hestermeyer, *Vienna Convention on Diplomatic Relations (1961)*, Max Planck Encyclopedias of International Law (2009) ¶ 2, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1004?rskey=Kf2Irc&result=1&prd=OPIL.

17 VCDR, *supra* note 14, at 2.

18 Hestermeyer, *supra* note 16, ¶ 43. *see also* Nicholson *supra* note 1.

19 Kalicharan M.L., Diplomatic Immunities and Privileges Critical Study With Special Reference to Contemporary International Law 57 (Mar. 31, 2015) (Ph.D dissertation, University of Mysore) (Shaodganga@INFLIBNET Centre).

20 Eileen Denza, *Introductory Note on Vienna Convention on Diplomatic Relations*, UN Audiovisual Library of International Law, http://legal.un.org/avl/ha/vcdr/vcdr.html.

21 VCDR, *supra* note 14, art. 31.

22 *Id.* art. 23.

23 *Id.* art. 37 (1).

24 *Id.* art. 31 (1) (a) (b) (c).

25 *Id.* art. 41.

importantly, the scope of the immunities and privileges under the Convention is limited to the receiving state, and any action of the diplomatic agent does not preclude them from the jurisdiction of the sending state.[26] Although the diplomats are immune to specific jurisdiction, the receiving state can declare a diplomat *persona non grata* and notify the sending state without explaining its decision.[27] This suggests that immunity and privileges do not provide diplomats with impunity.

International law and its subjects are constantly scrutinized. The law concerning diplomatic privileges and immunities pursuant to the Vienna Convention on Diplomatic Relations, 1961 has received criticism[28] for the potential abuse of immunity dating back to the 1980s.[29] The question of impunity over immunity was heightened especially following the disappearance of the Washington Post journalist and a critique of Saudi Arabia, Jamal Khashoggi, visiting the Saudi Arabian consulate in Istanbul.[30]

Although the criticism concerning abuses of diplomatic immunity remains, it is essential to note that diplomatic law constitutes a self-contained regime also acknowledged by the International Court of Justice. In its decision in the *United States of America v. Iran*, it laid out:

> The rules of diplomatic law … constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges, and immunities to be accorded to diplomatic missions and, on the other hand, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious.[31]

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26 *Id.* art. 31 (4).

27 *Id.* art. 9.

28 *See* S.R. Subramanian, *Abuse of Diplomatic Privileges and the Balance between Immunities and the Duty to Respect the Local Laws and Regulations under the Vienna Conventions: The Recent Indian Experience*, 3 The Chinese Journal. of Global Governance 182, 232 (2017), https://doi.org/10.1163/23525207-12340027; *see also* Erin Handley, *Jamal Khashoggi: Does Diplomatic Immunity Make It Possible to Get Away With Murder?*, ABC News (Oct. 10, 2018) https://www.abc.net.au/news/2018-10-10/diplomatic-immunity-clouds-jamal-khashoggi-case/10356566.

29 Vannesha Mae, Challenging the Vienna Convention on Diplomatic Relations: Possibilities of New Obligations to Protect Domestic Workers (2019), (Masters dissertation, University of Amsterdam) (Scripties).

30 Handley, *supra* note 28.

31 United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 86 (May 24).

For a convention that forms a part of the self-contained regime with nearly universal recognition, it is rather interesting to see the call for reforms in how the diplomatic immunities are rolled out. The pertinent question about diplomatic immunity is if its rationality would dilute with events where the diplomats are not held accountable for the damage caused by them to the people of the receiving state.

This article recounts Nepal's legal framework and its practice to derive Nepal's approach concerning diplomatic privilege and immunities.

3 Diplomatic Privileges and Immunities: Mapping Nepal's Law

The following are the legal instruments that help map out Nepal's law concerning diplomatic privileges and immunities:

3.1 *Vienna Convention on Diplomatic Relations, 1961*

Nepal is a party to the Vienna Convention on Diplomatic Relations, 1961, with its accession to the Convention in 1965. Nepal should conform its practices to the Convention.

3.2 *Constitution of Nepal*

Nepal remains committed to upholding its obligations under international law. The Constitution of Nepal states that it is under Nepal's State Policy to "conduct an independent foreign policy based on the Charter of the United Nations, non-alignment, principles of *Panchasheel*, international law and the norms of world peace, taking into consideration of the overall interest of the nation."[32] It further mentions the reviews of treaties and entering and making new treaties as a part of state policy.[33] State policy provides the basis for the Constitution to refer to international law as a source while conducting its foreign policy.[34]

In this sense, the Constitution of Nepal provides ample space for Nepal to undertake its obligation under the Vienna Convention on Diplomatic Relations.

32 Constitution of Nepal, Sept. 20, 2015, art. 51 (m)(1).

33 *Id.* art. 51 (b).

34 *Id.* art. 51(a); *see also supra* note 12, *Nepal's Foreign Policy*.

3.3 *Diplomatic Privilege and Immunities of the Foreign States and Representatives Act, 1970*

Section 10 of the Act provides immunity to the diplomatic agent from all criminal, civil and administrative jurisdictions. Similar to the Vienna Convention on Diplomatic Relations, the Act provides the following three exceptions to criminal civil and administrative jurisdictions:

1. A real action relating to private immovable property situated in the territory of the Foreign State for the purpose of the Mission.
2. An action relating to succession in which the diplomatic agent is involved as a private person and not on behalf of the Foreign State.
3. An action relating to any professional or commercial activity exercised by the Diplomatic Agent outside his/her official functions.

The Act's preamble caters to providing diplomatic privileges and immunities to the foreign state and their officials per international Law and practice. Besides the three exceptions and mentioning the scope of privileges and immunities based on reciprocity, Nepal's Act does not limit the scope of the immunity it provides. It is essential to mark that the provision of *persona non grata* mentioned in the Vienna Convention is notably absent in the Act. However, the provision of *persona non grata* in the Vienna Convention has attained the status of customary international law.

3.4 *Diplomatic Code of Conduct, 2011*

The 2011 Diplomatic Code of Conduct provides a systematic and dignified manner of conducting official meetings, contacts, negotiations, and communications of the Government of Nepal with foreign governments that is consistent with diplomatic norms and international practices.[35] Rule 9.3 of the Code of Conduct states that Heads of Nepalese Diplomatic Missions and other officials of the Mission should not abuse their diplomatic privileges and immunities. Rule 9.4 states that The Heads of Nepalese Diplomatic Missions or their spouses or diplomatic officials should not hold any position of benefit or engage in business activities.

The Code of Conduct directs the diplomats as a sending state not to abuse the privileges vis-à-vis reciprocity to the receiving state. It, however, does not mention the consequences of violating the rules concerning diplomatic privileges and immunities.

35 Diplomatic Code of Conduct Preamble (2011) (Nepal).

3.5 *Protocol and Consular Handbook, 2018*

Protocol and Consular Handbook, 2011 is a handbook promulgated by the Ministry of Foreign Affairs. The handbook provides practical advice for foreign missions to perform their functions in Nepalese territory.[36] The handbook regarding privileges and immunities states that only the diplomatic agent and their family enjoy protection according to the international provision. In terms of limitation, it only provides limitations on Tax/Duty Exemption Privileges.[37]

4 Affairs to Account

This section of the article accounts for significant affairs during which Nepal has been embroiled in matters concerning diplomatic immunities and privileges or its exception.

4.1 *Dismissal for Shoplifting Books*

In 1988, Nepal's Ambassador to the United States was detained by the police for suspected shoplifting of books.[38] The ambassador was not prosecuted in the United States because of diplomatic immunity. While the Nepalese ambassador was recalled,[39] it is unknown if he was charged under Nepalese law.

4.2 *Saudi Diplomat, Indian Territory, and Nepali Victims*

In 2015, a Saudi Arabian diplomat was recalled from India, where he was accused of raping two Nepali women.[40] India's Ministry of External Affairs statement stated that the diplomat was protected from prosecution because

36 Ministry of Foreign Affairs Protocol Division, Protocol and Consular Handbook 1 (2018), https://mofa.gov.np/wp-content/uploads/2018/12/Pro-and-Con-Handbook-Update-on-Dec-2018.pdf.

37 *Id.* at 21.

38 *Ambassador Accused of Shoplifting Recalled Home*, UPI (Jan. 4, 1988), https://www.upi.com/Archives/1988/01/04/Ambassador-accused-of-shoplifting-recalled-home/2316568270800/.

39 Kim Patch, *Ambassador Accused of Shoplifting Recalled Home*, UPI (Jan. 5, 1988), https://www.upi.com/Archives/1988/01/05/Ambassador-accused-of-shoplifting-recalled-home/9278568357200/.

40 Jason Bruke, *Saudi Diplomat Accused of Raping Two Maids Uses Immunity to Leave India*, The Guardian (Sept. 17, 2015), https://www.theguardian.com/world/2015/sep/17/saudi-diplomat-accused-of-raping-two-maids-uses-immunity-to-leave-india.

of diplomatic immunity.[41] Although the Saudi Arabian side recalled the diplomat, they maintain that the allegation against him was false.[42]

This case not only triggered the public of India and Nepal, countries sensitive to sexual misconduct and trafficking but also brought forth questions concerning the regime of diplomatic immunity. The incident does pose a question on the extent of diplomatic privileges and immunities.

4.3 *Diplomats, Foreign Intervention, and a Case for* Persona Non Grata

In 2001, a Pakistani ambassador was declared *persona non grata* and ordered to return to Pakistan by the Nepal government.[43] The diplomat was found with 16.2 kg of RDX from his residence. Although the Diplomatic Privilege and Immunities of the Foreign States and Representatives Act, 1970 does not provide provisions concerning *persona non grata*, Article 9 of the Vienna Convention on Diplomatic Relations, 1961, to which Nepal is a party, does.

In 2016, complaints were lodged against an Indian ambassador requesting the government declare him *persona non grata* considering his ill-intended involvement in the internal affairs of Nepal.[44] As a result, there was a lot of media traction, with outlets reporting the Nepalese government preparing[45] to declare the ambassador *persona non grata*, which the Foreign Minister rebuffed, citing as baseless rumors.[46]

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41 Nida Najar, *Saudi Diplomat Accused of Rape Has Left India, Government Says*, NEW YORK TIMES (Sept. 17, 2015), https://www.nytimes.com/2015/09/18/world/asia/saudi-diplomat-accused-of-rape-has-left-india-government-says.html.

42 *Saudi Diplomat Accused of Rape Withdrawn from India*, REUTERS (Sept. 17, 2015),https://www.reuters.com/article/uk-india-saudi-rape/saudi-diplomat-accused-of-rape-withdrawn-from-india-idUKKCN0RH0IJ20150917.

43 *Pak Diplomat Labeled Persona Non Grata*, ZEE NEWS (Apr. 14, 2001), https://zeenews.india.com/news/south-asia/pak-diplomat-labelled-ipersona-non-grata/i_11589.html.

44 *Persona Non Grata Complaint Registered Against Indian Envoy Rae*, MY REPUBLICA (Dec. 4, 2016), https://myrepublica.nagariknetwork.com/news/persona-non-grata-complaint-registered-against-indian-envoy-rae/.

45 *Indian Envoy Ranjit Rae May Be Declared Persona Non Grata by Nepal*, INDIA TODAY (May 8, 2016), https://www.indiatoday.in/watch-right-now/video/indian-envoy-ranjit-rae-may-be-declared-persona-non-grata-by-nepal-443276-2016-05-08?jwsource=cl.

46 *Nepal Rejects Reports on Government Mulling Indian Envoy's Expulsion*, THE ECONOMIC TIMES (May 9, 2016), https://economictimes.indiatimes.com/news/politics-and-nation/nepal-rejects-reports-on-government-mulling-indian-envoys-expulsion/articleshow/52185399.cms?from=mdr.

Providing specified measures to counter problems within a particular regime allows a regime of law to be self-contained.[47] *Persona non grata* was foreseen as a mechanism envisioned by the law of diplomatic immunity to govern the possible misuse of the law. Thus, Article 9 of the Convention, with the placement of *persona non grata*, formed the law of diplomatic immunity as a part of a self-contained regime.[48]

4.4 *Human Trafficking and Resignation*

In 2019, the Nepalese Ambassador to Australia resigned following allegations against her alleged involvement in human trafficking. The ambassador's driver made allegations against her taking money from people to provide safe passage to Australia.[49]

This case probed the attention of the opposition party at the time, which demanded the government take steps to remove her if she was found guilty of the charges.[50] The Ministry of Foreign Affairs formed a three-member panel to investigate claims made against her. While the panel recommended relieving her from duties, she resigned,[51] saying she did not feel morally equipped to continue with her service, which was fueled by a false allegation. Media reports that the three-member panel submitted a report to the government suggesting discontinuing the Ambassador's career after she failed to provide convincing evidence against the charges by her own driver.[52] However, during the research for the article, the author could not find an official document indicating the submission of a report that indicated such a suggestion.

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47 Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 61 (4th ed. 2016), https://opil.ouplaw.com/display/10.1093/law/9780198703969.001.0001/law-9780198703969.

48 *Id.*

49 Tapendra Karki, *Amid Controversy, Lucky Sherpa Resigns as Ambassador to Australia*, My Republica (Feb. 1, 2019), https://myrepublica.nagariknetwork.com/news/amid-controversy-lucky-sherpa-resigns-as-ambassador-to-australia/.

50 Sanjaya Lama, *NC Demands Probe Against Ambassador Lucky Sherpa*, The Kathmandu Post (Dec. 5, 2018), https://kathmandupost.com/national/2018/12/05/nc-demands-probe-against-ambassador-lucky-sherpa.

51 Sanjaya Lama, *Nepali Envoy to Australia Lucky Sherpa Resigns*, The Kathmandu Post (Feb. 1, 2019), https://kathmandupost.com/national/2019/02/01/nepali-envoy-to-australia-lucky-sherpa-resigns-20190201162707.

52 *Id.*

5 Analysis

Apart from the legal and policy framework, Nepal's history suggests its keenness to maintain decent foreign relations. An essential part of maintaining diplomatic relationships is striking a balance between maintaining diplomatic relations with diplomatic immunity. Nepal's accession to the Vienna Convention on Diplomatic Relations, 1961 automatically suggests its disposition to oblige the legal obligation the Convention supposes. Nevertheless, analysis of the legal framework with the country's accounts of involvement with matters relating to diplomatic immunity can help derive the Nepalese way or attitude towards diplomatic immunities and privileges.

5.1 *Derivation from Mapping out Nepal's Law*

5.1.1 Conformity to the International Legal Framework

Nepal's accession to the Vienna Convention and its constitutional framework provides the necessary provisions to reconcile international obligations with the domestic framework. Diplomatic Privilege and Immunities of the Foreign States and Representatives Act, 1970, Diplomatic Code of Conduct, 2011, and Protocol and Consular Handbook, 2018 make up Nepal's domestic framework concerning diplomatic immunity. The adherence to international obligation while framing the rules and conducts domestically suggests Nepal's conformity to the existing laws concerning diplomatic privileges and immunities.

5.2 *Derivation from the Dismissal of Diplomats*

5.2.1 Balancing Friends or Legal Conformity?

The 2015 diplomatic crisis between Saudi Arabia, India, and Nepal following the withdrawal of a Saudi diplomat for charges of rape of Nepali women in India led to the question of the extent to which diplomatic immunity is applicable.

Offenses related to sexual violence are primarily condemned in both India and Nepal. However, India did not declare anyone *persona non grata* for a criminal charge which otherwise would have been prosecuted in its jurisdiction. Instead, it released a statement highlighting the invokable immunity against its criminal jurisdiction.

This case brings a question to the applicability of diplomatic immunity-are immunities also applicable to the diplomats when the abuse results in criminal acts towards the nationals of a third state? Article 46 of the Vienna Convention provides the temporary protection of the interest of the third state and its nationals by the sending state in the receiving state when the third state is not represented in the receiving state.

Here, Nepal (third state) has a bilateral relationship with both India (receiving state) and Saudi Arabia (sending state). However, the immunity was applied to a criminal act committed against nationals of a third state which the Vienna Convention provides to no avail. Although the Nepali victims are said to have been rescued from the tip provided by the Nepalese embassy, the silence of Nepali officials and the Foreign Ministry of Nepal during the time regarding the matter speaks otherwise.

The derivation of silence during this incident from the Nepalese side is that if diplomatic immunity supersedes the abuse of the sending state by virtue of the diplomats' action toward its nationals as a third state, it will continue confirming the legal norm.

Diplomatic immunity is vital in maintaining international relations and a state's sovereignty, but at what cost? Making sovereign friends does come with benefits but should it come at the expense of making foes with the public, the innocent? Nepal's silence about its nationals' abuse at the hands of a diplomat in a different country, even when it has a bilateral relationship with both, suggests hesitancy in approaching the reform to the extent of applicability of the diplomatic immunity.

5.2.2 No Accountability of the Sending State?

It is understood that where a diplomat has been detected in some personal misconduct, the diplomat is withdrawn without the receiving State making any formal notification withdrawing his recognition as a mission member. Vienna Convention states that even if the diplomat is exempted from receiving state, the scope of the Convention is not extended to the sending state's jurisdiction.

Saudi Arabia did claim that the charges against its diplomat were false, but seeing as the immunity does not apply in the sending state, could the diplomat have been investigated in that state?

The same applies to the Nepalese ambassador's shoplifting case in 1988. Reports suggesting any follow-up investigation in Nepal could not be found during the drafting of this article. Interestingly, in the case of the Nepalese Ambassador to Australia, the opposition party probed the then government to take action against the diplomat had the charges been proven. The domestic legal framework in Nepal does not have any provision through which it can charge a diplomat for abusing their immunity. In this instance, it is essential that we, again, draw our attention to Vienna Convention expressly mentioning the limitation of immunity's scope – applicable only within the receiving state.

On another note, the Convention neither provides a mechanism to follow up nor provides ways in which the sending state can investigate the charges pressed on the diplomats it withdrew, nor does it hold the sending states

accountable for the suffering caused by the abuse of power of the diplomats they dismissed without seeing through any consequences.

States such as Nepal that confirm the diplomatic rules not being vocal over the lack of accountability of the sending state could be the preventive approach taken to withhold its accountability should it someday be in the shoes of sending state. This analogy can be applied to look over the silence of Nepal over Saudi Arabic diplomats to its citizen and the fact that Nepal has not volunteered to see through the limitation of diplomatic immunity in its jurisdiction as a sending state.

5.3 *Derivation through the Application of* Persona Non Grata

Given *persona non grata*'s status as customary international law, its exclusion from the text of domestic legislation does not hinder Nepal's conformity with the diplomatic laws being a part of a self-contained regime. Additionally, Nepal's practice shows that it has, when deemed suitable, declared diplomats *persona non grata*. This suffices Nepal's conformity to Article 9 of the Vienna Convention under treaty law as well as the status of customary international law.

6 Conclusion

Nepal's legal and policy framework keeps high regard on international relations and law. This vantage point is derived from the international legal framework Nepal has signed and the integration of international treaties in its state policy. Mutual respect for territorial integrity and sovereignty, non-interference in each other's internal affairs, respect for mutual equality, and cooperation for mutual benefit[53] is the basis for the applicability of the Vienna Convention.

Analysis of Nepal's legal framework and the trend of its involvement in issues relating to diplomatic immunities suggest that it has a conformist approach toward the rules relating to diplomatic immunity. Looking through the involvement of Nepalese elements in the issues concerning diplomatic privileges and immunities, we can derive the two significant gaps that Vienna Convention has: the abuse of diplomatic immunity to the national third party in receiving state; and absence of accountability of the sending state towards the abuse of immunity.

53 *Nepal's Foreign Policy*, Government of Nepal Ministry of Foreign Affairs, https://mofa.gov.np/foreign-policy/.

Will Nepal look at these gaps? Will Nepal shift from the conformist approach towards the diplomatic immunities that it enjoys? Looking at Nepal's approach towards diplomatic privileges and immunities through its legal framework and state practice, the answer to these questions tends towards a "no." Despite that, it is imperative that time, and again, we are reminded of the Nepalese approach toward diplomatic privileges and immunity. Nepal should, even if it does not call for reform or confirm the validity of reform of the Vienna Convention, look at the gaps in the given two accounts to strike a balance between diplomatic immunity and preventing spillover of the bad taste of diplomacy because of abuse amidst its nationals.

Legal Materials

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Participation in Multilateral Treaties

*Karin Arts**

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 2021. 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 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 or, when not available there, from the *United Nations Treaty Series Online*, https://treaties.un.org/pages/UNTSOnline.aspx?id=2&clang=_en
- 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 https://www.iaea.org/resources/treaties/treaties-under-IAEA-auspices
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from https://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/

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- 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::NO:::
- Where reference is made to the International Maritime Organization (IMO), data were derived from https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from https://en.unesco.org/about-us/legal-affairs/instruments/conventions
- Where reference is made to WIPO, data were derived from http://www.wipo.int/treaties/en
- Where reference is made to the Worldbank, data were derived from https://www.worldbank.org/en/about/leadership/members
- 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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Cambodia	10 Oct 2013	8 Apr 2021

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Cambodia		8 Apr 2021
China		17 Jun 2021
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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. 21 p. 245.
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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 Elimination of All Forms of Discrimination against Women, 1999: *see* Vol. 7 p. 170.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000: *see* Vol. 20 p. 202.
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000: *see* Vol. 25 p. 197.
Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002: *see* Vol. 24 p. 337.
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008: *see* Vol. 22 pp. 312–313.
International Convention for the Protection of All Persons from Enforced Disappearance, 2010: *see* Vol. 22 p. 313.
Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, 2011: *see* Vol. 25 p. 197.

Convention against Discrimination in Education, 1960
(Continued from Vol. 22 p. 312)

State	*Sig.*	*Rat.*
Turkmenistan		2 Apr 2021

Convention on the Rights of Persons with Disabilities, 2008
(Continued from Vol. 25 p. 197)

State	*Sig.*	*Rat.*
Uzbekistan	28 Feb 2009	28 Jun 2021

Humanitarian Law in Armed Conflict

International Conventions for the Protection of Victims of War, I–IV, 1949: *see* Vol. 11 p. 252.
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. 25 p. 198.

Intellectual Property

Convention for the Protection of Industrial Property, 1883 as amended 1979: *see* Vol. 23 p. 188.
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. 25 p. 199.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 26 p. 146–147.
Convention Establishing the World Intellectual Property Organization, 1967: *see* Vol. 13 p. 188.
Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001: *see* Vol. 22 p. 314.
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 25 p. 199.
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.
Patent Law Treaty, 2000: *see* Vol. 24 p. 340.
Singapore Treaty on the Law of Trademarks, 2006: *see* Vol. 23 p. 189.
Beijing Treaty on Audiovisual Performances, 2012: *see* Vol. 26 p. 147.

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979
(Continued from Vol. 24 p. 338)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Cambodia	9 Dec 2021	

Madrid Union Concerning the International Registration of Marks, including the Madrid Agreement 1891 as Amended in 1979, and the Madrid Protocol 1989
(Continued from Vol. 25 p. 199)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Pakistan	24 Feb 2021	24 May 2021

WIPO Performances and Phonograms Treaty, 1996
(Continued from Vol. 26 p. 147)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Afghanistan	9 Nov 2020	9 Feb 2021

WIPO Copyright Treaty, 1996
(Continued from Vol. 26, p. 147)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Afghanistan	9 Nov 2020	9 Feb 2021
Vietnam	17 Nov 2021	

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 2013
(Continued from Vol. 26 p. 148)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Turkmenistan	15 Oct 2020	15 Jan 2021

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. 24 p. 342.
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.
International Convention Against the Taking of Hostages, 1979: *see* Vol. 20 p. 206.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol. 18 p. 111.
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. 23 p. 191.
Convention on the Safety of United Nations and Associated Personnel, 1994: *see* Vol. 11 p. 255.
International Convention for the Suppression of Terrorist Bombings, 1997: *see* Vol. 20 p. 206.
Statute of the International Criminal Court, 1998: *see* Vol. 25 p. 202.
International Convention for the Suppression of the Financing of Terrorism, 1999: *see* Vol. 17 p. 174.
United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 23 p. 191.
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 26 p. 149.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 21 p. 250.
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. 21 p. 250.
United Nations Convention Against Corruption, 2003: *see* Vol. 23 p. 191.
International Convention for the Suppression of Acts of Nuclear Terrorism, 2005: *see* Vol. 25 p. 203.
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 2005: *see* Vol. 25 p. 203.

Amendment to Article 8 of the Rome Statute of the International Criminal Court
Kampala, 10 June 2010
Entry into force: 26 September 2012

State	*Sig.*	*Rat.*
Mongolia		18 Jan 2021

Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court
Kampala, 11 June 2010
Entry into force: 17 July 2018

State	*Sig.*	*Rat.*
Mongolia		18 Jan 2021

International Representation

(*see also*: Privileges and Immunities)
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975: *see* Vol. 6 p. 257.

International Trade

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 17 p. 176.
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. 25 p. 204.
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. 26 p. 150.
Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific, 2016: *see* Vol. 26 p. 150.

Judicial and Administrative Cooperation

Convention on Civil Procedure, 1954: *see* Vol. 20 p. 208.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: *see* Vol. 26 p. 151.
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 26 p. 151.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961
(Continued from Vol. 25 p. 204)
(Status as provided by HccH)

State	*Party*	*E.i.f.*
Indonesia	5 Oct 2021	
Singapore	18 Jan 2021	16 Sep 2021

Labour

Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 22 p. 320.
Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): *see* Vol. 26 p. 152.
Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111): *see* Vol. 22 p. 320.
Employment Policy Convention, 1964 (ILO Conv. 122): *see* Vol. 8 p. 186.
Minimum Age Convention, 1973 (ILO Conv. 138): *see* Vol. 26 p. 152.
Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182): *see* Vol. 19 p. 194.

Forced Labour Convention, 1930 (ILO Conv. 29)
(Continued from Vol. 19 p. 192)
(Status as provided by ILO)

State	*Rat. Registered*
Korea (Rep.)	20 April 2021

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87)
(Continued from Vol. 22 p. 319)
(Status as provided by ILO)

State	*Rat. Registered*
Korea (Rep.)	20 April 2021

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98)
(Continued from Vol. 16 p. 152)
(Status as provided by ILO)

State	*Rat. Registered*
Korea (Rep.)	20 Apr 2021

Employment Policy Convention, 1964 (ILO Conv. 122)
(Continued from Vol. 8 p. 186)
(Status as provided by ILO)

State	*Rat. Registered*
Turkmenistan	14 Apr 2021

Promotional Framework for Occupational Safety and Health Convention, 2006 (ILO Conv. 187)
(Continued from Vol. 25 p. 204)
(Status as provided by ILO)

State	*Rat. Registered*
Uzbekistan	14 Sep 2021

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, 1948: *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.
Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1975: *see* Vol. 21 p. 253.
Convention on Psychotropic Substances, 1971: *see* Vol. 13 p. 276.
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: *see* Vol. 20 p. 210.

Nationality and Statelessness

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 17 p. 178.
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.
Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol. 24 p. 345.
Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1988: *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.
Convention on Nuclear Safety, 1994: *see* Vol. 24 p. 345.
Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 16 p. 178.
Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997: *see* Vol. 24 p. 346.
Protocol to Amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 17 p. 180.
Amendment to the Convention on the Physical Protection of Nuclear Material, 2005: *see* Vol. 24 p. 346.

Amendment to the 1980 Convention on the Physical Protection of Nuclear Material, 2005
(Continued from Vol. 24 p. 346)
(Status as provided by IAEA)

State	*Cons.* (*deposit*)	*E.i.f.*
Philippines	16 Jun 2021	16 Jun 2021

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.
Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: *see* Vol. 10 p. 284.
Convention on Registration of Objects launched into Outer Space, 1974: *see* Vol. 15 p. 229.

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 Agencies, 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. 26 p. 155.
Convention on Road Signs and Signals, 1968: *see* Vol. 25 p. 208.

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: *see* Vol. 25 p. 156.

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. 26 p. 157.
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 as amended: *see* Vol. 19 p. 200.
International Convention for Safe Containers, as amended 1972: *see* Vol. 20 p. 215.
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, 1978 as amended: *see* Vol. 19 p. 200.
Protocol Relating to the International Convention for the Safety of Life at Sea, 1988: *see* Vol. 25 p. 209–210.
Protocol Relating to the International Convention on Load Lines, 1988: *see* Vol. 26 p. 157.

Nairobi International Convention on the Removal of Wrecks, 2007
(Continued from Vol. 26 p. 157)
(Status as provided by IMO)

State	*Cons.* (*dep.*)	*E.i.f.*
Indonesia	14 Dec 2020	14 Mar 2021
Kazakhstan	28 Apr 2021	28 Jul 2021

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.
International 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.
International 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: *see* Vol. 25 p. 211.

Telecommunications

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 13 p. 280.
Convention on the International Mobile Satellite Organization (INMARSAT), 1976 as amended: *see* Vol. 19 p. 202.

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.
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.
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. 26 p. 159–160.
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 the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: *see* Vol. 22 p. 327.
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 21 p. 259.
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 1980: *see* Vol. 23 p. 201.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1992: *see* Vol. 21 p. 259.
Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects (Protocol IV on Blinding Laser Weapons), 1995: *see* Vol. 26 p. 160.
Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices, as amended, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 1996: *see* Vol. 26 pp. 160–161.
Comprehensive Nuclear Test Ban Treaty, 1996: *see* Vol. 24 p. 352.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997: *see* Vol. 23 p. 201.
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. 23 p. 201.
Protocol (V) on explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 2003: *see* Vol. 26 p. 161.
Convention on Cluster Munitions, 2008: *see* Vol. 25 p. 212.
Arms Trade Treaty, 2013: *see* Vol. 26 p. 162.

Treaty on the Prohibition of Nuclear Weapons, 2017
(Continued from Vol. 26 p. 162)
Entry into force: 22 Jan 2021

State	*Sig.*	*Cons.*
Cambodia		22 Jan 2021
Mongolia		10 Dec 2021
Philippines	20 Sep 2017	18 Feb 2021

State Practice of Asian Countries in International Law

Bangladesh

Sumaiya Khair and Muhammad Ekramul Haque***

Treatment of Diplomatic and Consular Missions, Premises & Bags

Diplomatic and Consular Relations

***Vienna Convention on Diplomatic Relations, 1961 – Eastern Diplomatic Services Limited and others v National Board of Revenue and others* (2022) *74* DLR *336* (HCD) [*Writ Petition Nos. 7743, 7804, 8031 and 8072 of 2021, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 30 November 2021*]**

The petitioners filed the writ petition challenging the legality of the respondents developing unsecured and unencrypted web-based software by issuing the impugned order and compelling the petitioners to use it. They contended that the action violated the Customs Act, 1969, and the Rules of Business, 1996 and caused significant threat of violating the provisions of the Vienna Convention on Diplomatic Relations, 1961, as well as the Communication Technology Act, 2006, and Digital Security Act, 2018. The court delved into the issue of whether 'the National Board of Revenue could introduce the software – Diplomatic Bond Automation System – to regulate the procedural framework of diplomatic bonded warehouses for maintaining transparency and accountability of the services rendered by the government and to provide speedy service to the concerned persons under the Customs Act.'

The court observed that sections 13, 119A, and 219B of the Customs Act do not contain provisions that empower the National Board of Revenue 'to introduce software for regulating frameworks of the diplomatic bonded warehouses, thereby compelling the respective licensees to use the same.' In support of this observation, the court referred to multiple newly inserted provisions via amendments in the Customs Act, the Income Tax Ordinance, 1984 (via the

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Finance Act), and the VAT and Supplementary Duty Act, 2012 to introduce online and electronic systems for performing certain acts and the absence of the same in the existing case. Based on these observations, the court then declared the impugned order illegal. It further held that digital systems could be introduced and imposed upon the users by inserting new provisions in the Customs Act through amendment.

International Relations & Co-Operation

Maldives-Bangladesh Bilateral Relations 2021

Bilateral Consultation between Bangladesh and Maldives, 27 November 2021, Dhaka.

Bangladesh and Maldives had their first bilateral consultation on 27 November 2021, led by the Foreign Secretaries of both countries. Acknowledging excellent relations between them, both countries committed to further strengthening bilateral ties. They emphasized the deepening of their relationship and concluded several bilateral instruments, including agreements on trade and connectivity, and tourism for enhancing people to people to contact. Maldives recognized the support which Bangladesh had extended to Maldives during the COVID-19 pandemic. It also sought support from Bangladesh for the recruitment of skilled workers and professionals.

Bilateral Agreements between Maldives and Bangladesh, 23 December 2021, Male.

Four important agreements were exchanged on 23 December between Bangladesh and Maldives on health and family welfare. The MOUs were as follows:

- MOU between the Ministry of Health, Government of the Republic of Maldives, and the Ministry of Health and Family Welfare, Government of the People's Republic of Bangladesh, on the recruitment of qualified health professionals.
- MOU between the Ministry of Youth, Sports, and Community Empowerment of the Republic of Maldives and the Ministry of Youth and Sports of the People's Republic of Bangladesh on cooperation in the area of youth and sports development.
- MOU between Maldives and Bangladesh for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance.

- Renewal of the MOU between the Ministry of Health, Government of the Republic of Maldives, and the Ministry of Health and Family Welfare, Government of the People's Republic of Bangladesh, in the area of healthcare and Medical Sciences.

Nepal-Bangladesh Bilateral Relations 2021

Exchange of Letters between Nepal and Bangladesh, 22–23 March 2021, Dhaka.

Nepal and Bangladesh signed an Exchange of Letters on 22–23 March 2021 for the designation of the Rohanpur-Singhabad railway route as an additional transit route for movement of traffic-in-transit between Nepal and Bangladesh and also for third-country transit trade.

India-Bangladesh Bilateral Relations 2021

Memorandum of Understanding between India and Bangladesh, 27 March 2021, Dhaka.

India and Bangladesh signed five MOUs in different important areas, including, connectivity, commerce, information technology and sports, all of which contribute to further strengthening bilateral ties between the two nations and their efforts towards development. The five instruments include:

- MOU on disaster management, resilience and mitigation;
- MOU between Bangladesh National Cadet Corps (BNCC) and National Cadet Corps of India (INCC);
- MOU for the establishment of a framework of cooperation in the area of trade remedial measures between Bangladesh and India;
- Tripartite MOU on the establishment of sports facilities at Rajshahi College field and surrounding areas; and
- Tripartite MOU on the supply of ICT equipment, course materials, reference books, and training for Bangladesh-Bharot Digital Service & Employment and Training (BDSET) Center.

France-Bangladesh Bilateral Relations 2021

Bilateral Agreement between France and Bangladesh, 11 November 2021, Paris

Bangladesh and France signed three agreements on financial assistance and technical cooperation during the Bangladeshi Prime Minister's five-day state visit to France. Under the agreement, France will provide Bangladesh with

330 million euros to support its development projects. Of the 330 million euros, 200 million euros will be invested in managing concerns arising from COVID-19 pandemic, whereas 130 million euros will be spent on the ongoing Dhaka Environmentally Sustainable Water Supply Project. In addition, they signed a letter of intent on defence cooperation to further strengthen the defence and security component of their partnership. They also signed credit facility agreements on health systems strengthening and water treatment plants.

France-Bangladesh Joint Statement, 10 November 2021, Paris

In a joint statement, Bangladesh and France have committed to enhancing cooperation in the area of defence equipment, including through capacity building and potential technology transfer. This took place during the Bangladesh Prime Minister's visit to France in November 2021. The joint statement stated that France and Bangladesh shared the same vision for a free, open, peaceful, secure and inclusive Indo-Pacific region, based on international law. Both countries agreed to promote regional peace and stability and to explore further opportunities for cooperation in maritime security and blue economy.

The joint statement reinforced the commitment of both nations to fully comply with the 1982 UN Convention on the Law of the Sea and with the principles of peaceful settlement of disputes, refraining from any threat or use of force. Both countries recognized the importance of maintaining security and freedom of navigation and overflight in all seas and oceans.

Noting the problems Bangladesh has been facing due to the continued Rohingya crisis and potential security risks for the whole region, the statement emphasized the need to ensure funding for the UN's joint response plan for the Rohingya and enable their voluntary, safe, dignified and sustainable return to Myanmar without further delay.

Both countries reaffirmed their desire to strengthen long-term economic and industrial partnerships, including in the area of agriculture, infrastructure, transport, energy and digital technology. They reaffirmed that terrorism, in all its forms and manifestations, is one of the most serious threats to global peace and security and that all terrorist acts are criminal and unjustifiable. Both countries, therefore, expressed their commitment to support counter-terrorism efforts and agreed to enhance their cooperation in this context, including under the auspices of the United Nations.

Australia-Bangladesh Bilateral Relations 2021

Bilateral Trade and Investment Agreement between Bangladesh and Australia, 15 September 2021, Dhaka

Bangladesh and Australia signed a framework for trade and investment between them. This type of agreement is the first of this kind between Australia and Bangladesh in a long time. The Trade and Investment Framework Arrangement (TIFA) is expected to provide a platform for institutionalized economic interactions and offer novel opportunities for trade and investment between the two countries. The TIFA requires the formation of a Joint Working Group with representations from relevant sectors and sub-sectors.

Implementing International Economic Law

International Economic Law

Adequate Compensation-Most Favored Nation

Bilateral Agreements/Consultation

In 2021, Bangladesh concluded Bilateral Investment Treaties (BITs) with 29 countries, namely, Austria, Belgium-Luxembourg Economic Union, Cambodia, China, Denmark, France, Germany, India, Indonesia, Islamic Republic of Iran, Italy, Japan, Republic of Korea, Malaysia, Netherland, Democratic People's Republic of Korea, Pakistan, Philippines, Poland, Romania, Singapore, Switzerland, Thailand, Turkey, United Arab Emirates, United Kingdom, United States of America, Uzbekistan, and Vietnam.

All BITs signed by the Bangladesh government focus on protecting expropriation and underpinning non-discrimination and prompt, adequate compensation. The BITs also grant principles of most-favored-nation (MFN) and national treatment for post-establishment, and not for entry.

UNCTAD

***Deshbandhu Sugar Mills Ltd v Bangladesh and others* (2022) 27 BLC 367 (HCD) [*Writ Petition No. 6951 of 2019, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 15 September 2021*]**

The Automated System for Customs Data ASYCUDA was designed by the United Nations Conference on Trade and Development (UNCTAD) to administer

a country's customs. UNCTAD aims to aid customs authorities worldwide in automating and controlling their core processes and obtaining timely, accurate, and relevant information to facilitate government policy projections and planning. In this case, the petitioner challenged the impugned actions of the respondents to shut down the ASYCUDA World System on 12 June 2019 from 3:53 PM for generating a Bill of Entry registration in violation of their notice dated 11 June 2019 (which mentioned that the ASYCUDA World System would be shut down from 11:00 PM on 13 June 2019) as unlawful, illegal, without lawful authority, and of no legal effect. The shutting down delayed the registration of the petitioner's Bill of Entry, thereby causing the petitioner significant substantive and financial damage. Conversely, the respondent argued that it was rather the petitioner who failed to submit its Bill of Entry before 13 June 2019. Thus, the petitioner must follow the new rates under the budget announced on and effective from 13 June 2019 onwards.

After perusing the documentary evidence and the submissions by the parties, the High Court Division held the impugned action of the respondents to be a blatant violation of the notice dated 11 June 2019. It held that the prevention of the registration of the petitioner's Bill of Entry by the respondents was unlawful, illegal, without lawful authority and of no legal effect. Consequently, the court ordered respondent No. 2 to ensure the registration of the Petitioner's Bill of Entry by fully complying with the notice dated 11 June 2019 and to levy customs duty on their consignment at the rate prevailing on 12 June 2019 within 3 weeks from the date of receipt of the certified copy of the verdict.

Commercial Arbitration – UNCITRAL Model Law

***Gas Transmission Company Limited v Drilltec-Maxwell Joint Venture* (2021) *22 ALR 31* (*HCD*) [*Arbitration Application No. 2 of 2020, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 24 June 2021*]**

The petitioner filed an application invoking sections 42 and 43 of the Arbitration Act, 2001, for setting aside the arbitral awards provided by the majority decision of the arbitral tribunal to the respondents. At the onset, the court adjudicated whether it was competent to examine the merit of the awards passed by the arbitral tribunal. After a combined reading of sections 39, 42, and 43 of the Arbitration Act, the court held that the High Court Division is competent to set aside the arbitral award since this was an international commercial arbitration and the arbitral tribunal mentioned its seat to be in Dhaka. The court, however, stated that in setting aside arbitral awards, the High Court Division must 'act within the peripheries of section 43 of the Arbitration Act, 2001.' The court further observed that while reading the provisions of 'clauses (a) and (b) and all

the sub-clauses thereunder in section 43(1) of the Arbitration Act,' they must be separated by 'or' otherwise the application of section 43 will be impossible. This is also in line with the provisions of the UNCITRAL Model Law. Thus, the court established its competence to examine the merits of the arbitral award under the abovementioned sections.

The court elaborated on whether the absence of the signature of the minority arbitrator (one) can be a ground for setting aside an arbitral award. Referring to the UNCITRAL Arbitration Rules 2010 and numerous Indian precedents, the court finally held that the absence of the signature of the third arbitrator in the majority decision could not be a ground for setting aside the arbitral award since it fully complies with the provisions in section 38(2) of the Arbitration Act. The court finally examined the merits of the arbitral award at length to conclude that due to no negligence on the petitioner's part, let alone any misrepresentation by them, the question of compensating the respondents did not arise at all. Therefore, it set aside all awards passed by the arbitral tribunal.

At the end, the court asked the Ministry of Law, Justice and Parliamentary Affairs to consider inserting 'or' at the end of each clause and sub-clause of section 43(1) of the Arbitration Act. It also asked them to issue 'official circular/directives' to 'different ministries to incorporate the provisions of the Arbitration Act as the rules for conducting arbitrations with foreign counterparts while executing contracts.'

***Accom Travels and Tours Limited v Oman Air SAOC* (2022) *27 BLC 596* (*HCD*) [*First Appeal No. 209 of 2016, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 12 December 2021*]**

In this case, the majority opinion by a larger bench (consisting of 3 judges) of the High Court Division held that according to sections 3(1) and 3(2) of the Arbitration Act, 2001 (scope of the Act), no other provisions of the Arbitration Act, except sections 45 (recognition and enforcement of foreign arbitral awards), 46 (grounds for refusing recognition or execution of foreign arbitral awards.) and 47 (power of Government to declare specified state), apply to an arbitration whose seat is a foreign country. As such, sections 7 (jurisdiction of court in respect of matters covered by arbitration agreement), 7A (powers of court and High Court Division to make interim orders), and 10 (arbitrability of the dispute) do not apply to such arbitrations. The court observed that section 7A (power of the concerned courts to take interim measures) might only be invoked in such arbitrations while enforcing the foreign arbitral awards (emphasis added). It cannot be so done during the continuation of the arbitration proceedings, before, or until enforcement of the arbitral award under section 44 or 45 of the Arbitration Act.

Furthermore, the court eloquently pointed out that while there is a difference in the text of the provisions in article 1 (2) UNCITRAL Model Law and sections 3 (1) and 3(2) of the Arbitration Act, a combined reading of the entire section 3 of the Arbitration Act makes it clear that the provision is analogous to that of Article 1 (2) of the UNCITRAL Model Law. It observed that the subordinate court committed gross illegality by invoking section 7 of this Act in this particular suit. The court decided in the affirmative regarding the applicability of section 151 of the Code of Civil Procedure, 1908. It stated that by exercising its inherent power, the subordinate court should have stayed the suit and referred the parties to arbitration to resolve their dispute.

Intellectual Property (WIPO)

Trademark – Trips Agreement

***Mirza International Ltd v Registrar, Department of Patents, Designs and Trade Mark, Dhaka and others* (2022) 27 BLC 30 (HCD) [*Trade Mark Appeal No. 4 of 2014, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 31 January 2021*]**

The appellant (engaged in the business of manufacturing, merchanting, and exporting all kinds of footwear, readymade garments and clothing, leather goods, leather garments, learner belt, headgear, and other various goods), during the pendency of his trademark (RED TAPE) application in Bangladesh (filed on 11 November 2020) discovered that an exact similar trademark – RED TAPE – was advertised in the Trade Marks Journal in the name of respondent No. 3. Since the appellant is the registered proprietor of the trademark – RED TAPE – in India (as well as various other countries) for the same goods and description of the goods, he submitted that it is a gross violation of article 6*bis* of the Paris Convention and articles 16(2) and (3) of the TRIPS Agreement relating to the protection of well-known trademark. However, respondent No. 3 contended that their trademark was registered earlier on 14 June 2005.

The court observed that the appellant filed the trademark application five years after that of the respondent and that the appellant also failed to produce a single string of evidence about any person in Bangladesh importing or trading any item(s) under their trademark – RED TAPE – or that they have been exporting any class of goods in Bangladesh under the said trademark. The court also elaborated on the relevant provisions in the Trademarks Act, 2009. Thus, the court observed that Article 6*bis* of the Paris Convention did not override any Bangladeshi law. Instead, the Convention is considered in addition to Bangladeshi laws. The court also observed that without registering

its trademark in Bangladesh and without it being a well-known trademark in Bangladesh subsequently, no one could claim the benefit of article 6*bis* of the Paris Convention in Bangladesh.

The court opined that, in the absence of the appellant's trademark being registered, the use of the registered trademark by respondent no. 3 is not a 'reproduction, an imitation, or a translation, or liable to create confusion.' The court decided that article 6*bis* of the Paris Convention did not apply to this appeal. However, it held that since the appellant's trademark application is pending a final decision, they can raise their respective grievances before the Registrar of Trademarks.

State Responsibility for Environmental Pollution and Damage

International Environmental Law

Climate Change

Statement by Bangladesh at the Security Council Open Debate on the Maintenance of International Peace and Security: Climate and Security, 23 September 2021, The United Nations, New York

Referring to the IPCC Sixth Assessment Report 2020 prediction that the global temperature will cross the threshold of 2 degrees Celsius by 2100, Bangladesh flagged the potential security implications of the multifaceted risks posed by climate change. Notwithstanding the daunting forecasts, Bangladesh cautioned against the "alarmist" approach and over-securitization of the climate change discourse, not only because there was no conclusive evidence of a connection between climate change and international security, but also because it would essentially divert attention from the well-established linkage between climate change and global development as recognized by Agenda-21, the 2030-Agenda, the Paris Climate Agreement, and the Sendai Framework. The key areas of concern were as follows:

- Recognizing climate change as a threat to human security in climate-vulnerable countries, which undermine food security, water security, energy security, and livelihood security, and etc., Bangladesh observed that it was imperative to create opportunities for alternative livelihoods and encourage localized solutions to climate change induced problems, especially to prevent or minimize population displacement.

- Bangladesh emphasized the need to consider climate change impacts on sustainable livelihoods, population displacement, and socio-economic shocks with the help of a development and human security lens. In this context, Bangladesh urged the UN to draw on national and subnational sources of information for it to act appropriately.
- Bangladesh advocated that operational activities of peacekeeping missions should prioritize the "do no harm" principle in the context of climate change in order to reduce the environmental footprints of the UN peace operations in the field.
- Bangladesh maintained that the impacts of climate change might interact with other drivers of fragility to further exacerbate human security challenges. As such, prevention at the source was fundamental to supporting efforts in this context.
- Bangladesh thought it important to leverage the synergies among the peace and development actors and ensure adequate resources for climate actions in climate-vulnerable countries.

Statement by Her Excellency Sheikh Hasina, Hon'ble Prime Minister of Bangladesh at the 26th Session of the Conference of the Parties (COP26) of the United Nations Framework Convention on Climate Change (UNFCCC), 01 November 2021, Glasgow, UK.

While speaking at COP 26, the Prime Minister of Bangladesh stated that although Bangladesh contributed less than 0.47% of global emissions, it remains one of the most climate-vulnerable countries. She highlighted the various initiatives that Bangladesh has adopted to date to address this challenge. Referring to the latest IPCC report, the Prime Minister urged the major emitters to submit and implement ambitious NDCs. Seeking synergies amongst various climate finds, she called on developed countries to fulfill their commitments of providing 100 billion dollars with a 50:50 balance between adaptation & mitigation. She encouraged the developed countries to disseminate clean, green, and advanced technology to the most vulnerable developing countries at affordable costs and to address the issue of loss & damage, including global sharing of responsibility for climate migrants displaced by sea-level rise, salinity increase, river erosion, floods, and droughts.

Contribution to the Development of the Law of the Sea (including uncloss iii)

Law of the Sea

Ocean Science and Sustainable Development – Climate Change – International Security – Oceans – Law of the Sea – UNCLOS – Marine Pollution

Statement by Bangladesh under agenda item 78: 'Oceans and Law of the Sea,' 76th Session of the United Nations General Assembly, 07 December 2021

Reiterating that the oceans and their resources are the lifelines of humanity, Bangladesh highlighted how oceans and the ecosystem today are under threat due to different factors, including climate change, sea-level rise, unsustainable fishing, pollution, and oil and gas extraction. The COVID-19 pandemic, which further compounded the challenges by adversely affecting the livelihoods of scores of people, particularly in developing countries. Bangladesh observed that our common future would be determined by the way we conserve, develop and tap into oceanic resources and services. In this context, Bangladesh proposed the following:

- Address the impact of climate change on oceans through integrated, collaborative actions including cross-agency action at the global level. This action has also been recognized in the recently concluded Glasgow Pact.
- Ensure a balance between the equitable and efficient utilization of ocean resources, the conservation of marine resources, and the protection and preservation of the marine environment. It is imperative to ensure an early conclusion of the BBNJ agreement.
- Enhance international cooperation to address the continued threats to maritime security, such as piracy, armed robbery, kidnapping and smuggling of migrants through sea and to comply with obligations for search and rescue at the sea, and to work towards addressing the root causes of these security threats.
- Undertake capacity building and technical support, particularly for developing states to ensure implementation of legal and policy framework for the oceans and seas. Constraints posed by the COVID-19 pandemic must be taken into account.
- Encourage and foster integrated cooperation and coordination at the international, regional and local levels, especially in support of the developing and small island states, and coastal communities in order to recover from the impacts of COVID-19 on ocean economy.

Bangladesh concluded the statement by reiterating its commitment to UNCLOS, which remains the principal instrument for all activities in the oceans and seas and calling upon all remaining States to join the Convention to achieve universal accession.

Statement by Bangladesh to the International Seabed Authority at the High Level Event of the ISA 2021 Reports on the Opportunities Offered by UNCLOS to LDCs, LLDCs and SIDS, 16 November 2021

Bangladesh observed that the LDCs are among the world's most resource-constraint economies in the world, vulnerabilities of which have been exacerbated further due to the COVID-19 pandemic. Afflicted by extreme poverty, LDCs has experienced a drop in the growth rate from 4.8% in 2019 to 1.3% in 2020. In this context, Bangladesh underpinned the potential of the oceans and the seas to transform the lives and livelihoods of more than one billion people in the LDCs. Given that over 80% of the total number of LDCs are States Parties to the UNCLOS (i.e., 37 out of the 48 LDCs), the Convention can open up an "ocean of opportunity" for them. Bangladesh floated the following thoughts:

- Recognizing how marine scientific research and capacity building was critical for the LDCs, Bangladesh called for enhanced support for capacity building through the sharing of knowledge, expertise, and transfer of technology from advanced countries. In this context, Bangladesh proposed that ISA could support advanced and collaborative research in critical areas for sustainable, inclusive, and resource-efficient utilization of ocean resources in the LDCs.
- In view of the impacts of climate change on oceans and seas, Bangladesh maintained that it was imperative to scale up global efforts to tackle uncontrolled activities in the deep sea, especially in terms of marine pollution, and illegal and unregulated fishing.
- In order to cope with the challenges of structural transformation in the LDCs, Bangladesh emphasized the need for infrastructural investments and access to sophisticated marine technologies for the exploration of resources in the high seas. In this regard, Bangladesh lauded the efforts of the ISA in facilitating the transfer of marine technology from developed to developing countries but encouraged the scaling up of the work through strategic partnerships with the UN Technology Bank for LDCs, OHRLLS, UNCTAD and other relevant organizations.
- Bangladesh urged the creation of more space for the women and the youth of the LDCs so that they can access emerging opportunities that activities in the deep-sea, and the blue economy can offer.

State Legislation on Maritime Zones, Rights & Obligations

The Territorial Waters and Maritime Zones (Amendment) Act 2021

Following the wins in its disputes with India and Myanmar over territorial waters, Bangladesh has secured extended control over the Territorial Sea, Exclusive Economic Zone and Contiguous Zone. In the wake of these developments and in order to make the law consistent with UNLCOS (which was adopted in 1982), Bangladesh has amended the Territorial Waters and Maritime Zones Act 1974.

Briefly, the new Act has:

- Introduced several new definitions, for example, Remotely Operated Underwater Vehicle, Autonomous, Underwater Vehicle, and Unmanned Underwater Vehicle (section 2);
- Incorporated both civil and criminal jurisdictions for the regulation of the entry of foreign vessels into Bangladesh's maritime boundary (sections 3B and 3C);
- Extended the boundary of the Contiguous Zone from 18 nautical miles to 24 nautical miles (section 4[1]);
- Replaced the term "Economic Zone" with "Exclusive Economic Zone" in which Bangladesh shall have sovereign rights over all living and non-living natural resources (section 5), in line with the UN Convention on the Law of the Sea (UNCLOS 1982), under which all coastal countries are granted sovereign right over a stretch of the sea up to 200 nautical miles beyond their coast, which is known as an exclusive economic zone;
- Redefined Continental Shelf and its extent and introduced provisions on the determination of safety zone and the establishment of submarine cables and pipelines.

Previously, if any robbery or theft took place in shipping ports, the 1974 Act termed them as 'piracy.' In the new amendment, piracy, armed robbery, maritime terrorism, theft, and unlawful acts against the safety of maritime navigation have been specifically defined for ease of crime categorization. The provision of videos, photographs, and electronics records have been included as admissible evidence to prove the commission of crimes in the sea. In the case of marine pollution, the new law prescribes punishments of three years' imprisonment or a monetary fine of a minimum of BDT two crore to a maximum of BDT five crore BDT, whereas, previously it was BDT five thousand BDT. Failure to take actions to prevent pollution, will incur a punishment of five years' imprisonment with a fine not less than BDT ten crore or both. It also

prescribes punishments for offences committed in Exclusive Economic Zone, Continental Shelf and Contiguous Zone.

The amendments have strengthened Bangladesh's maritime law. Since the provisions are in sync with the UNCLOS, the new provisions have vested new jurisdictional power and have given several rights to enjoy over the maritime boundary. With the new provisions in place, Bangladesh can control marine pollution and take appropriate measures to sustain, preserve the marine diversity and boost the blue economy.

Implementation of Human Rights Treaties

Human Rights

Children's Right to Health – CRC

The Bangladesh Children's Hospital and Institute Act, 2021

The Act provides for the establishment of specialized children's hospitals and institutes, which will replace the existing Children's Hospital and Institute of Child Health, with the aim of expanding the scope for research and higher education to enhance children's physical and mental health services. An executive board comprising of a cross section of professionals shall be the key decision-making body (section 6) and will be responsible for, amongst other things, policy formulation and execution, budget approval, oversight, and recruitment (section 7). In addition to the executive board, the Act provides for an academic council (section 11) to guide training and research activities of the institute and a hospital management committee (section 13) to oversee the activities of the hospital respectively. The Act has provisions that cover the recruitment process of faculty, nurses and technical personnel of the Hospital and Institute (section 14) and the course curricula of the Institute (section 15).

Policy Action towards Legislative Reform

Labour Issues – Workplace Safety and Health – Workers' Rights – Collective Bargaining – ILO

Bangladesh adopted a National Action Plan (2021–2026) for the labor sector, based on the roadmap which Bangladesh had submitted to the ILO Governing Body as part of its commitment to uphold labor rights and workplace safety in the country. This also relates to the outcome of 9th session of the EU-Bangladesh Joint Commission held in October 2019. Specific actions in the plan would be implemented by engaging tripartite constituents and,

where appropriate, with support from the International Labour Organization (ILO) and other development partners. The roadmap which informed the development the action plan contains specific actions in terms of legal and administrative reforms, the enforcement of laws, and training and promotional activities, addresses four priority areas, namely, (1) labor law reform; (2) trade union registration; (3) labor inspection and enforcement; and (4) anti-union discrimination/unfair labor practices and violence against workers.

The first progress report on the roadmap was submitted to the ILO on 30 September 2021 and was discussed at the 343rd session of the ILO Governing Body on 6 November 2021. Since its inception, a comprehensive reform process has evolved to consider amendments of particular laws to ensure proper implementation of these laws through effective institutions, such as, the labor inspectorate, dispute resolution processes and the labor courts.

Specific Human Rights Incidents or Cases

Human Rights Universal Declaration of Human Rights – Freedom of Movement

***Durnity Daman Commission v GB Hossain and others* (2022) *74* DLR *1* (AD) [*Civil Petition for Leave to Appeal Nos. 1340 of 2021, C.P. No. 1184, 1009, 605 of 2020 and 1523 of 2021, Appellate Division of the Supreme Court of Bangladesh, judgment delivered on 27 September 2021*]**

The Appellate Division heard and disposed of this batch of civil petitions for leave to appeals together due to common issues involving all the petitions, i.e., the fundamental right to freedom of movement under Article 36 of the Constitution of Bangladesh for individuals under investigation by the Anti-Corruption Commission. The State and the Anti-Corruption Commission submitted that the right under Article 36 is 'subject to any reasonable restriction imposed by law in the public interest' and the impugned orders fall within the ambits of the preamble and sections 17 and 19 of the Anti-Corruption Commission Act, 2004. Conversely, the writ-petitioner-respondents argued that the restrictions imposed upon them were devoid of being imposed by law and for the public interest. They submitted that the particular law, The Anti-Corruption Commission Act (2004), does not expressly 'authorize the Commission to impose any embargo to move freely throughout Bangladesh, to reside and settle in any place in Bangladesh, and to leave and re-enter in Bangladesh.' In this connection, the writ-petitioner-respondents further relied upon Article 13 of the Universal Declaration of Human Rights.

While disposing of the petitions, the court held that the right to freedom of movement is a non-absolute right, and as such, it can be restrained by laws enacted when needed in the public interest. The court further held that merely being accused in a criminal case cannot be grounds to deny someone their right to freedom of movement. Lastly, the court stated that 'such restrictions may be imposed to prevent individuals from quickly leaving the country to avoid due process of law subject to the restrictions being confirmed by appropriate courts within three working days.'

***Md. Ahsan Habib v Government of the People's Republic of Bangladesh and others* (2020) 9 LNJ 62 (HCD) [*Writ Petition No. 1046 of 2021, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 14 March 2021*]**
The petitioner filed this writ petition challenging the legality of an Anti-Corruption Commission memo that barred him from leaving and re-entering Bangladesh and the action of Officer-in-Charge (Immigration Police), Special Branch, Hazrat Shahjalal International Airport, Kurmitola, Dhaka, and for seizing his passport since they violated his fundamental rights guaranteed in articles 27, 31, 32, 36 and 39 of the Constitution. The court tested the legality of both actions in light of the provisions in the Anti-Corruption Commission Act, 2004, the Anti-Corruption Commission Rules, 2007, and the Code of Criminal Procedure, 1898. It then ordered the return of the petitioner's passport so he could resume his studies abroad.

The court then provided guidelines to the Anti-Corruption Commission on impounding passports and barring individuals accused of corruption from going abroad. It also directed that during the pendency of an inquiry/investigation, if the Anti-Corruption Commission bars an accused from leaving Bangladesh and seizes their passport in an emergency situation without showing cause or giving them a hearing, it must seek post-approval of the Senior Special Judge/Special Judge for such an act at the earliest possible time, preferably within 15 days. The Senior Special Judge/Special Judge shall then notify the accused of the Anti-Corruption Commission's application and hear both parties before ordering to approve or reject the Anti-Corruption Commission's decision at the earliest possible time, preferably within 60 days of receiving the Anti-Corruption Commission's application. Furthermore, the accused must submit their address, mobile number, and email to the Anti-Corruption Commission so that it can contact them for any assistance or cooperation regarding the inquiry/investigation. Failure to appear before the Anti-Corruption Commission within the stipulated time will lead to legal action against the accused.

Right to Property

Belayet Hosen v Anti-Corruption Commission and others [***Writ Petition No. 1539 of 2021, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 27 June 2021***]

The petitioner challenged the legality of an order by the respondent no. 3 (an official of the Anti-Corruption Commission) to freeze their bank accounts. The respondents submitted that the order was lawful according to the provisions in the Anti-Corruption Commission Act, 2004, and the Anti-Corruption Commission Rules, 2007. However, after a plain reading of rule 18 of the Anti-Corruption Commission Rules, 2007, the court concluded that 'without the permission of the Senior Special Judge or the trial Judge, as the case may be, no one, not even the Commission, has the power to pass any order to freeze or attach or impose any restrictions regarding the property of a citizen of Bangladesh, who is alleged to have acquired them by illegal means, i.e., "crime acquired property."' Thus, elaborating on this provision, the court ruled in favor of the petitioner regarding the impugned order by the Anti-Corruption Commission.

Custody Of Children – CRC

Eriko Nakano v Bangladesh and others [***Writ Petition No. 6592 of 2021, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 21 November 2021***]

The petitioner filed a habeas corpus petition asking the court to direct the respondent to bring the minor daughters before the court to satisfy the court that the minors are not being held in custody without lawful authority or illegally. They contended that on 31 May 2021, the Family Court, Tokyo, Japan, granted the petitioner the custody of his minor daughters and ordered the respondent to hand over his minor daughters to the petitioner. However, before this verdict, the respondent brought his two daughters to Bangladesh on 18 February 2021. Suppressing the judgment by the Japanese Family Court, the respondent filed a family suit for custody of the minor daughters against the petitioner before the Family Court in Dhaka. In response to the petitioner, the respondents contended that the Japanese Family Court based its verdict on the petitioner's one-sided story, in the absence of the opinions of the concerned minors, the respondent, and the third child (a minor too young to understand the issues) of the petitioner and the respondent. Thus, the verdict did not consider the best interest and welfare of the minors. Moreover, the minors were being kept in the father's custody as per an ad-interim order by the Dhaka Family Court on 28 February 2021, of which the Japanese Family Court was fully aware.

The petitioner submitted that in this case, the principle of 'comity of courts' would apply since the custody issue has been finally adjudicated by the Japanese Family Court, keeping in mind the welfare of the minors, and that there is no scope to decide the issue afresh. He further submitted that since the minors were abducted/kidnapped by the respondent, the 'Convention on the Civil Aspects of International Child Abduction' will also be applicable, although Bangladesh is yet to sign/ratify the Convention. This is because, as per the decision in RMMRU v Bangladesh and others (2020) 72 DLR 420 (HCD), this Convention is part of customary international law. Lastly, he referred to Bangladeshi precedents of granting custody of minor children to their mothers. Conversely, the respondents relied upon the provisions in the Bangladesh Citizenship (Temporary Provisions) Order, 1972, the Guardians and Wards Act, 1890, the Convention on the Rights of the Child (CRC), and Islamic Jurisprudence to supplement their submission that the respondent (father and citizen of Bangladesh) should be the guardian of the minors (Bangladeshi citizens who are above seven years and therefore matured enough to form an intelligent preference and whose best interests must be taken into account).

The court ultimately rejected the petitioner's arguments to mechanically apply the principle of 'comity of courts' without first considering the minors' wellbeing and welfare. It stated that it kept in mind that the Japanese Family Court, while pronouncing the verdict in favor of the petitioner, knew about the ad-interim order (to which the petitioner did not object) of the Dhaka Family Court. Therefore, having obtained the desire and preference of the daughters and taking into account the relevant provisions of the CRC and Bangladeshi precedents and the welfare of the minors, the High Court Division ordered that the daughters be kept in the custody of the respondent (father) and granted the petitioner (mother) regular visitation rights. Furthermore, the court refrained the father from taking the daughters out of Bangladesh and imposed certain cost orders upon him regarding the travel and stay of the petitioner.

Health Care – Medical Negligence

***Mirja Shahpar Jalil v The State and Others* (2021) 29 BLT 169 (HCD) [*Criminal Miscellaneous Case No. 26267 of 2017, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 23 February 2021*]**

In this case, the High Court Division adjudged under section 561A of the Code of Criminal Procedure, 1898, as to why it should not set aside the impugned order of the learned Metropolitan Sessions Judge, Dhaka, affirming the order of the learned Metropolitan Magistrate Court, Dhaka-33 of discharging the accused opposite party Nos. 2–4 in a case of medical negligence under

sections 304A and 34 of the Penal Code, 1860. The complainant-petitioner had alleged that due to gross negligent treatment by the accused nos. 1–4, his daughter succumbed to death. The petitioner claimed that the brain tumor of the victim was long undetected by accused No. 1 and was subsequently wrongly and negligently mistreated by accused nos. 2–4 of which all the documentary evidence lies with him. In this regard, the accused did not perform a single MRI or CT scan on the victim.

Despite these facts, the learned Metropolitan Magistrate illegally assumed the role of the trial court in deciding whether there was negligence on the part of the opposite party nos. 2–4. This, however, was the ultimate issue under Section 304A of the Penal Code, which could only be resolved after the conclusion of the trial by assessing the evidence adduced by all the contesting parties, but not at the stage of taking cognizance. Hence, the High Court Division held that the learned Magistrate and Metropolitan Sessions Judge committed gross illegality and manifest abuse of process of the court in discharging the opposite party nos. 2–4 from the case based on the inquiry committee's report.

During the proceedings before the High Court Division, Square Hospital Limited submitted that they followed the International Treatment Protocol in this critical case. However, the court held that it is a matter for trial, which can only be ascertained after both parties adduce evidence, not under an application under section 561A of the Code of Criminal Procedure. Moreover, it involves a disputed question of fact since the version of the petition of the complaint is entirely different.

Protection of Individuals under International Humanitarian Law

International Humanitarian Law

Humanitarian Law – Sexual Violence during Conflicts – Criminal Accountability – Violence against Women – Sexual Exploitation – Corruption

Statement by Bangladesh on Agenda Item No: 79 "Criminal Accountability of the UN Officials and Experts on Missions" at the 76th Session of the United Nations General Assembly, Sixth Committee, General Assembly Hall, 12 October 2021

Referring to the various allegations, including those of sexual exploitation and abuse, corruption, fraud and other forms of misappropriation of funds, against UN officials and Experts on Missions, Bangladesh encouraged zero

tolerance for these incidents in order to maintain the credibility and integrity of the United Nations and its field missions. Acknowledging the training initiatives on standards of conduct, including through pre-deployment and in-mission induction programs, and technical assistance to States in developing their domestic criminal laws, at their request, Bangladesh advocated for more investment in preventive measures by developing customized training modules for in-mission and pre-deployment training, and refresher training, including in native languages. Bangladesh noted that the standards of investigation of such crimes must be harmonized; extreme caution must be practiced to ensure confidentiality of the communications regarding allegations of misconduct to protect concerned persons from unfair stigmatization, especially when the allegations have not been proven beyond a reasonable doubt; relevant information must be shared expeditiously to facilitate effective execution of the investigations and criminal proceedings; and, utmost importance must be attached to protecting the rights of the victims.

Specific Incidents

International Criminal Law

Applicability of Foreign Criminal Law Verdict in Bangladesh

***Nurun Nahar Begum v Bangladesh* (2022) 74 DLR 1 (HCD) [*Writ Petition No. 3994 of 2021, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 8 June 2021*]**

A Kuwaiti criminal court convicted a member of the Bangladesh Parliament on 28 January 2021. The convicted person appealed against the decision, which was pending in the appellate court. Against this backdrop, the Bangladesh Parliament Secretariat issued a gazette notification under the Rules of Business of Parliament declaring that the convicted person was no longer a member of the Parliament of Bangladesh. The gazette notification was issued on the ground of disqualification as provided in Article 66 (2) (d), read together with article 67 (1) (d) of the Bangladesh Constitution. The court, while deciding on the standing of the parties before it to file the writ petition, held that the petitioners were not persons aggrieved to file the writ under article 102 (2) (a) (ii) of the Constitution. It thus rejected the writ petition summarily.

However, before doing so, the court held that the conviction and sentence handed down were definitely in a 'criminal offence' involving 'moral turpitude.' While articles 66 (2) (d) and 152 do not elaborate on the territory of the court, owing to the gravity of the offence and the conviction, which attracts

the provisions in article 66 (2) (d), the court observed that a foreign court's verdict on account of commission of 'criminal offence' will equally be applicable while disqualifying a 'member of parliament.' This is because a competent criminal court of a sovereign country pronounced the conviction and sentence. The convicted person got the full opportunity to defend himself and prove his innocence. Any contrary action merely due to the court being situated beyond Bangladesh's territorial jurisdiction would be equal to disregarding a competent foreign court's verdict.

Disarmament – Global Security – Technological Development – Cyberspace – Sovereignty

Use or Threat of Force

Statement by Bangladesh at the Thematic Debate: Combined Clusters 2: Other Disarmament Measures, Regional Disarmament, and Disarmament Machinery, First Committee of the 76th UNGA, 18 October 2021

Bangladesh reiterated its commitment to uphold internationally-agreed disarmament norms and to help strengthen the UN disarmament machinery to ensure a safer and better world for future generations. Acknowledging how rapid technological development, including artificial intelligence, biotechnology, etc., and progressively redefining the nature of the disarmament discourse, Bangladesh cautioned against the emergence of new vulnerabilities, particularly following the Covid-19 Pandemic. While urging the UN to continue its norm-setting role for a globally accessible, free, open, and secured cyberspace, Bangladesh stressed the necessity of adhering to the core principles of the UN Charter and international law, in particular, the principles of sovereignty and peaceful coexistence between countries and the need to maintain a safe and secure cyber ecosystem. Bangladesh also stresses the importance of mainstreaming and preserving relevant environmental norms in the implementation of disarmament and arms control measures.

Bangladesh called for the establishment of nuclear-weapon-free-zones (NWFZ), as an interim measure, through ratification of related protocols to all treaties establishing NWFZs by the nuclear weapons states, to ensure sustainable peace, security, and stability around the world. In this context, Bangladesh encouraged the practice of peaceful dialogue and diplomacy for building a sound regional security architecture. It maintained that enhanced regional cooperation, transparency and confidence-building measures, were critical

for creating conditions conducive to sustained and meaningful dialogues on disarmament and security issues. An ardent proponent of multilateralism in the pursuit of general and complete disarmament, Bangladesh emphasized the strengthening of the UN Disarmament Machinery to boost inter-governmental negotiations on outstanding disarmament and non-proliferation regime.

State Practice of Asian Countries in International Law

Central Asia

*Sergey Sayapin**

History and Theoretical Approach of Central Asian States in International Law

Central Asian States' Approach to 'Law' and 'International Law'

This contribution follows up on the relevant section in 26 *Asian Yearbook of International Law* (2020), and describes developments in Central Asian States (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan) pertaining to international law and foreign policy in 2021.

Kazakhstan

On 12 March 2021, amendments to the Law "On Treaties of the Republic of Kazakhstan" were introduced. The amendments include, among other things, the scholarly expertise of draft treaties, treaties affecting the interests of private business entities, proposals to conclude treaties, priority of ratified treaties over the laws of the Republic of Kazakhstan, and other matters.

On 29 December 2021, the Law "On the Legal Status of Foreigners" was amended. In particular, Article 18 of the Law, as amended, reads that "[f]oreigners in Kazakhstan shall have the right to appeal to the courts, the Commissioner for Human Rights in Kazakhstan and other public authorities for the protection of their property and personal non-property rights." It reads further that "[f]oreigners use procedural rights in court as citizens of the Republic of Kazakhstan, except in cases provided for in the international treaties of the Republic of Kazakhstan."

Use of Force between Kyrgyzstan and Tajikistan

Despite both being members of the Collective Security Treaty Organization (CSTO), Kyrgyzstan and Tajikistan used military force against one another on 28 April–1 May 2021. The use of force reportedly derived from a dispute over a water supply facility, and resulted in at least 55 persons killed on both sides

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(B. Abdülkerimov, "Death toll rises to 55 from Kyrgyz-Tajik border clashes," https://www.aa.com.tr/en/asia-pacific/death-toll-rises-to-55-from-kyrgyz-tajik-border-clashes/2230340#), and more than 33,000 local residents were evacuated ("33,388 Kyrgyzstanis evacuated from conflict zone in Batken," https://en.trend.az/casia/kyrgyzstan/3418071.html). As a result of mutual accusations, both Kyrgyzstan and Tajikistan instituted criminal proceedings on charges of crimes against peace.

Additionally, allegations of war crimes were also made (J. Pedneault, S. Sultanalieva, "Civilians Harmed in Kyrgyzstan, Tajikistan Border Clashes: Both Sides Should Abide by Laws of War," https://www.hrw.org/news/2021/04/30/civilians-harmed-kyrgyzstan-tajikistan-border-clashes).

Turkmenistan

On 16 April 2021, the President of Turkmenistan approved the National Human Rights Action Plan of Turkmenistan for 2021–2025 (NHRAP for 2021–2025). According to the United Nations Development Programme (UNDP), "[t]he adoption of the given NHRAP 2021–2025 is aimed at strengthening the national system of provision and protection of human rights and liberties in Turkmenistan, implementation of the international obligations of the country in the given area, and the expansion of cooperation with the international organizations in the humanitarian sphere" (UNDP, "National Human Rights Action Plan for 2021–2025 adopted by the Government of Turkmenistan," https://www.undp.org/turkmenistan/press-releases/national-human-rights-action-plan-2021–2025-adopted-government-turkmenistan). Accordingly, the Action Plan will be carried out "by state and local authorities with involvement of civil society organizations, UN Agencies, and other international organizations" (ibid.).

Uzbekistan

Uzbekistan's Law ZRU-674 "On International Commercial Arbitration" was adopted by the Legislative Chamber of the Parliament on 5 August 2020, approved by the Senate on 11 September 2020, and signed by the President on 16 February 2021. The Law consists of eight Chapters and 56 Articles, and regulates, in particular, the legal regime of an arbitral clause (Chapter 2), the composition and jurisdiction of an arbitral tribunal (Chapter 3), provisional measures (Chapter 4), the conduct of arbitral proceedings (Chapter 5), the adoption of arbitral awards (Chapter 6), and appeals (Chapter 7).

In his annual address to the Parliament on 29 December 2020, the President of Uzbekistan suggested revising the Concept of Foreign Political Activity, and relevant proposals were developed in 2021 (A. Ne'matov, A. Karimov, "New

Uzbekistan – New Model of Foreign Policy," https://uza.uz/ru/posts/novyy-uzbekistan-novaya-model-vneshney-politiki_199223). The revised Concept is based on the principles of pragmaticism, multilateralism, proactivity, openness, constructivism, and humanization of foreign policy.

On 15–16 July 2021, Uzbekistan hosted a high-level International Conference "Central and South Asia: Regional Connectivity. Challenges and Opportunities." The Conference was attended by over 250 delegates representing more than 40 countries and international organizations. The Conference was addressed online by the UN Secretary-General Antonio Guterres who said, inter alia, that connectivity was "central to economic growth and sustainable development, leading to regional cooperation and friendly relations among near and far neighbours. He urged active and collective engagement in support of Afghanistan's peace and security" (S. Arora, "Uzbekistan hosts Central – South Asia conference 2021," https://currentaffairs.adda247.com/uzbekistan-hosts-central-south-asia-conference-2021/).

State Practice of Asian Countries in International Law

China

*Guifang Xue**

Domestic Law

Territory & National Security

National Land Boundary Law of the People's Republic of China
Document Number: Order No. 99 of the President of the People's Republic of China, Date Issued: 23 October 2021; Effective Date: 1 January 2022
In 2014, the Foreign Affairs Committee of the National People's Congress took the lead in relaunching the legislative process of the National Land Boundary Law of the People's Republic of China. On 23 October 2021, the 31st Session of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China adopted the National Land Boundary Law of the People's Republic of China, which came into effect on 1 January 2022. The National Land Boundary Law legalizes China's guidelines, policies and relevant working systems for dealing with land boundary affairs and issues, incorporates the important provisions of the signed agreements on national boundary management systems into the domestic legal system, clarifies the leadership system, coordination mechanism and responsibilities of all relevant parties for China's land boundary work. It also makes clear provisions on the delineation and demarcation of land boundaries, the defense and management of land boundaries and borders, international cooperation in land boundary affairs, and related legal responsibilities, providing a direct legal basis for the formulation of boundary-related regulations.

The General Provisions of the National Land Boundary Law consist of 15 articles (Article 115), including the purpose of the legislation, the basic principles, the leadership system and coordination mechanism, the division of responsibilities, important policies, and the policies and principles for foreign affairs. Also, the National Land Boundary Law specifies the management of

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national land boundaries and borders, generally divided into two parts: regulations of conduct and legal liability. The details include the following:

Delineation and Demarcation of National Land Boundaries.
Chapter II of the Law, covering Articles 16–25, deals with the institutional aspects of China's boundary issues. The most notable aspect of this chapter is that the term "delimitation" is replaced by "delineation and demarcation," instead of using the concept of "alteration" of the national boundary in accordance with the comments made during the preliminary examination of the draft National Land Boundaries Law.

Defense of National Land Boundaries and Borders.
This chapter includes Articles 22–25, highlighting the issue of China's boundary-guarding system. Article 22 provides for the boundary-guarding duties of the PLA and the Armed Police Force, to wit, the PLA and the Armed Police Force shall be jointly responsible for border dominating, which fills the legislative gap between the National Defense Act and the Border Patrol Regulations.

Management of National Land Boundaries and Borders.
This chapter contains three sections with 22 articles (Articles 26–47), mainly regulating the management of land boundaries and borders. In terms of content, the main objective of the border management provisions is to improve the socio-economic development of the border areas while ensuring security.

International Cooperation in National Land Boundary Affairs
This chapter comprises Articles 48–56 and regulates the institutional aspects of the "use of boundaries." This chapter was added in 2014 after the relaunch of the legislation on land boundaries, with the intention of translating the important provisions of the above-mentioned agreements into domestic law, so that the legislation can actively serve China's diplomatic strategy and contribute to the establishment of a long-term sound surrounding environment. Article 48 firstly specifies the principle of equality and mutual benefit of cooperation, and the purpose of mutual benefit and win-win situation. Articles 49 to 56 set out the fields of cooperation that can be established with countries sharing a national land boundary with China – joint boundary committee mechanism, boundary defense cooperation mechanism, boundary defense talks and meetings mechanism, boundary (boundary defense) representative mechanism, the public security, customs, immigration, and other departments may establish a cooperation mechanism with the relevant departments

of countries, mutual notification, information sharing, exchange of technology and talents, and other cooperation mechanisms in port construction and management, utilization of natural resources, ecological and environmental protection, epidemic prevention and control, emergency management, and other fields.

Legal Liability

Chapter VI including Articles 57–60, provides for legal liability for boundary-related violations.

In conclusion, the National Land Boundary Law promotes the better development of relations with countries sharing a national land boundary with China on the basis of treaties, contributes to the improvement of China's land boundary governance capacity and actively serves China's promotion of the "The Belt and Road initiative" and other relevant constructions.

Cyber Sovereignty and Security

Data Security Law of the People's Republic of China

Document Number: Order No. 84 of the President of the People's Republic of China, Date Issued: 10 June 2021; Effective Date: 1 September 2021

On 10 June 2021, the Data Security Law of the People's Republic of China was officially published and came into force on 1 September 2021. The Data Security Law consists of seven chapters and 55 articles, of which three chapters, namely "General Provisions," "Legal Liability" and "Supplemental Provisions," are regular chapters. The other four chapters provide clear requirements on "Data Security and Development, Data Security Systems, Data Security Protection Obligations, Security and Public Availability of Government Data." Article 1 of the Data Security Law begins by stating its legislative objectives, namely "safeguarding data security, promoting data development and utilization, protecting the lawful rights and interests of individuals and organizations, and maintaining national sovereignty, security and development interest," stating that its legislative purposes include two aspects of maintaining national sovereignty, security and safeguarding data security and development. In the maintenance of national sovereignty and security, Article 4 of the Data Security Law clearly stipulates that "in the maintenance of data security, a holistic approach to national security shall be adhered to, a data security governance system shall be established and improved, and the capability to safeguard data security shall be enhanced," a provision that reflects the legislator's focus on data security as an initiative to implement national security. Also, in conjunction with

the supervision system established in Articles 6 and 7 of the Data Security Law, it can be seen that the leading authority for data security is the central leading body for national security. The establishment of this authority also reveals more clearly the close link between national security and data security.

In terms of safeguarding data security and development, Article 13 of the Data Security Law provides that 'the state shall coordinate development and security, and adhere to promoting data security with data development and utilization and industry development and safeguarding data development and utilization and industry development with data security.' Meanwhile, different articles in Chapter II of the Data Security Law respectively demonstrate the dynamic balance between data security and development, as is seen from the "big data strategy implementation and general plan on digital economy development" (Article 14), "encouraging technological research and promotion" (Article 16), "advancing the construction of the data development and utilization technology and data security standards system" (Article 17), "promoting the development of data security testing and assessment" (Article 18), "cultivating data trading markets" (Article 19), and "promoting the professionals and exchange of talents" (Article 19).

Internationally, Article 2 of the Data Security Law provides that 'those that conduct data processing activities outside the territory of the People's Republic of China to the detriment of the national security, public interest, or lawful rights and interests of citizens and organizations of the People's Republic of China shall be held legally liable in accordance with the law.' This provision is a fundamental reflection of national sovereignty. However, the effective prosecution of offshore harmful activities in practice relies on the interface and cooperation with provisions such as extraterritorial enforcement at the international law level. More importantly, Articles 25 and 26 of the Data Security Law state that China will "impose export control in accordance with the law on data as controlled items related to safeguarding national security and interest and performing international obligations," as well as "where any country or region takes any discriminatory prohibition or restriction or other similar measures against the People's Republic of China in investment or trade, among others, related to data and data development and utilization technology, among others, the People's Republic of China may take measures against the country or region reciprocally based on the actual circumstances."

With respect to cooperation and assistance in extraterritorial law enforcement, the Data Security Law places greater emphasis on data sovereignty and national security, with Article 36 requiring that China 'shall process a request for data from a foreign judicial or law enforcement authority in accordance with relevant laws and international treaties and agreements entered into or acceded to by the People's Republic of China, or under the principle of

equality and reciprocity.' This requirement provides the applicable regulations for organizations and individuals involved in cooperation and assistance with extraterritorial law enforcement. Also, compared to the first and second review drafts of this Law, the Data Security Law imposes an obligation on subjects involved in cooperation and assistance with extraterritorial law enforcement, to wit, 'without the approval of the competent authority of the People's Republic of China, a domestic organization or individual shall not provide data stored in the territory of the People's Republic of China to any foreign judicial or law enforcement authority,' reaffirming the Data Security Law's critical role in safeguarding national sovereignty and security.

Implementing International Economic Law

International Economic Law

Anti-foreign Sanctions Law of the People's Republic of China
Document Number: Order No. 90 of the President of the People's Republic of China, Date Issued: 10 June 2021; Effective Date: 10 June 2021

On 10 June 2021, the 29th session of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China adopted the Anti-foreign Sanctions Law of the People's Republic of China, which came into effect on the date of its promulgation. The Anti-foreign Sanctions Law consists of 16 articles, mainly on the circumstances of adopting countermeasures, the applicable object of countermeasures and relevant countermeasures, applicable object of countermeasures and relevant countermeasures.

According to the second paragraph of Article 3 of the Anti-foreign Sanctions Law, countermeasures shall be taken 'Where a foreign country in violation of international law and basic norms of international relations contains or suppresses China under various pretexts or pursuant to its own laws, adopts discriminatory restrictive measures against any Chinese citizen or organization, and meddles in China's internal affairs, China shall have the right to adopt corresponding countermeasures.' In addition, Article 15 of the Anti-foreign Sanctions Law provides that 'Where foreign countries, organizations, or individuals conduct, assist in, or support acts that compromise China's sovereignty, security, or development interests, and necessary countermeasures need to be adopted, the relevant provisions of this Law shall apply mutatis mutandis,' that seems to underwrite the circumstances in which countermeasures are to be taken as set out in Article 3.

According to Article 4 of the Anti-foreign Sanctions Law, 'the relevant departments of the State Council may decide to include in a countermeasure

list the individuals and organizations directly or indirectly involved in the development, decision-making, and implementation of the discriminatory restrictive measures as mentioned in Article 3 of this Law.' In addition, according to Article 5, the scope of targets for countermeasures under the Anti-foreign Sanctions Law has been further expanded to include: (a) Spouses and immediate family members of individuals included in the countermeasure list. (b) Senior executives or actual controllers of organizations included in the countermeasure list. (c) Organizations, where individuals included in the countermeasure list, serve as senior executives. (d) Organizations that are actually controlled by individuals and organizations included in the countermeasure list or of which the said individuals and organizations participate in the formation or operation.

Further, the countermeasures under the Anti-foreign Sanctions Law are more limited in nature and extent, including refusing to issue a visa, denying entry, canceling a visa, or deportation, placing under seal, impounding, or freezing movables, immovables, and other types of property in the territory of China, prohibiting or restricting organizations and individuals in the territory of China from carrying out relevant transactions, cooperation, and other activities with them and other necessary measures. It is worth noting that, given the relatively stringent countermeasures of the Anti-foreign Sanctions Law, its compatibility with Bilateral Investment Treaty (BITS) is subject to further study.

International Cooperation Initiatives

International Environmental Law

The Kunming Declaration "Ecological Civilization: Building a Shared Future for All Life on Earth" CBD/COP/15/5/Add.1. 13 October 2021

The Kunming Declaration is an outcome of the high-level segment of the UN Biodiversity Conference 2020. It reflects the Conference's topic and is the first political declaration to incorporate the notion of ecological civilization.

The Declaration commits to ensuring the development, adoption, and implementation of an effective post-2020 global biodiversity framework to reverse the current loss of biodiversity and ensure that biodiversity is put on a path to recovery by 2030 at the latest, towards the full realization of the 2050 Vision of "Living in Harmony with Nature." Additionally, the declaration commits working across respective governments to continue to promote the

integration, or "mainstreaming" of the conservation and sustainable use of biodiversity into decision-making; establishing effective systems of protected areas; enhancing the global environmental legal framework; and increasing the provision of financial, technological and capacity building support to developing countries necessary to implement the post-2020 global biodiversity framework.

Climate Change – Cooperation Initiatives

China–U.S. Joint Glasgow Declaration on Enhancing Climate Action in the 2020s 10 November 2021

On 10 November 2021, China and the U.S. jointly released China–U.S. Joint Glasgow Declaration on Enhancing Climate Action in the 2020s during COP 26 in Glasgow to the United Nations Framework Convention on Climate Change. The Declaration builds on and refines the Joint Statement Addressing the Climate Crisis (hereinafter referred to as the Statement) issued on 17 April 2021 and is dedicated to the effective implementation of the Statement.

The Declaration makes clear that China and the United States will cooperate on an equal footing under the United Nations Framework Convention on Climate Change and the Paris Agreement, and refers that the two sides engage in expanded individual and combined efforts to accelerate the transition to a global net-zero economy. In addition, the Declaration intends to establish a "Working Group on Enhancing Climate Action in the 2020s," which will meet regularly to address the climate crisis and advance the multilateral process, focusing on enhancing concrete actions in this decade. This may include, *inter alia*, continued policy and technical exchanges, identification of programs and projects in areas of mutual interest, meetings of governmental and non-governmental experts, facilitating participation by local governments, enterprises, think tanks, academics, and other experts, exchanging updates on their respective national efforts, considering the need for additional efforts, and reviewing the implementation of the Joint Statement and this Joint Declaration.

Besides, the Declaration also promotes cooperation and exchange through the establishment of the "Working Group on Enhancing Climate Action," and cooperation in standards, policies, technologies and specific areas such as methane, energy and power, to promote the implementation of China's and the United States respective climate action and emission reduction targets, and to advance the global response to climate change.

State Legislation on Maritime Zones, Rights & Obligations

Law of the Sea

The Coast Guard Law of the People's Republic of China

Document Number: Order No. 71 of the President of the People's Republic of China, Date Issued: 22 January 2021; Effective Date: 1 February 2021

The Coast Guard Law of the People's Republic of China (hereinafter referred to as the Coast Guard Law), as adopted at the 25th session of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China on 22 January 2021 came into force on 1 February 2021. This Law aims to clarify the duties of coast guard agencies, so as to ensure maritime rights protection, law enforcement and international cooperation, simultaneously helping the Chinese coast guard agencies better perform their duties and obligations under international treaties and maintain maritime order. The Coast Guard Law consists of 11 chapters, comprising a total of 84 articles. Articles 1 and 2 stipulate the purpose of law enforcement by coast guard agencies and the nature of coast guard agencies. Article 3 formulates the scope of maritime rights protection and law enforcement by coast guard agencies. Articles 4 and 5 illustrate the principles of law enforcement by coast guard agencies and the basic tasks of law enforcement by coast guard agencies, and Article 6 explicitly clarifies that coast guard agencies shall be independent in law enforcement and no organization or individual may illegally interfere in their performances.

Chapters 3 to 9 also provide for maritime security, maritime administrative law enforcement, investigation of maritime crimes, use of police equipment and weapons, guarantees and cooperation, international cooperation and supervision. These provisions not only transform the previous situation where the laws related to China's coast guard enforcement were scattered and limited, providing legal guarantees for China's coast guard enforcement but promote the standardization of maritime law enforcement, preventing, stopping and punishing maritime crimes. It is also expedient to the greater protection of national sovereignty, security and maritime rights and interests.

It is worth noting that China's Coast Guard Law is able to actively promote international cooperation in China's coast guard enforcement. First, the Coast Guard Law explicitly takes international treaties as the basis for law enforcement cooperation and fixes the international law obligations of the Chinese coast guard agencies in the form of domestic law. The above-mentioned

content places higher requirements on the Chinese coast guard agencies to fulfill their obligations in accordance with the law, which is conducive to promoting coast guard enforcement cooperation under the international legal framework. Second, the Coast Guard Law clarifies the scope of international law enforcement cooperation and advocates the establishment of a mechanism for law enforcement cooperation, which is capable of promoting concrete cooperation in coast guard enforcement between China and countries in the surrounding waters. Third, the Coast Guard Law gives the Chinese coast guard agencies a certain degree of autonomy and flexibility in terms of the areas and contents of cooperation, leaving room for better law enforcement cooperation with other countries.

However, the international community holds different views regarding the Coast Guard Law. In terms of content, first, the main responsibility of the coast guard agencies is maritime administration and law enforcement. Article 2 of the Law states that 'the coast guard units of the People's Armed Police Force, or marine police units, shall perform unified maritime rights enforcement duties.' Accordingly, the activities of maritime rights protection and law enforcement are the main responsibility of the China Coast Guard. In addition, Articles 23, 34, 37, 53, 58, and 76 of Coast Guard Law provide for the maritime administrative law enforcement measures, the dispute over the jurisdiction over maritime administrative cases, the procedures for maritime administrative law enforcement, along with the information sharing and work cooperation mechanisms between the coast guard agency and other departments. According to Article 83 of the Coast Guard Law, 'a coast guard agency shall perform defense operations and other tasks in accordance with the National Defense Law of the People's Republic of China, the Law of the People's Republic of China on the People's Armed Police, and other applicable laws, military regulations, and orders of the Central Military Commission.' In other words, the Chinese Coast Guard's performance on defense operations in wartime is based on the National Defense Law of the People's Republic of China and other relevant regulations. Also, the dual nature of the Chinese Coast Guard (administrative law enforcement and operational defense) is consistent with the maritime rights protection and law enforcement of other countries in the international community. Moreover, with regard to the issue of 'conditions for the use of weapons,' Articles 46, 49 and 50 of the Coast Guard Law provide strict and detailed regulations on the circumstances of the use of weapons, namely the criteria and methods for judging the use of police equipment and weapons, which regulates the elements and procedures for the use of different types of weapons.

Maritime Traffic Safety Law of the People's Republic of China (2021 Revision)

Document Number: Order No. 79 of the President of the People's Republic of China, Date Issued: 29 April 2021; Effective Date: 1 September 2021

The Maritime Traffic Safety Law of the People's Republic of China was enacted in 1983 and was one of the first pieces of legislation to build the national maritime rule of law since China's reform and opening up. In 2016, the Maritime Traffic Safety Law of the People's Republic of China (hereinafter referred to as 2016 MTSL) was amended to remove the requirement for port entry and departure visas of maritime vessels from the former Article 12. On 29 April 2021, the Maritime Traffic Safety Law of the People's Republic of China was revised and adopted by the 28th session of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China and came into force on 1 September 2021. This revision draws on the achievements of the international maritime rule of law, focuses on the coordinated expression between domestic maritime-related laws, and establishes a unified and efficient maritime traffic safety legislative system. The 2021 MTSL contains 10 chapters and 122 articles, with major revisions relating to optimizing maritime traffic conditions and navigation safeguards, improving maritime search and rescue mechanisms and strengthening accountability, and also comprehensively and systematically fulfilling the obligations of the international maritime conventions concluded or acceded to by China in terms of vessel registration, vessel inspection, navigation safety, crews safeguard and pollution prevention.

In terms of content, the 2021 MTSL has been improved. Although the 2021 MTSL has been reduced by two chapters compared to the 2016 MTSL, the number of articles has been increased from 53 to 122. Articles 3, 6, 7 and 8 in the General Provisions section of Chapter I are newly-enacted Articles. Compared to the previous General Provisions, the new General Provisions explicitly provide statements for the guarantee of the use of sea for traffic, the publicity and education of maritime traffic safety, the labor safety and occupational health of crews, and the modernization construction of maritime traffic safety in accordance with laws. In addition, Chapter II "Vessels, Offshore Installations and Crews" consolidates Chapters II and III of the 2016 MTSL and supplements Articles 11–12 and 14–17, setting out clear requirements on the prerequisites for canceling the nationality registration of the vessel, the legal consequences of not canceling the nationality, and the ship's anti-pollution and safety management system. Chapter III titled "Maritime Traffic Conditions and Navigation Safeguards," is a new chapter, which expands the requirements for pilotage, after adding the functions of the departments in

charge of transportation and maritime administrative agencies in developing maritime traffic resources and demarcating maritime traffic functional areas.

At an international level, the 2021 MTSL has paid timely attention to the hot-spot issues in the international law of the sea and international shipping during the revision. For example, the 2021 MTSL requires establishing and improving the early warning and emergency response mechanisms for overseas emergencies of crews, and developing contingency plans for overseas emergencies of crews in order to prevent the negative impact of the COVID-19 epidemic on the safety and security of maritime traffic. The 2021 MTSL also has augmentation contents that 'the pilotage institution shall designate pilots with corresponding capabilities and experience in a timely manner to provide pilotage services for vessels.' In addition, the content of "safe operation and prevention and control of vessel pollution management systems" in 2021 MTSL implements the main anti-fouling measures of the International Safety Management Code. Further, the provision on "conditions on obtaining a maritime labor certificate" follows the specific requirement of the 2006 Maritime Labor Convention. Likewise, requirements for "international voyage vessels enter or exit ports" in 2021 MTSL fulfills the obligations in the content of the International Ship and Port Facility Security Code.

Importantly, the 2021 MTSL aligns with parts of the United Nations Convention on the Law of the Sea (UNCLOS). For example, the 2021 MTSL adds "maintaining the maritime traffic order" to its legislative articles, and its Articles 7, 19, 48, 53, 65, 66, 74, 91 and 117 also reflect the obligation to "protect the marine environment" to varying degrees. In addition, the 2021 MTSL, in compliance with the United Nations Convention on the Law of the Sea, clarifies the time limits for the processing of import and export permits for vessels on international routes and the provisions relating to the entry of foreign vessels. For instance, Article 46 of the 2021 MTSL regulates 'a vessel sailing on international routes that enter or exit ports shall, according to the law, apply to the maritime safety administration for permission and the maritime safety administration shall, within five working days from the date of accepting an application, make a decision on whether to grant permission.' Also, Article 53 states, 'the transport department under the State Council may, in conjunction with the relevant competent departments, take necessary measures to prevent and stop the non-innocent passage of vessels of foreign nationality in the territorial sea.' Articles 54 and 55 elaborate 'special circumstances of vessels of foreign nationality entering or exiting the territorial sea of China' and Article 92 provides that 'the maritime safety administration may exercise the right of hot pursuit in accordance with the law.'

State Practice of Asian Countries in International Law

India

R Rajesh Babu and Sujith Koonan***

Introduction

This report brings out current trends in state practice and domestic implementation of international law in India. The report mainly focuses on the interpretation and application of international law by the domestic courts, primarily the Supreme Court of India. The report also reflects some of the major developments and engagements of India in the context of international law, most importantly, treaties that India entered into during the relevant period. While international law has been referred to in a large number of judgments by the Supreme Court of India, this report includes only those judgments in which the court has engaged with or applied the relevant international law norms and rules that are reflective of India's state practice.

Making & Concluding Treaties

Treaties

Select Treaties Signed by India during the Year 2021

During the year 2021, some of the important international agreements signed by India are the following:

- Agreement between the Government of the Republic of India and the Government of the Republic of the Gambia on Exemption from Visa Requirement for Holders of Diplomatic and Official Passports, 1 November 2021
- General Framework Agreement for Cooperation between Government of the Republic of India and the Government of the Republic of the Gambia, 1 November 2021

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- Agreement between the Government of the Republic of India and the Government of the Republic of Serbia for Authorizing the Dependents of Members of a Diplomatic Mission or Consular Post to Engage in Gainful Employment, 19 September 2021
- Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of India and the Kingdom of Belgium, 16 September 2021
- Agreement between the Portuguese Republic and the Republic of India on the Recruitment of Indian Citizens to Work in the Portuguese Republic, 13 September 2021
- Convention on the International Organization for Marine Aids to Navigation, 1 September 2021
- Agreement between the Government of the Republic of India and the Government of Georgia for Gifting of a Relic of St. Queen Ketevan by the People of India to the People of Georgia, 8 July 2021
- Agreement between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland on Customs Cooperation and Mutual Administrative Assistance in Customs Matter, 30 May 2021
- Agreement between the Government of the Republic of India and the Government of the Commonwealth of Dominica on the Exemption of Visa Requirements for Holders of Diplomatic and Official Passports, 7 May 2021

In addition, India has entered into Memorandums of Understanding (MoU) with several countries on various subjects which are available online (Treaty/Agreement, MEA, https://www.mea.gov.in/TreatyList.htm?1).

Terminated Bilateral Investment Treaties

India made fundamental changes to its investment policy framework post in the *White Industries Australia Limited v. The Republic of India* (2011) case. India adopted a new Model Bilateral Investment Treaty (BIT) in 2015. India sent termination notices to 57 partner countries with which it had BITs, some of which have already expired or will expire. In 2021, the following BITs stood terminated:

- Agreement between the Government of the Republic of India and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments, 13 January 2004, terminated on 24 March 2021
- Agreement between the Government of the Republic of India and the Government of the Republic of Sudan for the Promotion and Protection of Investment, 22 October 2003, terminated on 19 October 2021
- Agreement between the Government of the Republic of India and the Government of the Republic of Latvia for the Promotion and Protection of Investments, 8 February 2010, terminated on 26 November 2021

Settlement of Disputes

International and Regional Dispute Resolution Mechanisms

India – Measures Concerning Sugar and Sugarcane, Complaint by Brazil Australia and Guatemala (DS579, DS580, DS581), Report of the Panel dated 14 December 2021

Brazil, Australia and Guatemala requested consultations with India concerning domestic support measures allegedly maintained by India in favour of producers of sugarcane and sugar (domestic support measures), as well as all export subsidies that India allegedly provides for sugarcane and sugar (export subsidy measures). Specifically, the challenges were against:

- India's mandatory minimum prices for sugarcane (the Fair and Remunerative Price (FRP) and State-Advised Prices (SAPS)), as market price support within the meaning of the Agreement on Agriculture, as well as other payments and policies in favour of sugarcane producers, as non-exempt direct payments or other non-exempt policies within the meaning of the Agreement on Agriculture, and three assistance schemes, as WTO-inconsistent export subsidies, that operate in conjunction with India's Minimum Indicative Export Quotas (MIEQS) or Maximum Admissible Export Quantity (MAEQ).

It was claimed that India's schemes constitute subsidies within the meaning of the Agreement on Agriculture, as well as subsidies contingent upon export performance within the meaning of the SCM Agreement. Accordingly, they claimed that the domestic support measures appear to be inconsistent with Articles 3.2, 3.3, 6.3, 7.2(b) 8, 9.1 and 10.1 of the Agreement on Agriculture and Article 3 of the Agreement on Subsidies and Countervailing Measures.

The Panel was established on 28 October 2019 and the Panel report was circulated on 14 December 2021. Concerning domestic support, the Panel found that India is acting inconsistently with its obligations under Article 7.2(b) of the Agreement on Agriculture. Concerning export subsidies for sugar and the various schemes, the Panel found that the challenged schemes are export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture; inconsistent with India's obligations under Articles 3.3 and 8 of the Agreement on Agriculture and Articles 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures.

On 24 December 2021, India notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the panel report.

Enforcement of International & Foreign Awards

***KLA Const Technologies v. The Embassy of the Organization and Matrix Global v. Ministry of Education, Ethiopia*, (COMM) 82/2019; (COMM) 11/2016 and OMP (ENF) COMM 82/2019 and IA No. 7023/2019, Delhi High Court OMP(ENF)(COMM)82/2019 & OMP(EFA)(COMM)11/2016 Date of Decision: 18 June 2021**

The key question in these cases was whether prior consent of the Central Government is necessary under Section 86(3) of the Code of Civil Procedure (CPC) to enforce an arbitral award against a Foreign State. The Delhi High Court answered in the negative stating that no such prior consent is required from the Central Government before enforcing an arbitral award against a foreign State. The High Court also stated that a "Foreign State cannot claim a Sovereign Immunity against enforcement of an arbitral award arising out of a commercial transaction."

Facts

The petitioner sought enforcement of the arbitral award dated 25 October 2015 and the notice of this petition was issued to the respondent on 24 October 2016, but the respondent did not appear despite service. However, on request, the petitioner furnished a copy of the arbitral award to the respondent on 18 May 2019, which was acknowledged by the respondent on 30 May 2019. Vide order dated 19 November 2019, the Court directed the Union of India to examine whether the prior consent of the Central Government is necessary under Section 86(3) of the CPC to enforce the arbitral award.

On 15 March 2021, the Central Government placed on record via the Ministry of External Affairs (MEA), that prior consent of the Central Government is not necessary for enforcement of an arbitral award under Section 86(3) of the CPC "for execution of the arbitral award/decree against the Ethiopian Government." It also noted that "the execution proceedings in respect of an arbitral award cannot be regarded as a suit for the purpose of Section 86 of the CPC. Thus, we understand that, for execution of an arbitral award, MEA's concurrence under Section 86 (3) CPC may not be required."

Judgment

According to the Court, Section 36 of the Arbitration and Conciliation Act treats an arbitral award as a "decree" of a Court for the limited purpose of enforcement of an award under the CPC. This cannot be read in a manner that would defeat the very underlying rationale of the Arbitration and Conciliation Act namely, speedy, binding and legally enforceable resolution of disputes

between the parties. Thus, Section 86 of the CPC is of "limited applicability and the protection thereunder would not apply to cases of implied waiver. An arbitration agreement in a commercial contract between a party and a Foreign State is an implied waiver by the Foreign State so as to preclude it from raising a defence against an enforcement action premised upon the principle of Sovereign Immunity."

The court noted that in a contract arising out of a commercial transaction,

> a Foreign State cannot seek Sovereign Immunity for the purpose of stalling execution of an arbitral award rendered against it. Once a Foreign State opts to wear the hat of a commercial entity, it would be bound by the rules of the commercial legal ecosystem and cannot be permitted to seek any immunity, which is otherwise available to it only when it is acting in its sovereign capacity. It is the purpose and nature of the transaction of the Foreign State which would determine whether the transaction, and the contract governing the same, represents a purely commercial activity or whether the same is a manifestation of an exercise of sovereign authority.

Since arbitration is a consensual and binding mechanism of dispute settlements, the foreign State cannot contest that its consent must be sought again at the stage of enforcement of an arbitral award that is against it, while ignoring the fact that the arbitral award is the culmination of the very process of arbitration which the foreign State has admittedly consented to. This proposition is in consonance with the growing international law principle of restrictive immunity, juxtaposed with the emergence of arbitration as the favored mechanism of international dispute resolution in the past few decades.

> if Foreign States are permitted to stymie the enforcement of arbitral awards, which are the ultimate fruits of the above consensual process, on the specious ground that they are entitled to special treatment purely on account of being Foreign States, then the very edifice of International Commercial Arbitration would collapse. Foreign States cannot be permitted to act with impunity in this regard to the grave detriment of the counter-party in the arbitration proceedings.

Applying the abovementioned well settled principles of law, this Court holds that prior consent of the Central Government under Section 86(3) of the Code of Civil Procedure is not required for enforcement of the two arbitral awards in question against the respondents.

***Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors.* Supreme Court of India, Civil Appeal Nos. 4492–4493, Judgment dated 6 August 2021**

The Supreme Court of India, in this case, was seized of two important questions:

- First, whether an "award" delivered by an Emergency Arbitrator under the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) can be said to be an order under Section 17(1) of the Arbitration and Conciliation Act, 1996 (Arbitration Act); and
- Second, whether an order passed under Section 17(2) of the Arbitration Act in the enforcement of the award of an Emergency Arbitrator by a learned Single Judge of the High Court is appealable

Facts

Proceedings were initiated by Amazon.com NV Investment Holdings LLC (Amazon) before the High Court of Delhi under Section 17(2) of the Arbitration Act to enforce the award/order dated 25 October 2020 of an Emergency Arbitrator. This emergency award/order was passed in arbitration proceedings (SIAC Arbitration No. 960 of 2020) initiated by Amazon against the Respondents collectively referred to as "Biyani Group" which includes Future Retail Limited & Ors (FRL). As agreed by the parties, the seat of the arbitral proceedings is New Delhi, and SIAC Rules apply.

The bone of contention between the parties was that in breach of the agreement with Amazon, Biyani Group entered into an agreement with the Mukesh Dhirubhai Ambani Group, envisaging the amalgamation of FRL, the consequential cessation of FRL as an entity, and the complete disposal of its retail assets in favour of the said group. Amazon filed for interim relief under the SIAC Rules, asking for injunctions against the aforesaid transaction. The Emergency Arbitrator passed an "interim award" providing interim injunction prohibiting Biyani Group from taking any steps to complete the disputed transaction.

The interim award of the Emergency Arbitrator and its implementation under the Indian Arbitration Act was contested in the Delhi High Court and finally brought to the Supreme Court as a Special Leave Petition.

Whether an "award" delivered by an Emergency Arbitrator under the Arbitration Rules of the SIAC Rules can be said to be an order under Section 17(1) of the Arbitration and Conciliation Act, 1996 (Arbitration Act)?

Regarding the first issue, the Supreme Court declared that "full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as 'awards.' Such orders are an important step in aid

of decongesting the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and are made under Section 17(1) of the Arbitration Act" (para 41).

The Court noted that the "arbitration" in Section 2(1)(a) means any arbitration, whether or not administered by a permanent arbitral institution, including "interim orders that are passed by Emergency Arbitrators under the rules of a permanent arbitral institution would, on a proper reading of Section 17(1), be included within its ambit." The Court also noted that the words "arbitral proceedings" are not limited by any definition and thus encompass "proceedings before an Emergency Arbitrator" (para 19).

The Court also reasoned that there is nothing in Section 17(1) to interdict the application of rules of arbitral institutions that the parties may have agreed to. This being the position, at least insofar as Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an Emergency Arbitrator, the context of Section 17 "otherwise requiring" – the context being interim measures that are ordered by arbitrators (para 20). The Court further noted the objective of introducing Sections 9(2) and 9(3) was to prevent courts from being flooded with Section 9 petitions when an arbitral tribunal is constituted for two good reasons – (i) that the clogged court system ought to be decongested, and (ii) that an arbitral tribunal, once constituted, would be able to grant interim relief in a timely and efficacious manner.

The Court accordingly concluded that an Emergency Arbitrator's "award," i.e., order, would "undoubtedly be an order which furthers these very objectives, i.e., to decongest the court system and to give the parties urgent interim relief in cases which deserve such relief." Given the fact that party autonomy is respected by the Act and that there is otherwise no interdict against an Emergency Arbitrator being appointed, it is clear that an Emergency Arbitrator's order, which is exactly like an order of an arbitral tribunal once properly constituted would fall within the institutional rules to which the parties have agreed, and would consequently be covered by Section 17(1) when read with the other provisions of the Act.

Whether an order passed under Section 17(2) of the Arbitration Act in enforcement of the award of an Emergency Arbitrator by a learned Single Judge of the High Court is appealable?

Regarding the second issue, the Supreme Court declared that "no appeal lies under Section 37 of the Arbitration Act against an order of enforcement of an Emergency Arbitrator's order made under Section 17(2) of the Act" (para 76).

The Supreme Court noted that Section 17(1) of the 2015 Amendment Act has provided the same powers to an arbitral tribunal as are given to a court. At the same time, there is no doubt that the arbitral tribunal cannot itself enforce

its orders, which can only be done by a court with reference to the CPC. But the court, when it acts under Section 17(2), acts in the same manner as it acts to enforce a court order made under Section 9(1). If this is so, then what is clear is that the arbitral tribunal's order gets enforced under Section 17(2) read together with the CPC.

The Court further held that Section 17(2) creates a legal fiction and there can be no doubt that the legal fiction created under Section 17(2) for enforcement of interim orders is created only for the limited purpose of enforcement as a decree of the court. To extend this fiction to encompass appeals from such orders is to go beyond the clear intention of the legislature. Thus, as far as Section 17 is concerned, the scheme qua interim orders passed by an arbitral tribunal mirrors the scheme qua interim orders passed by civil courts under Section 9. This vital difference between the provisions of Section 17 read with Section 9 and as contrasted with Section 36 puts paid to this argument.

Despite Section 17 being amended by the same Amendment Act, by making Section 17(1) the mirror image of Section 9(1) as to the interim measures that can be made, and by adding Section 17(2) as a consequence thereof, significantly, no change was made in Section 37(2) (b) to bring it in line with Order XLIII, Rule 1(r). The said Section continued to provide appeals only from an order granting or refusing to grant any interim measure under Section 17. There can be no doubt that granting or refusing to grant any interim measure under Section 17 would only refer to the grant or non-grant of interim measures under Section 17(1)(i) and 17(1)(ii). What is clear from this is that enforcement proceedings are not covered by the appeal provision.

International and Regional Trade Treaties and Bodies

International Economic Law

The Legal Status of 'Joint Statement Initiatives' and Their Negotiated Outcomes, Communication from India and South Africa dated 18 February 2021 (WT/GC/W/819)

India and South Africa, in their joint communication, considered new forms of plurilateral and open agreements that are inconsistent with WTO because they violate consensus-based decision-making. They noted that any attempt to introduce new rules resulting from the Joint Statement Initiatives negotiations into the WTO without fulfilling the requirements of Articles IX and X of the Marrakesh Agreement would be detrimental to the functioning of the rule-based multilateral trading system.

India's Non-Participation in the "Joint Statement on Investment Facilitation for Development" dated 10 December 2021 (WT/L/1130)

In December 2021, 112 WTO members co-sponsored a 'Joint Statement on Investment Facilitation for Development recognizing Easter Text (Revision 5).' India refused to participate in the joint statement owing to the reservation that (i) negotiation of investment should not be under the WTO framework, and (ii) the plurilateral route of negotiations under which investment facilitation is being discussed has no legitimacy in the WTO.

Intellectual Property Rights

AstraZeneca AB & Anr. v. Intas Pharmaceuticals Ltd. in the High Court of Delhi, FAO(OS) (COMM) 139/2020, CMS No. 28068/2020, Judgement dated 20 July 2021

AstraZeneca holds Patent IN 147 as the genus patent that expired on 2 February 2023 and specie patent, Patent IN 625 (which is valid until 15 May 2023), which cover the pharmaceutical component "Dapagliflozin" ("DAPA") and was granted by the Indian Patent Office. The species patent (IN 625) relates to the compound Dapagliflozin (DAPA), which forms a part of the Markush structure claimed in the genus patent (IN 147). The Defendant companies (nine generic drugmakers) sought to manufacture and sell drugs containing DAPA. AstraZeneca sought a permanent injunction from manufacturing and selling any drugs containing the compound DAPA claiming that it is still protected under its Patent IN 625. The defendants argued that two patents cannot be granted for a single invention and alleged that the genus patent anticipated the species patent. The defendants also argued that the patent lacked inventive step.

Judgment

The Delhi High Court division bench denied the remedy to AstraZeneca on the following grounds:

- With respect to one invention, there can be only one patent. A single formulation of DAPA is incapable of protection under two separate patents having separate validity period. AstraZeneca however, while claiming one invention only i.e. DAPA, are claiming two patents with respect thereto, with infringement of both, by the respondent companies (para 21).
- From the field of the invention "subject matter of the two patents being verbatim same, at this stage, it also appears that there is no enhancement of the known efficacy, within the meaning of Section 3(d) of the Act, between

the product subject matter of IN 147 and the product subject matter of IN 625" (para 46).
- Once AstraZeneca, before the USPTO, is applied for and agreed to the validity period of US patent equivalent of IN 625 ending on the same day as the validity period of the US patent equivalent to IN 147, AstraZeneca, in this country is not entitled to claim different periods of validity of the two patents (para 50).

Environmental Protection Through Law/Regulation

International Environmental Law

Influence on Domestic Environmental Law

Access to Judicial and Administrative Proceedings, Including Remedies

Sridevi Datla v Union of India* (*2 March 2021 – SC*): *MANU/SC/0138/2021

India adopted the National Green Tribunal in 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources. It is a specialized body equipped with the legal and scientific expertise to handle environmental disputes which are multifaceted. The Supreme Court of India reiterated the link between the establishment of the National Green Tribunal and India's commitments at the international level. More specifically, the Supreme Court referred to the United Nations Conference on the Human Environment (known as the Stockholm Conference), in 1972 and the United Nations Conference on Environment and Development at Rio de Janeiro in 1992 wherein specific emphasis was given to compensation to victims of pollution and other environmental degradation.

Protection of Mountain Ecosystem

S. Maheswari v State of Andhra Pradesh, Writ Petition Nos. 20185 and 7988 of 2020, Decided on: 28 October 2021, High Court of Andhra Pradesh

In this case, relating to the protection of the mountain ecosystem, the High Court of Andhra Pradesh relied on a range of binding and non-binding legal instruments to underline the obligation of the State to protect the mountain ecosystem. The court referred to the Fourth Meeting of the Conference of the Parties (COP) to the Convention on Biological Diversity, held in Bratislava in 1998, wherein mountain ecosystems were listed as an item for "in-depth consideration." It also referred to the United Nations Framework Convention on Climate Change and observed that it "… offers minimal guidance for tackling

the unique and possibly devastating consequences of climate change for mountain habitats and their human communities … In addition, the CCC notes the special vulnerability of specific biomes, including 'fragile mountain ecosystems.' It also referred to the Kathmandu Declaration on Mountain Activities" adopted by the International Union of Alpinist Associations (UIAA) in its 44th General Assembly held on 16 October 1982 and the Ecological Guidelines for Balanced Land Use, Conservation and Development in High Mountains adopted by the United Nations Environment Programme (UNEP) to foster ecologically sound development of mountain resources. In light of these international instruments, the court rejected the proposal of the government to convert a hillock into residential plots.

Specific Human Rights Incidents or Cases

Human Rights

Women's Rights

'Judicial Stereotyping' and Gender Justice – Aparna Bhat v State of MP, 2021 SCC Online SC 230

The issue of 'judicial stereotyping' came up for discussion in this case relating to the imposition of certain bail conditions on a person accused of sexual harassment charges. The lower court allowed bail with the following condition:

> The applicant along with his wife shall visit the house of the complainant with Rakhi thread/band on 3 August 2020 at 11:00 AM with a box of sweets and request the complainant – Sarda Bai to tie the Rakhi band to him with the promise to protect her to the best of his ability for all times to come. He shall also tender Rs. 11,000/ – to the complainant as a customary ritual usually offered by the brothers to sisters on such occasion and shall also seek her blessings. The applicant shall also tender Rs. 5,000/ – to the son of the complainant – Vishal for purchase of clothes and sweets. The applicant shall obtain photographs and receipts of payment made to the complainant and her son, and the same shall be filed through the counsel for placing the same on record of this case before this Registry. The aforesaid deposit of amount shall not influence the pending trial, but is only for enlargement of the applicant on bail.

As per the Supreme Court, the term 'Judicial stereotyping' refers to the practice of judges ascribing to an individual specific attributes, characteristics or

roles by reason only of her or his membership in a particular social group (e.g. women). It is used, also, to refer to the practice of judges perpetuating harmful stereotypes through their failure to challenge them, for example by lower courts or parties to legal proceedings.

The court relied on international law heavily to explain the normative aspects of judicial stereotyping.

First, it borrowed the following quote from a decision of the CEDAW Committee:

> stereotyping affects women's right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence.

Second, it used the following from the Bangalore Principles of Judicial Conduct, 2002:

> A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age.

The Court concluded that:

> imposing conditions that implicitly tend to condone or diminish the harm caused by the accused and have the effect of potentially exposing the survivor to secondary trauma, such as mandating mediation processes in non-compoundable offences, mandating as part of bail conditions, community service (in a manner of speaking with the so-called reformative approach towards the perpetrator of sexual offence) or requiring tendering of apology once or repeatedly, or in any manner getting or being in touch with the survivor, is especially forbidden. The law does not permit or countenance of such conduct, where the survivor can potentially be traumatized many times over or be led into some kind of non-voluntary acceptance, or be compelled by the circumstances to accept and condone behavior what is a serious offence.

Calculation of Compensation for Homemakers – Kirti v Oriental Insurance Co. Ltd., (2021) 2 SCC 166

While discussing the importance of taking into consideration the household work generally carried out by women, the Supreme Court of India referred to the General Recommendation No. 17 on the Measurement and Quantification

of the Unremunerated Domestic Activities of Women and their Recognition in the Gross National Product, 1991 adopted by the United Nations Committee on the Elimination of Discrimination Against Women. The court particularly noted the importance of measuring the unremunerated domestic activities of women to reveal the de facto economic role of women and to send the message to the society that the law and the Courts of the land believe in the value of the labour, services and sacrifices of homemakers. While supporting the inclusion of unremunerated work of homemakers in calculating the compensation, the Supreme Court highlighted it is a 'reflection of changing attitudes and mindsets and of our international law obligations.'

Right of Married Women to be Considered for Compassionate Appointment – State of M.P. v Jyoti Sharma, 2021 SCC Online MP 744

In a case challenging a policy that deprives married women of the right to be considered for compassionate appointment, the High Court of Madhya Pradesh extensively referred to various provisions of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) to reiterate the obligation of India to adopt appropriate measures including laws and policies to prohibit all discrimination against women. The Court underlined that:

> By operation of Article 2(f) and other related articles of CEDAW, the State should by appropriate measures modify law/policy and abolish gender-based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

Refugees and Principle of Non-refoulement

Mohammad Salimullah v Union of India, 2021 SCC Online SC 296

The court discussed the application of the principle of non-refoulment in India. The Supreme Court reiterated the fact that India is not a signatory to the Refugee Convention. However, it held the right of the asylum seekers not to be deported as enshrined in the principle of non-refoulment as 'ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e).'

Nandita Haksar v State of Manipur, 2021 SCC OnLine Mani 176

The Manipur High Court took a different position when compared to the decision of the Supreme Court mentioned above. The Court observed that India's policy on 'refugees' remains rather opaque and asylum seekers are straightaway branded as 'foreigners.' It was further observed that rights guaranteed under Articles 14 and 21 of the Constitution are available to everyone including foreigners. The High Court of Manipur, in this case, went to the extent of locating the principle of non-refoulment in Article 21 of the Constitution. Thus, the court held that:

> The far-reaching and myriad protections afforded by Article 21 of our Constitution, as interpreted and adumbrated by our Supreme Court time and again, would indubitably encompass the right of non-refoulment, albeit subject to the condition that the presence of such asylum seeker or refugee is not prejudicial or averse to the security of this country. Therefore, though India may not be a signatory to the Refugee Convention of 1951, its obligations under other international declarations/covenants, read with Article 21 of our Constitution, enjoins it to respect the right of an asylum seeker to seek protection from persecution and life or liberty-threatening danger elsewhere.

Prisoner's Rights

Right to Compensation for Unlawful Arrest or Detention – Jagdish v State of M.P., 2021 SCC Online MP 4117

The High Court of Madhya Pradesh made an observation in this case regarding India's reservation to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) which recognizes the right of a victim of unlawful arrest or detention to receive compensation from the State. According to the court, although India has made reservations to this particular provision, this reservation has lost its significance because the Supreme Court of India, in a number of cases, awarded compensation for the infringement of the fundamental right to life of a citizen and therefore there is no need for an express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life.

Rights of the Differently Abled

Vikash Kumar v Union Public Service Commission and Ors., Civil Appeal No. 273 of 2021 and Special Leave Petition (C) No. 1882 of 2021, Decided on: 11 February 2021, Supreme Court of India

In this case, involving the right of the differently abled persons to use the facility of a scribe to write examinations, the Supreme Court of India directed the Ministry of Social Justice and Empowerment, Government of India, to formulate the procedure to lay down appropriate norms to ensure that the condition of the candidate is duly certified by such competent medical authority as may be prescribed so as to ensure that only genuine candidates in need of the facility are able to avail of it. The Supreme Court took note of General Comment No. 7, adopted by the Committee on the Rights of Persons with Disabilities which underscores the importance of participative decision-making by involving persons with disabilities and organizations of persons with disabilities. By taking into account this international obligation, the Court directed the Ministry of Social Justice and Empowerment to formulate guidelines to facilitate the use of scribes by persons with disability by involving the public, particularly persons with disabilities and their organizations.

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State Practice of Asian Countries in International Law

Indonesia

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Making & Concluding Treaties – Negotiation – Accession – Ratification – Deposit – Registration – Internal Constitutional Arrangements

Treaties

***Indonesia – to Improve Public Services and Support Ease of Doing Business in Indonesia – ratified the Convention on the Elimination of Statutory Requirements for Foreign Public Documents* (*Apostille Convention*).**

The Government of Indonesia ratified the Convention Abolishing the Requirement of Legislation for Foreign Public Documents on 4 January 2021, and promulgated it on 5 January 2021, through Presidential Regulation Number 2 of 2021. The Convention Abolishing the Requirement of Legislation for Foreign Public Documents was signed on 5 October 1961, in The Hague, The Netherlands.

The essential consideration for acceding to this Convention is that the legalization of foreign public documents is necessary in international cooperation relations in order to meet the necessities of life and the existence of a country to protect and promote public welfare as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia. In order to improve public

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services and facilitate business in Indonesia, it is necessary to simplify the process of legalizing foreign public documents. It is in line with the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Apostille Convention), which was adopted at The Hague Conference on Private International Law.

Prior to the ratification of the Apostille Convention, the Minister of Foreign Affairs of the Republic of Indonesia issued Regulation No. 09/A/KP/XII/2006/01, governing the legalization of foreign documents. It specified that foreign documents to be recognized in Indonesia must be authenticated by the Ministry of Justice and/or the Ministry of Foreign Affairs of the other country and by Indonesian representatives in the foreign country. On the other hand, Indonesian documents that will be enforced in other countries must be legalized by the Ministry of Law and Human Rights, the Ministry of Foreign Affairs, and Indonesian representatives abroad.

After issuing Presidential Regulation of the Republic of Indonesia Number 2 of 2021 concerning the Ratification of the Apostille Convention, the Government of Indonesia issued technical instructions regarding the implementation of the Apostille service, namely through the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 6 of 2022 concerning Apostille Legalization Services in Public Documents.

An apostille refers to the act of validating the Official's signature, stamp approval, and/or official seal on the requested documents based on verification. By Article 2, paragraph (1) of the Minister of Law and Human Rights of the Republic of Indonesia Regulation No. 6 of 2022, the Apostille is administered by the Minister of Law and Human Rights through the Director General. An apostille is performed on documents issued in Indonesia for use in the territories of other signatory nations to the Hague Apostille Convention.

Article 2 paragraph (3) of the Regulation of the Minister of Law and Human Rights states that several documents that require Apostille action are:

1. Documents originating from an authority or official related to a state court or tribunal, including those from a public prosecutor, court clerk, or bailiff;
2. Administrative documents;
3. Documents issued by a notary public; and
4. An official certificate is attached to a document signed by an individual with civil rights, such as a certificate that records the registration of a document or a specific validity period of a document on a certain date, and ratification of signatures by officials and notaries.

Under Article 2 paragraph 4, there are exceptions applied under the following conditions: Documents signed by diplomatic or consular officials;

Administrative documents directly related to commercial or customs activities; and Documents issued by the prosecutor's office as a prosecution institution as stated in Presidential Regulation Number 2 of 2021.

Malahayati Rahman

Mutual Legal Assistance between the Republic of Indonesia and the Russian Federation for Eradicating Corruption across National Sovereignty

In 2021, Indonesia ratified Mutual Legal Assistance (MLA) as the follow-up to the two-state agreement between Russia and Indonesia in Moscow. The MLA tried to eradicate and prevent corruption that may happen across the boundaries of state sovereignty. This ratification instrument was carried out on the legal basis of the Law of the Republic of Indonesia Number 5 of 2021 on the Treaty Between the Republic of Indonesia and the Russian Federation on Mutual Legal Assistance in Criminal Matters.

The implementation of the MLA for Indonesia requires a negotiation process that is quite challenging and needs a certain period, namely two years only for signatories in 2019 and another two years for ratifying the MLA on 19 October 2021. While for Russia, this MLA was ratified a year earlier, namely in November 2020. According to Article 23(2), the MLA has bound for both parties for 30 days after the parties notify each other through their instrument of ratification.

This MLA technically consists of 23 Articles which cover, among others, legal aid issues in connection with criminal cases, especially corruption involving two countries where each party has the promise to assist in terms of submitting documents, taking evidence, locating and identifying people and goods suspected of being related to criminal acts, especially corruption, requests for the presence of witnesses, victims and experts, transferring people to participate in criminal justice processes, taking steps to freeze, detain, searches of places connected with criminal acts, and confiscation of proceeds of crime. In addition, the crucial element is that each party may accept legal assistance from another party on the grounds that this is an object of bank or tax secrecy. The MLA is crucial for Indonesia and Russia, considering that there are several cases between the two States, especially those related to criminal acts of corruption or other financial crimes, which often cross the borders of state sovereignty and become a significant obstacle to creating an impartial judicial process. This entered-into-force treaty will prevent the perpetrators of crimes involving Indonesian legal jurisdiction from running into the jurisdiction of Russia and vice versa. Russia is the eleventh country that has an MLA agreement with Indonesia. With the existence of this MLA agreement, Russia and

Indonesia cannot avoid that they must provide full support for the judicial process in each country, which is directly or not related to their legal jurisdiction.

Nurhidayatuloh

Environmental Impact Assessment & Other Environmental Principles

International Environmental Law

The Implementation of NDPE Principle in Indonesia (*No Deforestation, No Peat, No Exploitation*)

The NDPE (No Deforestation, No Peat, No Exploitation) principle was first introduced by the company Wilmar International on 5 December 2013. Since then, various oil palm plantation companies have begun to commit themselves to this principle to support the sustainability of oil palm plantations. By 2020, almost all the largest palm oil processing companies in Indonesia and Malaysia have committed to NDPE. As of April 2020, the NDPE policy covered 83 percent of palm oil processing capacity in Indonesia and Malaysia. Unfortunately, due to weak implementation, the effectiveness of NDPE coverage was reduced to 78 percent.

The NDPE policy is the strongest private instrument to cut the direct link between deforestation and palm oil. Under the "No Deforestation" principle, this policy intends to avoid deforestation when clearing land to produce commodities or other related activities. The implementation of this commitment usually refers to the High Carbon Stock and High Conservation Value approaches, which also include regulating land burning practices and reducing greenhouse gas emissions in plantations.

As for the "No Exploitation" principle, the policy requires no exploitation of workers, local communities, or small-scale farmers in the production of agricultural commodities. This commitment is about respecting human rights, with a focus on the rights of indigenous and local communities, workers, and smallholders. The 'No Peat' principle prohibits companies from carrying out new developments on peatlands and promotes the implementation of Best Management Practices on existing plantations located on peatlands. If possible, peat restoration should also be carried out.

NDPE policies, along with government actions and low palm oil prices, have resulted in lower rates of deforestation associated with oil palm plantations. By 2020, 16 of the 21 largest oil palm plantations in Indonesia will be

compliant with NDPE policies related to forest and peatland clearing activities. Nevertheless, certain plantation companies continue to engage in deforestation for the purpose of establishing oil palm plantations.

The results of a 2020 analysis by Chain Reaction Research (CRR) show that 10 palm oil companies are responsible for the deforestation and development of peatlands in Indonesia which totaled around 39,500 hectares in 2019. The 10 company groups are Sulaidy, Jhonlin Group, Mulia Sawit, Indonusa, Rugao Shuangma Group, BEST Group, Peputra Group, Musirawas, Golden Land Bhd, and Tunas Baru Lampung.

Furthermore, an analysis conducted by CRR's partner, AidEnvironment, reveals that Indonesia continues to be the deforestation hotspot in Southeast Asia, as indicated by concession data from the first six months of 2022. The data reveals that the top 10 deforesters collectively caused a forest loss of 8,100 hectares, with all the featured concessions located in Indonesia. Two out of the 10 concession companies in this period are in Papua, three are in Sumatra, and the rest are in Kalimantan.

The 8,100 hectares of forest loss among the top 10 deforesters represents a 43 percent increase compared to the first half of 2021. It is important to note that the deforestation calculation for this data was conducted at the concession level rather than at the group level. The higher number in 2021 could be the result of higher palm oil prices and may signal a reversal of the trend that saw declines in deforestation in recent years. However, it is still too early to draw definitive conclusions. Nevertheless, the data from the first half of 2022 is likely to be of concern to NGOs and other organizations that have been actively working to curb deforestation in Southeast Asia with policy commitment and appropriate action.

Vita Cita Emia Tarigan, Siti Khairunnisa, and Annisa Hafizhah

Indonesia and ICAO: Flight Information Region (FIR)

Air Law & Law of Outer Space

Sovereignty or Aviation Technical Issues?

In 2022, as a form of implementing the mandate of Law Number 1 of 2009 concerning Aviation, which has been fought for a long time, it has finally made significant progress. The entire airspace above Indonesian territory (including over the Riau Islands) is included in the Jakarta Flight Information Region (FIR). Indonesia and Singapore have agreed to a new bilateral agreement

through the Agreement between the Government of the Republic of Indonesia and the Government of the Republic of Singapore regarding the Adjustment of the Boundary Between the FIR Jakarta and the FIR of Singapore which was ratified through the Presidential Regulation of the Republic of Indonesia Number 109 of 2022. The bilateral agreement was agreed upon with various changes to benefit from this agreement.

Despite having gone through various negotiations and deliberations, several clauses of the bilateral agreement are still in conflict with several national and international provisions. It must be understood there were three agreements signed, namely the Extradition, Defense Cooperation Agreement, and FIR Realignment, a package of mutual benefit agreements. However, in its implementation, two of the three agreements were ratified through law by the mandate contained in Article 10 of Law Number 24 of 2000 concerning International Treaties that provide "[t]he ratification of international agreements is carried out by law when it relates to: a. political, peace, defense, and state security issues; b. changes in territory or determination of the boundaries of the territory of the Republic of Indonesia; c. sovereignty or sovereign rights of the state; d. human rights and the environment; e. formation of new legal norms; f. foreign loans and/or grants."

The fact that the agreement regarding FIR Realignment was ratified through a presidential regulation while the other two were ratified through law is proof that the Presidential Regulation of the Republic of Indonesia Number 109 of 2022 contradicts the provisions of national law. Then Article 7 of the latest FIR agreement states that "This agreement is valid for 25 years from its entry into force and will be extended by mutual agreement if both Parties feel the benefits of doing so …" Article 7 is contrary to international rules as stated in Annex 11 of the Convention which clearly states that "… *both the delegating and providing States may terminate the agreement between them at any time*." However, the existence of Article 7 has locked Indonesia for 25 years. Even if there is a change, it is only operational. And the fixed term of the agreement is 25 years, it cannot be changed. The difference in perception among high-ranking officials in Indonesia regarding FIR makes the newly ratified agreement relatively unchanged from the previous agreement.

In addition, Indonesia's biggest mistake in taking over the FIR from Singapore was to forgo the sovereignty aspect as the legal basis for bilateral agreements and instead consider this agreement to be only a technical matter. If the issue of taking over the FIR is only limited to a technical problem that has nothing to do with sovereignty, then AirNav Indonesia will suffice to resolve it. Cambodia used this approach when it took over the FIR from Thailand in 2000.

Article 6 of Law No. 1 of 2009 concerning Aviation mandates that: The government has the authority and responsibility to regulate and manage its airspace for the benefit of aviation, the national economy, defense and security, social culture, and the environment. So it is clear that responsibility for ensuring aviation safety is a must for a sovereign country, while delegation is temporary.

The results of the negotiations between the two countries gave the impression that Singapore came with a strong ideology while Indonesia came with the opposite conditions so that Indonesia only accepted proposals from Singapore which then became obligations in the clauses of the agreement that Indonesia had to fulfill to Singapore while Singapore did the opposite. The three agreements agreed upon by Indonesia and Singapore on 25 January 2022, are a formalization of the Framework of Discussion. In this case, Singapore implemented some kind of mutual agreement and almost made a profit from it all.

Ratification has already been done, the only way to change this Presidential Regulation regarding the FIR is by conducting a judicial review. Even so, this only changes national instruments and does not affect international instruments in the sense that it will not change the contents of agreements that have been stipulated because judicial review is only an internal mechanism for Indonesia.

M. Ya'kub Aiyub Kadir and Nabyla Humaira

Protection of Individuals under International Humanitarian Law

International Humanitarian Law

Government Regulation No. 3/302 on the Implementation of Law No. 23/2019 on National Resource Management for State Defense (PSDN Law) (PP 3/2021)

On 12 January 2021, the Government of Indonesia has signed Government Regulation No. 3/2021 on the Implementation of Law No. 23/2019 on National Resource Management for State Defense (PSDN Law) (PP 3/2021). The regulation allows the Ministry to start recruiting the first 25,000 members of the reserve component (*Komponen Cadangan*). Article 1 of PP No. 3/2021 on the Implementation of Law No. 23/2019 on PSDN Law defined the reserve component (*Komponen Cadangan*) as a national resource prepared to be deployed through mobilization to enlarge and strengthen the powers and capabilities of the main component.

On 25 October 2021, four non-government organizations (NGOs), including the Association for Participatory Community Initiatives for Justicial Transition (IMPARSIAL), Association for the Commission for Disappeared Persons and Victims of Violence (Kontras), Indonesian Public Virtue Foundation, Indonesian Legal Aid and Human Rights Association conducted a material review of the PSDN Law by submitting it to the Constitutional Court. The enactment of Law No. 23/2019 PSDN Law and PP No. 3/2021 brought confusion to the status of citizens (civilian and combatant). The law showed ambiguity of how people can be included in efforts to defend their state.

Indonesia has been a party to the Geneva Convention 1949 since September 1958. According to the Geneva Conventions, "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." This provision is included as the first article of all four of the 1949 Geneva Conventions. The ratification of the 1949 Geneva Convention implies that Indonesia is obligated to comply with International Humanitarian Law (IHL), particularly the distinction principle.

The protection objective of the distinction principle identifies the basic categories of ("civilian" and "combatant") and objects ("civilian objects" and "military objects"), distinguished, and the various conditions of protection can only be achieved if identified. The blurring status of *Komponen Cadangan* between civilians and combatants can also fall into the status of "unauthorized combatants," where this status will be very detrimental because citizens who are active in hostilities will lose their protected status as civilians. The civilian status will be ambiguous when they join *Komponen Cadangan*. Article 29 of the PSDN Law emphasizes that civilians as *Komponen Cadangan* would be ready to be mobilized in order to expand and reinforce the Main Components' strengths and capacities in dealing with military and hybrid threats.

Another confusion is that the PSDN Law does not explicitly state that the *Komponen Cadangan* is part of the military. This status creates legal uncertainty. IHL demands assertiveness of status, and there is no grey area in the principle of distinction.

Afandi Sitamala

State Practice of Asian Countries in International Law

Iran

Vahid Rezadoost, Abdollah Abedini**, Ali Mashhadi***, Hosna Sheikhattar****, Katayoun Hosseinnejad*****, Khalil Rouzegari Agbalag******, Mona Karbalaye Amini*******, Mahnaz Rashidi********, Nasim Zargarinejad*********, Pouria Askari********** and Seyed Hossein Sadat Meidani***********

Iran's Views on the Work of the International Law Commission (ILC), Seventy Second Session (2021)

History and Theoretical Approach of Iran in International Law

Iran traditionally comments on the work of the International Law Commission (ILC) during the annual meetings of the sixth committee of the General Assembly. Iran expressed its views on the work of the International Law Commission (ILC) in 2021 (Annual report contained in UNGA document A/76/10) during the meetings of the Sixth Committee of the UN General Assembly in October and November of 2021. The legal views of Iran can be presented as followings.

Protection of Atmosphere

- Iran stressed that the "essential importance of the atmosphere for sustaining life on Earth" and commended the Commission for the adoption of draft guidelines and its commentaries on the second reading. For Iran "an equitable utilization of atmosphere cannot be realized without affording due

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consideration to the benefit of the international community as a whole, especially developing countries and the most vulnerable groups."

- Iran preferred the concept of "common concern of humankind," instead of "pressing concern of international community," since the concept of "common concern of humankind" is a well-known concept which has already been supported and reflected in a preambular paragraph of the 2015 Paris Agreement.
- Regarding Draft Guideline 7, Iran maintained that "the phrase 'intentional large-scale modification' is not clear enough and it shall be determined what activities is a large-scale modification and what is the impact of the distinction made by referring to the element of intentionality in this guideline."
- Regarding Guideline 8, Iran referred to the necessity of obligation to cooperate for the protection of the atmosphere; and welcomed the addition of the word "technical." In this connection, Iran's representative referred to the inhumane and illegal unilateral coercive measures imposed on the Islamic Republic of Iran as the main impediment to any cooperation in this area. With the unilateral coercive measures, among other impediments to the transfer of advanced technologies, including technologies relating to renewable energies prohibited, *inter alia*, import of medicines and pesticides for agriculture, livestock and poultry, the industry has faced considerable barriers including problems in commerce and transferring of funds. Thus, Iran proposed that where the cooperation is endorsed as an obligation and where the negative impact will extend to the international community as a whole, the obligation shall be accompanied by a clause containing an obligation to refrain from imposing measures that render cooperation impossible.
- Regarding Draft Guidelines 10 and 11, Iran states that these guidelines shall be read together with Draft Guideline 8 on the obligation to cooperate. In most cases, implementation and compliance of the obligation depend on the scientific and technical knowledge which are exclusively owned by developed countries. In the circumstances in which a considerable number of States lack the capability to comply with obligations under international law, incurring international responsibility would not have the necessary efficiency. Thus, we propose strengthening the frameworks for cooperation instead of elaboration on State responsibility.

Provisional Application of Treaties

- Iran believed that "Article 25 of the VCLT on the provisional application of treaty merely offered States the possibility of provisional application without the imposition of any obligation. As a result, the provisional application would not serve as a basis for restricting States' rights with regard to their future conduct in relation to the treaty that might be provisionally applied."

- In this connection, Iran supported the view that no element relating to Article 18 of the VCLT be incorporated into the draft guideline, *inter alia*, and stressed that there is a substantial difference between Article 18 regime and Article 25 regime of the VCLT.
- With respect to a resolution, decision, or other act adopted by an international organization or at an intergovernmental conference might, Iran submitted that they would have an effect, only if, the State concerned agreed upon the binding nature of them.
- Regarding Guideline 6, Iran provided that the provisional application of a treaty only produces limited legal effects during the specific period in which it is mutually agreed upon its application. Iran maintained that "the principle of consent prevailing in international law and, particularly, the law of treaties as well as flexibility and non-binding nature of the proposed provisions as the core elements of the provisional application of treaties indicates the different characteristics of the topic. Thus, defining a responsibility regime, through analogy in Guideline 8 is inconsistent with the nature of the regime of the provisional application. This guideline would undermine the willingness of countries to apply treaties provisionally."

Immunity of State Officials from Foreign Criminal Jurisdiction

- Iran expressed its disappointment with the manner in which draft Article 7 has been provisionally drafted since this Draft Article is still "a central issue for the Commission." For Iran, Draft Article 7 is without prejudice in relation to the immunity *ratione personae*. Referring to the case law of the European Court of Human Rights affirmed in the case of Jones v. United Kingdom, in the judgment of 14 January 2014, Iran articulated that the "Immunity of State officials, which derives from immunity of States lasts during their tenure in office. Other officials – and all former officials – enjoy conduct-based immunity, which lasts forever but applies only to acts taken in an official capacity." Also, the judgment of 3 February 2012 of the International Court of Justice was cited by Iran, "wherein it implies that the substantial rules of international law cannot overcome procedural rules." While Iran admitted that immunity does not mean a lack of responsibility, at the same time, Iran stated that limiting the scope of immunity in favor of the responsibility of State officials shall be grounded on coherent State practices.
- Instead of enlisting specific crimes, such exception is best to be applied solely with regards to the most serious crimes of international concern as there is doubt whether State practice and jurisprudence support the inclusion of crimes, such as torture or enforced disappearance, under the scope of exceptions to the immunity *ratione materie* from foreign criminal jurisdiction.

- Draft Article 17 shall be read together with Draft Article 7. Under the circumstances in which there are considerable controversies over Draft Article 7 and the statements of States in the Sixth Committee over the course of previous years, Draft Article 17 will be applied only as a dispute production machine which will escalate tensions in relations between States.
- The final clauses, including a dispute settlement clause, sense only if the final product will be a treaty. While the Commission had yet to decide on the final product of the topic, it seems the time is not ripe enough to include such a clause in the Draft. Moreover, in light of its relationship with the Sixth Committee, the Commission mostly avoided inserting such clauses in its final drafts from the beginning of its work.
- It is also important to remind that the work on "peremptory norms of general international law (*jus cogens*)," which was mentioned in the Special Rapporteur's report, is not completed and could not, therefore, be taken as a precedent.
- Regarding the relationship between immunity in national and international criminal tribunals, Iran believed that the fact that a person can be prosecuted by an international tribunal cannot affect the immunity of the same person before the Forums of any foreign State. This emanates from the stark difference between the origins of immunity. The latter emanates from the principle of sovereign equality of States, while the first derives from the consent of States to the jurisdiction of the international tribunal. Iran also expressed its doubt whether Draft Article 18 can be applied to the States which are not parties to the statute of International Criminal Tribunals, particularly the Rome Statute of International Criminal Court.
- Iran again expressed its dissent in paragraph 4 of Draft Article 11 regarding the procedural requirements of the waiver of immunity. Iran is of the view that "the waiver of immunity as a procedural rule is the exclusive right of sovereign States which shall be declared by the State concerned in a manner that manifests the will of that State to waive the immunity of its official. Therefore, the state of the concerned official has an exclusive authority to invoke and waive the immunity of its officials, and the waiver should be not only clear and expressed but also should mention the official whose immunity is being waived."

Sea-Level Rise in Relation to International Law

- Iran is of the view that there is a lack of State practice regarding the topic on sea-level rise in relation to international law. Hence, Iran suggested that the commission be cautious about its studies, particularly on the protection of persons affected by sea-level rise in the coming year.

- Iran agreed with the approach of the studies that maritime zones designated by States cannot be assimilated into established territorial boundaries. The coastal States, by determination of their maritime zones, entertain their sovereign rights which are granted through customary international law. Inevitably, sea-level rise might lead to changes in baselines and, consequently, outer limits of maritime zones. Nonetheless, we are of the view that any change in lines shall be based on principles of equity and fairness.
- Iran admitted that the practice of land reclamation, coastal fortification and other means to maintain coastal areas, base points, baselines and islands could be considered as an appropriate response to sea-level rise. However, such fortifications will not result in the creation of any new rights for the States. In addition, as also confirmed in several paragraphs of the issue paper, in case of land loss, maritime entitlements may be reduced or completely dissipated. As such, Iran was of the view that in line with paragraph 8, Article 60 of the 1982 Convention on the Law of the Sea, "artificial islands, installations and structures do not possess the status of islands" and any discussion about the relationship between artificial islands and the change of maritime zones in relation to sea level rise is irrelevant.

General Principles of Law

- The Islamic Republic of Iran commended the studies of the Commission on the sources of international law as set forth in Article 38 of the International Court Justice Statute (ICJ Statute).
- Regarding the general principles of law, Iran concurred with the formulation proposed in draft conclusions 4, 5, and 6. This formulation can help the commission to identify the general principles of law in accordance with Article 38(1)(c) of the ICJ Statute.
- With regard to the element of "legal systems" in the concept of general principles of law, Iran agreed with the Special Rapporteur's view that Article 38 (1) (c) of the ICJ Statute should be read as general principles of law which have been recognized by States. However, Iran was of the view that an inclusive process for the identification and recognition of general principles of law is crucial to provide the contribution of all legal systems in a balanced manner. Taking into account this consideration, Iran did not concur with the reasoning expressed by the Special Rapporteur in paragraph 110 of his report regarding the irrelevance of *opinio juris* in the emergence of a general principle of law that might reduce the universality of the general principles of law.
- Against this backdrop, Iran expressed its concern over the draft conclusion 3(b). Therefore, the Commission should be cautious on draft

conclusion 7. It is also important to mention that the *travaux préparatoires* of the ICJ Statute signifies that the general principles of law are limited to the principles of law which stem from the legal experiences of different national legal systems.

- Iran stated that such principles or rules serve as category of general principles of law as embodied in Article 38 (l)(c) of the ICJ Statute. Moreover, principles formed within international law generally come to existence through the process of the development of customary international law. In this regard, it should be underlined that the declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations was adopted by the General Assembly on 24 October 1970, and has already provided States with the general principles formed within the international law.
- Regarding draft conclusions 8 and 9, Iran agreed with the importance of the decisions of the courts and tribunals and teachings of the most highly qualified publicists as subsidiary means for the determination of rules of international law. Means of such nature reflect the general practice and the *opinio juris* of States.
- Finally, Iran stressed that the result of this study should not lead to producing a specific list containing the general principles of law since the purpose of the topic is not to increase the quantity of the rules and principles of international law.

Seyed Hossein Sadat Meidani

The Islamic Republic of Iran Bill on "Strategic Action Plan to Lift Sanctions and Protect Iranian Nation's Interests" and Its Executive Regulation, 27 December 2020

Relationship between International & Domestic Law

On 8 May 2018, Donald Trump, the former president of the United States of America (US), publicly announced his decision to withdraw from the Joint Comprehensive Plan of Action (JCPOA). Based on this decision, he then reimposed the US lifted sanctions on Iran and extended their scope by imposing new ones.

In response to the action taken by the US, Islamic Republic of Iran and other participants to the JCPOA, namely EU/E3, attempted to reduce the adverse

effects of the US unilateral sanctions. Nevertheless, they failed to take any practical measures to ensure the benefits of the JCPOA to Iran. According to the International Atomic Energy Agency (IAEA) reports, Iran was still implementing its commitments under the JCPOA even a year after the US withdrawal.

Therefore, in the absence of adequate measures by the EU/E3 and the United Nations Security Council, on 2 December 2020, the Islamic Republic of Iran Parliament enacted a Bill entitled "Strategic Action Plan to Lift Sanctions and Protect Iranian Nation's Interests." Accordingly, as executive regulation of this Bill was issued on 27 December 2020.

The most important provisions of that Bill are as follows:

1. The Atomic Energy Organization of Iran had to produce and store at least 120 kilograms of enriched Uranium with a 20-percent purity level every year for peaceful purposes;
2. The Atomic Energy Organization of Iran had to increase the country's monthly enriched uranium output and enriched capacity with different purity levels for peaceful purposes by at least 500 Kilograms.

In fact, Iran relied on the US withdrawal from the deal and EU/E3 inaction as grounds to cease performing its commitments under the JCPOA as recognized in paragraphs 26 and 36 of that deal. However, it should be noted that the remedial measures of Iran are reversible as soon as the other participants implement their commitments and entirely remove the anti-Iran sanctions.

Mahnaz Rashidi

Regulations on the "Strategic Action to Termination Sanctions and Protect the Interests of the Iranian Nation" Act, 20 February 2021

On 20 February 2021, in line with the implementation of the "Strategic Action to Termination Sanctions and Protect the Interests of the Iranian Nation" Act adopted in late 2020 by the Iranian Parliament, the Regulations on the Act were approved by the Iranian Cabinet. According to the aforementioned Act, the Atomic Energy Organization of Iran is obliged, immediately after the adoption of this Act, to produce uranium with an enrichment of twenty percent (20%) of the annual reserve of at least one hundred and twenty kilograms inside Iran for peaceful purposes; to increase the capacity of enrichment and production of enriched uranium with the appropriate level of enrichment for each of the country's peaceful uses, by at least five hundred kilograms per month, and to take action regarding the storage and accumulation of enriched

materials in the country; Simultaneously with the operation of optimization and commissioning of the 40 MW heavy water reaction agent (reactor) of Khandab Arak, the design of a new 40 MW heavy water reaction agent (reactor) with the aim of producing unstable isotopes (radioisotopes) for hospital uses with a timetable; and in the event of non-fulfillment of the obligations of the JCPOA participant States, including the 4+1 States (Germany, France, England, China, and Russia) towards Iran and the full banking relations not being normalized and the obstacles to the export and sale of Iranian oil and oil products not being completely removed; and the complete and quick return of the currency of the resources obtained from the sale, two months after the adoption of the Act, to stop monitoring beyond safeguards, including the voluntary implementation of the Additional Protocol. The enforcement of the Additional Protocol, ultimately, ceased at the beginning of 2021.

According to the Regulations of the Act, approved by the Board of Ministers, the Atomic Energy Organization of Iran is required to implement Article 1 of the Act to provide a comprehensive report on the current situation, as well as the requirements for uranium with 20% enrichment and prerequisites, prepare their technical and financial and other related dimensions and submit them to the Executive within two months from the effective date of the Act, and comply with the reversibility criteria and the goals of the Act, in the implementation of Article 4 of the Act, complete the process of setting up the Isfahan metallic uranium production plant. In addition, the Executive is obliged to take the appropriate decision based on the report of the relevant institutions, based on the comprehensive report received, taking into account the approvals of Iran's Supreme National Security Council, the goals of the Act, and national interests.

Abdollah Abedini

The Comprehensive Program of Cooperation between Iran and China, 7 April 2021

Treaties; Memorandum of Understanding

On 7 April 2021, the foreign minister of China arrived in Tehran on an official visit, and in the midst of the discussions related to the return to the United States of America to the JCPOA and the vandalism that happened at the Natanz nuclear site, an agreement was signed under the title of a 25-year strategic memorandum of understanding between Iran and China. The unofficial text of

the memorandum of understanding was published in June 2019. It was raised in the media that after the signing of this document by the foreign ministers, the Chinese side would prefer to publish the text of the document. In fact, the conclusion of this agreement relates to a larger plan of China, which it refers to as the "Belt and Road Initiative." This initiative, which is also called as One Belt One Road initiative, is one of the ambitious foreign and economic policies of the current Chinese president, Xi Jinping, whose main goal is to strengthen China's economic leadership through a major infrastructure development program, primarily in neighboring China. In the same way, this initiative divided the neighborhood into different corridors. The most important of them is the corridor of Pakistan, which is located in the neighborhood of Iran. This plan was officially announced by Xi Jinping at the end of 2013, and the official name for this plan is "Silk Road Economic Belt and 21st Century Maritime Silk Road," from which the two key words "Belt" and "Road" come out. To complete one of the important parts of the puzzle of the plan, the Chinese government has concluded a series of these agreements under the title of a memorandum of understanding, with more than 110 States. These States have signed some of 123 agreements with China. Some of these agreements have been written in the form of a comprehensive agreement like Iran and some of them have been concluded in different areas. The 25-year strategic memorandum of understanding between Iran and China is also part of the plan that the Chinese government has foreseen in its Belt Road Plan. Based on the study of available sources and access to the full text of several examples of these agreements, it is safe to say that the main structure of these memorandums has five main parts and finally, there are less than 10 articles: political cooperation, connecting infrastructure to China's desired belt; commercial erasure; financing in such a way that the Chinese government prefers, and finally, cultural exchanges. In fact, these are the five fundamental principles of the Belt and Road Initiative introduced by the Chinese government. In particular, it can be seen all these principles in Iran's memorandum with China.

The 25-year strategic memorandum of understanding between Iran and China contains a preamble in which it addresses the position of Iran and China on the historical and friendly relations between them, and their purpose in concluding the memorandum. Specifically, in the first paragraph under the title of vision, it refers to the desire of the two parties to expand the comprehensive strategic partnership between China and Iran based on the win-win approach in the field of bilateral, regional and international relations.

The fourth clause of the memorandum is in the fields of cooperation, which can be seen in the annexes attached to the agreement. In general, some areas are considered as preferred areas, which specifically refers to the issue of the

Belt and Road Initiative, which has been discussed through the creation of highways, railways, and sea connections to promote Iran's role in this plan. The next issue is banking cooperation, although currently, Iran is having a challenge with China over the banking issue. This challenge is specifically on the mechanism of the "Financial Action Task Force" because China is also a member of this task force and accordingly, many of Iran's oil revenues are restricted based on the regulations of the task force and before that, the sanctions of the Security Council have blocked.

In paragraph 6 of this memorandum, a mechanism has been prepared for the annual meeting of the foreign ministers of the two States and, at a lower level, the deputy foreign ministers, whenever necessary. In paragraph 8 of the issue of negation of foreign pressures, it is stated that the parties have pledged to be united against unilateralism by any State. The final paragraph of this document has postponed any modification of the memorandum to the mutual consent of the parties. In this part, it is said that this agreement will be applicable for 25 years from the date of signing, i.e., 7 April, and the detailed appendices considered for this document are considered an integral part of this document. One of the important parts of the appendices is the interesting measures such as the creation of new cities with the help of China in Iran, the discussion of energy projects and cooperation in the ports selected by the parties in Iran.

In the second appendix, which is the main document of the memorandum of understanding, we see various and numerous fields of cooperation, the most important of which is the field of oil and energy. Based on this, it has been agreed that Iran will be one of the permanent suppliers of oil for China, and even the Chinese government has accepted the issue of building a separate refinery in China for the special formula of Iranian oil.

The next issue is the creation of a rail corridor, which is referred to as a pilgrimage railway. This railway route is between Pakistan, Iran, Iraq and Syria. This issue is mentioned under the title of active participation in the road belt. Another issue is the supply of gas to Pakistan and China using the China-Pakistan corridor. In the past years, Iran was trying to transfer its gas line to India. But due to various reasons, despite the initial agreement, Pakistan stopped this issue under the pressure of other States.

In the second appendix, which is under the title of the main issues of cooperation between Iran and China, the development of the Makran coast in the southwest of Iran and the development of Jask port are mentioned. The establishment of an industrial city in this area or tourist cities is the main subject of agreement between the parties in these islands.

In the field of political cooperation, the parties emphasize cooperation in regional and international assemblies, organizations and institutions. Especially since China has pledged to support Iran's full membership in the Shanghai Security Organization, which was established by China and where Eurasian and Asian States are mainly members and Iran is an observer member.

It seems the second appendix, as the main part of the memorandum, is further divided into several parts: short-term executive measures and long-term measures. In the short term, the interesting point is the discussion of the completion of half-finished projects that China had in Iran and left half-finished due to reasons such as sanctions, for instance, the highway project in northern Tehran or oil projects in the Persian Gulf. Another point is the discussion of establishing a joint commercial company between the two States. In the other part, there is the discussion of supporting Persian and Chinese language and literature teaching chairs in universities, granting mutual government scholarships, and exchanging professors and students. A further issue that is very significant is the discussion of coordination and cooperation between the two States in creating standards for government governance over cyberspace as a concern of both States.

Developments of Joint Comprehensive Plan of Action ("JCPOA" or "Iran nuclear deal") in 2021

In 2021, several developments took place in the field of the JCPOA. First of all, the Biden administration, which had just taken office, started its negotiations with Presidentt Rouhani. These negotiations were conducted indirectly and through other JCPOA parties with the United States at Iran's request. After seven rounds of negotiations in Vienna, a draft agreement was prepared on how the United States would return to the JCPOA and resume Iran's obligations according to the JCPOA. In August of this year, a new president took office in Iran and the JCPOA negotiations were suspended for a while until negotiations resumed in Vienna in November. By the end of this year, the eighth round of negotiations between Iran and the JCPOA parties and the United States was held. During this year, the parties emphasized their previous positions. Iran believed that the negotiations should not be outside the framework of the JCPOA and not include non-JCPOA issues. In addition, Iran wanted the Islamic Revolutionary Guard Corps to be removed from the list of terrorist organizations in the United States. On the other hand, some parties to the JCPOA wanted Iran's unconditional return to the implementation of JCPOA commitments and

the inclusion of some other issues, including activities related to ballistic missiles and Iran's activities in the region, which was met with Iran's opposition. In sum, despite Iran's desire to implement JCPOA commitments and the United States' intention to return to the JCPOA during 2021, the necessary agreement did not reach in light of conflicting views of Iran and the United States. During this period, Iran was focused on increasing the level of enrichment and new centrifuges, and the United States was also focused on imposing new sanctions against Iran. Several meetings were also held between the officials of the International Atomic Energy Agency and the Atomic Energy Organization of Iran regarding some uncertainties, including the increase of Iran's enrichment plan, and the Agency claimed in its reports of this year to find traces of radioactive materials in some places in Iran.

Abdollah Abedini

International Court of Justice ('ICJ' or 'Court')

Settlement of Disputes

Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (*Islamic Republic of Iran v. United States of America*)

Judgment on Preliminary Objections, 3 February 2021

On 3 February 2021, the ICJ delivered its judgment on the preliminary objections raised by the United States.

On 16 July 2018, Iran filed before the ICJ an Application against the United States regarding alleged violations of the Treaty of Amity, Commerce and Consular Rights of 1955 concluded between the US and Iran. In this case, the Court's jurisdiction was based on the compromissory clause contained in Article XXI(2) of the Treaty of Amity. The United States raised a number of preliminary objections.

Iran had claimed that the sanctions adopted by the United States against the former were contrary to various provisions of the Treaty of Amity. Therefore, the United States, according to Iran, must have ended the sanctions and stopped threatening to adopt other sanctions. In addition, Iran claimed that the United States must have paid Iran a sum in compensation for the damage caused. Contrariwise, the United States asked the Court to dismiss Iran's claims, because the Court did not have jurisdiction and/or the claims were not admissible.

At the date of filing of the Application, the Treaty of Amity was still in force. Subsequently, however, on 3 October 2018, the United States withdrew from it. The conclusion of the Joint Comprehensive Plan of Action ('JCPOA' other known as 'Iran Nuclear Deal') in 2015, which was endorsed by the Security Council through Resolution 2231 of 2015, resulted in a partial lifting of the sanctions of the United States and of all the EU sanctions stemming from Security Council decisions. In 2018, the United States terminated its participation in the JCPOA.

As to the *rarione materiae* jurisdiction of the Court under Article XXI of the Treaty of Amity, the United States contested that the dispute fell within the material scope of Article XXI(2) of the Treaty of Amity. For the United States, the real subject-matter of the dispute concerned the JCPOA and not the Treaty of Amity. Further, it claimed that the measures challenged by Iran related primarily to trade and transactions between Iran and third parties, not between Iran and the United States. (Paras. 39–41)

The first preliminary objection was as to whether the subject-matter of the dispute was the JCPOA or the Treaty of Amity. While Iran had formulated its claims under the Treaty of Amity, the United States disputed that its measures were contrary to it. Instead, according to the United States, 'by its Application, Iran, in fact, seeks the restoration of the sanctions relief provided by the United States when it was a participant in the JCPOA. The dispute thus exclusively pertains to the United States' decisions relating to the JCPOA.' (Para. 42) On the contrary, Iran argued that the subject-matter of the dispute that it had submitted to the Court was indeed the interpretation and application of the Treaty of Amity and that the dispute thus fell squarely within the scope of the Treaty of Amity's compromissory clause. In this respect, the ICJ determined that it was true that the dispute had arisen in a particular political context – i.e., that of the United States' decision to withdraw from the JCPOA – but this fact 'does not in itself preclude the dispute from relating to the interpretation or application of the Treaty of Amity.' (Para. 56) Therefore, the Court rejected the first preliminary objection to jurisdiction raised by the United States.

The second preliminary objection concerned the so-called 'third country measures.' This objection affected some, but not all, United States measures. The United States claimed that the vast majority of Iran's claims related to measures that 'principally concern trade or transactions between Iran and third countries, or between their nationals and companies.' (Para. 61) According to the United States, 'the Treaty of Amity is applicable only to trade between the two States parties, or their nationals and companies, and not to trade between one of them and a third country, or their nationals and companies.' (Ibid) On the other side, challenging the concept of 'third country measures' underlying

the United States' second preliminary objection, Iran argued that this concept is misleading, 'since in reality all the United States' measures at issue, in this case, are specifically targeted at Iran and Iranian nationals and companies, not at third States or their nationals and companies.' (Para. 70) For the Court, deciding on the scope of the Treaty of Amity required consideration of each provision, which meant that this second objection could not be upheld at this stage, because it brought into play elements of fact and law 'which are properly a matter for the merits.' (Para. 82) In addition, the Court observed that the 'third country measures' objection did not concern all, but only the majority of, Iran's claims. It followed that 'even if the Court were to uphold the second objection to jurisdiction – and assuming that it does not accept any of the other preliminary objections, each of which concerns all of Iran's claims – the proceedings would not be terminated.' (Para. 77) Therefore, the Court dismissed the second objection of the United States as a preliminary one.

Against this background, the Court concluded that it had jurisdiction *ratione materiae* to entertain Iran's Application based on Article XXI(2) of the Treaty of Amity.

As to the admissibility of Iran's Application, the United States raised arguments of 'abuse of process' and 'judicial propriety' (*opportunité judiciaire*). Thus, the United States contended that through these proceedings, Iran was seeking to obtain an 'illegitimate advantage' in respect of its nuclear activities and aimed to bring 'political and psychological pressure on the United States.' (Para. 87) Iran, on the other hand, argued that it was normal that a dispute brought under a treaty had political implications. Responding to the United States' contention that Iran would obtain an 'illegitimate advantage' if the Court were to pronounce in its favour, Iran recalled that in other cases, the Court had already considered similar contentions and concluded that the relevant circumstances did not constitute an abuse of process. Iran, moreover, argued that asserting its rights under a treaty could not be illegitimate. In this regard, the Court specified that only 'exceptional circumstances' can establish an abuse of process, and here, there was no illegitimate advantage for Iran. In fact, the Court's findings would simply be based on treaty provisions falling within its jurisdiction. Nor are there any exceptional circumstances. Furthermore, the ICJ determined that the political motives for the Applicant's action are beyond the jurisdiction of the Court: 'the fact that Iran only challenged the consistency with the Treaty of Amity of the measures that had been lifted in conjunction with the JCPOA and then reinstated in May 2018, without discussing other measures affecting Iran and its nationals or companies, may reflect a policy decision. However, … the Court's judgment "cannot concern itself with the political motivation which may lead a State at a particular

time, or in particular circumstances, to choose judicial settlement."' (Para. 95) This admissibility objection of the United States was therefore rejected by the Court.

Finally, the United States submitted objections on the basis of Article XX(1)(b) and (d) of the Treaty of Amity – substantial exceptions granted in the Treaty of Amity with respect to 'fissionable materials' and 'essential security interests.' Article XX(1)(b) and (d) of the Treaty of Amity reads as follows:

> 1. The present Treaty shall not preclude the application of measures:
> ...
> (b) relating to fissionable materials, the radio-active by-products thereof, or the sources thereof;
> ...
> (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

According to the United States, these questions could be dealt with at the preliminary stage, since they had 'exclusively preliminary character.' Moreover, according to the United States, these objections came under a third category of objections under Article 79 (now Article 79*bis*) of the Rules of Court, linked neither to jurisdiction nor to admissibility. However, according to the Court, these substantial exceptions, contained in the Treaty of Amity, did not restrict its jurisdiction but were part of a defence on the merits. In other words, these are not preliminary questions but questions on the merits. Therefore, the Court rejected the preliminary objections raised by the United States based on these provisions.

In light of the above, the Court unanimously rejected most of the preliminary objections of the United States, and fifteen votes to one (with the single dissent of the United States *ad hoc* Judge, Charles Brower) rejected the rest. Judge Tomka appended a Declaration, and *ad hoc* Judge Brower appended a Separate (partly concurring, partly dissenting) opinion to the Judgment.

Order for Fixing Time-Limit: Counter-Memorial of the United States, 3 February 2021

By its Order of 3 February 2021, founding that it had jurisdiction to entertain Iran's Application, and that the Application was admissible, the Court fixed 20 September 2021 as the time-limit for the filing of the Counter-Memorial of the United States.

Order for Extension of Time-Limit: Counter-Memorial of the United States, 21 July 2021
By its Order of 21 July 2021, taking into account the views of the Parties, the Court extended to 22 November 2021 the time-limit for the filing of the Counter-Memorial of the United States.

Certain Iranian Assets (*Islamic Republic of Iran v. United States of America*)

– *Rejoinder of the United States of America, 17 May 2021*
On 17 May 2021, in response to the Reply of Iran dated 17 August 2020, the United States submitted its Rejoinder.

Vahid Rezadoost

Iran-United States Claims Tribunal ("Tribunal" or "IUSCT")

Submission of Brief on the Algiers Declarations Claims by Iran, 15 and 17 January 2021
In Case No. B/1 (Claims 2&3), pursuant to the Tribunal's Order of 17 September 2020, Iran (Claimant) filed its written submission on the Algiers Declarations Claims against the United States (Respondent). In accordance with the Tribunal's current practice, Iran filed an original copy and 24 copies of its submission as well as one digital copy of the entire submission. In addition, it filed the Persian version of the general and individual briefs as well as an expert report. Iran also declared that it intended to submit the translation of the appendixes to the expert report within the next two weeks. Thus, on 27 January 2021, Iran submitted the appendixes.

Tribunal's Order on Iran's Request for the Enforcement of Award No. 604 by the United States, 25 June 2021
As noted in Iran State practice of 2020, on 10 March 2020, the Tribunal rendered Award No. 604-A15(II:A)/A26(IV)/B43-FT ('Award'), in which it upheld a number of claims asserted by Iran against the United States and dismissed others, and subsequently, on 27 November 2020, the Tribunal issued a Correction to the Award ('Correction to the Award').

In the corrected award – which will hereinafter be referred to as 'Award No. 604' – the Tribunal held that the United States was obligated to pay Iran

the total sum of USD 29,101,538.65, plus interest, on several Iran's claims. In addition, on two further claims, the Tribunal directed the United States to arrange for the transfer of certain items to Iran within four months of the date of Award No. 604, and if the items were not transferred to Iran within that time period, the Tribunal awarded further sums, plus interest, to Iran.

Under Article 32(2) of the Tribunal's Rules of Procedure, the awards shall be 'final and binding on the parties' and the parties 'undertake to carry out the award without delay.' On the date of issuance of the Order on 25 June 2021, according to the Tribunal, it was 'uncontested that, to date, the United States has not carried out any part of Award No. 604.' (Para. 2)

On 21 May 2021, Iran requested the Tribunal to 'take appropriate action so that the United States enforces the Award promptly and unconditionally.' Furthermore, Iran contended that in response to Iran's requests to enforce Award No. 604, 'the United States made two proposals to Iran concerning Award No. 604, neither of which involved paying the amounts awarded directly to Iran, and both of which Iran rejected.' By contrast, on 28 May 2021, the United States claimed that Iran's request was 'unfounded' and, in particular, disregarded the Tribunal's presumption, articulated in the past, that the Parties will comply with their obligations under the Algiers Declarations. Moreover, by declaring that it 'has acknowledged its obligation under the Algiers Declarations with respect to [Award No. 604]'; and just over one year has passed since the issuance of Award No. 604, and only six months since the Tribunal's Correction to the Award, the United States submitted that there was no basis for the Tribunal to act on Iran's Request. On 7 and 17 June 2021, respectively, Iran and the United States further commented on each other's statements.

On 25 June 2021, the IUSCT issued an Order, declaring that Award No. 604 is a 'final and binding' award and must be carried out 'without delay.' Relying on its previous precedent, the Tribunal held that '[r]ecourse to this Tribunal implies the undertaking to respect its awards.' (Para. 8) In addition, relying again on its previous case law, the Tribunal found that unless otherwise agreed by the Parties, 'payments due under an award must be made directly to the party in favor of which the award has been made.' (Ibid) Finally, the Tribunal noted that the United States acknowledged its obligation under the Algiers Declarations with respect to Award No. 604, and that it has assured the Tribunal that it 'takes this matter seriously' and 'is actively working on it.' According to these acknowledgements and assurances, the Tribunal did not find any reason to assume that the United States would not carry out Award No. 604 and expected that the United States would act in conformity with its obligations under the Algiers Declarations and the Tribunal Rules.

Tribunal' Order regarding the Hearing on the Algiers Declarations Claims, 11 November 2021

In Case No. B/1 (Claims 2&3), by this Order, having carefully considered the proposals of Iran and the United States, and having regard to the fact that at any stage of the proceedings, each Party be given a full opportunity of presenting its case, the Tribunal determined that the Hearing on the Algiers Declarations Claims would take place over seven days, namely, on 28 February–4 March and 7–8 March 2022.

Vahid Rezadoost

Enforcement of International & Foreign Awards

Crescent v. National Iranian Oil Company*, Partial Award on Merits, PCA Case No. 2009–20, 27 September 2021*

In this case, the Claimants are Crescent Petroleum Company International Limited ("Crescent Petroleum"), a company incorporated under the laws of Bermuda, and Crescent Gas Corporation Limited ("Crescent Gas"), a company incorporated under the laws of the British Virgin Islands. Crescent Gas is Crescent Petroleum's wholly-owned subsidiary. These two are collectively referred to as "Crescent" or "Claimants." The Respondent is the National Iranian Oil Company ("NIOC"), a state-owned oil company owned by Iran, through its Ministry of Petroleum.

The dispute between the Parties arose under a Gas Sales and Purchase Contract concluded by NIOC and Crescent Petroleum in 2001, as amended ("GSPC" or "Contract") several times throughout 2001 and 2004. Under the GSPC, NIOC agreed to supply and sell to Crescent Petroleum, and in turn, Crescent Petroleum agreed to purchase from NIOC, specified quantities of natural gas, at the price and on the terms and conditions there provided, for a period of 25 years, commencing on 1 December 2005 ("Commencement Date"). Crescent claimed that, in breach of the GSPC, NIOC failed to deliver gas on 1 December 2005 or at any time thereafter up until 11 September 2018, on which date Crescent allegedly terminated the GSPC. On 26 July 2003, pursuant to Article 16 of the GSPC, Crescent Petroleum assigned its rights and obligations under the GSPC to Crescent Gas before the first delivery of gas was due.

As for the arbitration agreement, Article 22 of the GSPC provides:

> 22.1 Governing Law
> This Contract shall be governed by and interpreted in accordance with the Laws of Islamic Republic of Iran.

> 22.2 Arbitration
> The Parties shall use all reasonable efforts to settle amicably within 60 days, through negotiations, any dispute arising out of or in connection with this Contract or the breach, termination or invalidity thereof. Any dispute, controversy or claim arising out of or in relation to this Contract, or the breach, termination or validity or invalidity thereof shall be finally settled by arbitration before three arbitrators, in accordance with a "Procedures for Arbitration" (attached hereto as Annex 2) which will survive the termination or suspension of this Contract. Any award of the arbitrators shall be final and binding upon the Parties. Either Party may seek execution of the award in any court having jurisdiction over the Party against whom execution is sought.

The Award was rendered by an *ad hoc* arbitral tribunal (the "Tribunal") seated in London, United Kingdom. In the light of the Award on Jurisdiction and Liability of 31 July 2014, the Tribunal determined that:

A. NIOC is liable to pay damages to Crescent Gas for NIOC's breaches of the Gas Sales and Purchase Contract of 25 April 2001 ("GSPC") up to 31 July 2014.
B. NIOC pay to Crescent Gas, within three (3) months of the date of this Partial Award.
C. NIOC pay to Crescent Gas post-award interest on the amount referred to in B. at the rate of 12 month EIBOR + 1 percentage point, compounding annually, commencing from three (3) months from the date of this Partial Award until date of payment.
D. The Claimants' claim for pre-award interest is dismissed.
E. (1) The Claimants' claim for declarations of indemnity in respect of liability to end-users and to CNGC in respect of its liability to end-users and service providers is deferred for further consideration.
   (2) The Parties may apply for directions in respect of the matter referred to in E. (1) within three (3) months of the date of this Partial Award.
F. (1) The Tribunal reserves for subsequent determination all questions concerning costs fees and expenses, including the Parties' costs of legal representation.
   (2) The Claimants are directed to file, within eight (8) weeks of the date of this Partial Award, any submissions they wish to make on the matters referred to in F.(l) except as to quantum.

(3) The Respondent is directed to file, within a further eight (8) weeks, any submissions it wishes to make on the matters referred to in F.(l) except as to quantum.

G. The Tribunal reserves jurisdiction in respect of the matters referred to in E. and F. above.

H. The Respondent's claims for relief, save insofar as they relate to the matter of declarations of indemnity and questions of costs, are dismissed.

It is worth mentioning that this Award was originally confidential, but subsequently it became public: A duly certified copy of the Award was attached as an exhibit (Exhibit A) to a Declaration in *Crescent Petroleum and Crescent Gas* (*Petitioners*) *v.* NIOC (*Respondent*), United States District Court, District of Columbia, 16 May 2022 for the enforcement of the Award in the United States under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

Vahid Rezadoost

Judgment of the Court (Grand Chamber), C-124/20, Bank Melli Iran v Telekom Deutschland GmbH, Request for a Preliminary Ruling from the Hanseatisches Oberlandesgericht Hamburg, 21 December 2021

On 21 December 2021, the Court of Justice of the European Union ("CJEU") ruled for the first time on the interpretation of the Regulation (EC) No. 2271/96 (the "Blocking Regulation"). The EU Blocking Regulation prohibits EU persons and companies from complying with specific sanction programs listed in its Annex unless an authorization to be exempt from that prohibition has been obtained. As enacted in 1996, the Annex to the Blocking Regulation contained certain pieces of US legislation concerning sanctions against Cuba, Libya and Iran, namely the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (the "Helms – Burton Act") and the Iran and Libya Sanctions Act of 1996 (the "D'Amato Act"). Following the US's departure from the Joint Comprehensive Plan of Action ("JCPOA") on 8 May 2018, the US declared its intention to reintroduce nuclear-related economic sanctions on Iran.

On 6 June 2018, the European Commission adopted the Commission Delegated Regulation (EU) 2018/1100 (the "Delegated Regulation"), amending the Blocking Regulation with effect from 7 August 2018. Through this amendment, the Annex to the Blocking Regulation was updated to include the Iran Freedom and Counter-Proliferation Act of 2012, the National Defense Authorization Act for Fiscal Year 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012 and the Iranian Transactions and Sanctions Regulations (ITSR) (31 CFR Part 560).

A key provision of the Blocking Regulation is Article 5, which expressly prohibits persons covered by the Blocking Regulation under Article 11 ("Covered Persons") from complying with any requirement or prohibition based on the foreign laws specified in the Annex. This mechanism is in particular relevant for US secondary sanctions, which are retaliatory measures against persons with no jurisdictional nexus to the US insofar as they conduct transactions with certain entities and individuals listed by the US.

The request for a preliminary ruling in this case arose from a main proceeding between the German branch of the Bank Melli Iran (an Iranian bank owned by the Iranian state) and Telekom Deutschland GmbH (a subsidiary of Deutsche Telekom AG). Based on a framework contract, Telekom GmbH provided Bank Melli with several telecommunications services, which were essential to the internal and external communication of the bank in Germany. Following the reintroduction of nuclear-related economic sanctions by the US against Iran, a prohibition was introduced by the US which extended to non-US persons trading, outside the territory of the United States, with any person or entity included in the Specially Designated Nationals and Blocked Persons List ("the SDN list"). Bank Melli was listed on the SDN list. On 16 November 2018, Telekom notified Bank Melli of the termination of all of the contracts between them, with immediate effect. The termination notice did not provide any express reasons and did not include any authorization from the European Commission.

Bank Melli challenged the termination of the contracts before the Landgericht Hamburg (Regional Court, Hamburg). The court held that the ordinary termination by Telekom of the contracts was effective. Bank Melli appealed against the judgment before the Hanseatic Higher Regional Court ("the referring court") arguing that the notice of ordinary termination was in breach of Article 5(1) of the Blocking Regulation and therefore ineffective. In response, Telekom submitted that Article 5(1) does not deprive a party of its commercial freedom to lawfully terminate a contract. The referring court stayed the proceedings and asked the CJEU four questions on the interpretation of Article 5(1) of the Blocking Regulation. On 12 May 2021, Advocate General Gerard Hogan delivered his Opinion in the case. The Advocate General Opinions provide influential, albeit non-binding, guidance to the CJEU on making its judgments. On 21 December 2021, the CJEU gave preliminary rulings to all four questions referred to it:

> Question 1: Does the first paragraph of Article 5 of Regulation No. 2271/96 only apply where the United States issues an administrative or judicial order directly or indirectly against an EU economic operator, within the meaning of Article 11 of that regulation, or does it suffice for that article to

> apply that the action of the EU economic operator seeks to comply with secondary sanctions, even in the absence of such an order?

Relying on the wording of Article 5(1) and the objectives of the Blocking Regulation, the CJEU concluded that the prohibition in the said Article applies to Covered Persons even in the absence of an order directing compliance issued by the administrative or judicial authorities of the state imposing secondary sanctions.

> Question 2: If the answer to the first question is that the second alternative applies, does the first paragraph of Article 5 of Regulation No. 2271/96 preclude the interpretation of national law as meaning that the party giving notice of termination may terminate any continuing obligation with a contracting party included in [the SDN list] held by the US Office of Foreign Assets Control, and thus announce a termination owing to wishing to comply with sanctions [imposed by the United States …] – without having to show and prove in civil proceedings that the reason for termination was not in any event a wish to comply with those sanctions?

While acknowledging that the party claiming the nullity of a legal act due to an infringement bears the burden of proving the infringement, the CJEU noted that the application of such a general rule relating to the burden of proof can undermine the effectiveness of the prohibition contained in Article 5(1). Evidence showing that a termination has been motivated by an intention to comply with secondary sanctions is typically not available. Therefore, in an attempt to strike a balance between the effectiveness of the Blocking Regulation and the EU operators' contractual freedom, the CJEU concluded that where all the evidence in civil proceedings before a national court "*tends to indicate prima facie*" that a party terminated the contract in order to comply with the relevant secondary sanctions, the burden of proof shifts to that party to prove otherwise.

> Question 3: If the second question is answered in the affirmative, must ordinary termination in breach of the first paragraph of Article 5 of Regulation No. 2271/96 necessarily be regarded as ineffective or can the purpose of the regulation be satisfied through other penalties, such as a fine?

> Question 4: If the answer to the third question is that the first alternative applies, having regard to Articles 16 and 52 of [the Charter], on the

> one hand, and the possibility of granting an exemption under the second paragraph of Article 5 of Regulation No. 2271/96, on the other, does that apply even where maintaining the business relationship with the listed contracting party would expose the EU operator to considerable economic losses on the US market (in this case: 50% of group turnover)?

The CJEU examined the third and fourth questions together. It first noted that the provisions of EU law must be interpreted in the light of fundamental rights enshrined in the EU Charter. Recognizing the freedom to conduct a business as a right guaranteed in Article 16 of the Charter, the court clarified that this right is not an "absolute prerogative." It concluded that national courts should in principle have the power to annul a contractual termination, which has been in breach of the prohibition laid down in Article 5(1) of the Blocking Regulation. Nevertheless, national courts are required to carry out a proportionality assessment before annulling a contractual termination. Therefore, it is for the referring court to determine whether annulling the contractual termination would be justified in light of balancing the proportionality on the freedom to conduct business for Telekom with the objectives of the EU Blocking Regulation as well as the possible disproportionate effects of the annulment on Telekom.

Hosna Sheikhattar

The Impact of US Judicial Decisions against the Iranian Entities' Assets in Luxembourg, Judgment No. 2021TALCH02/00649 of 30 April 2021, the District Court of Luxembourg

Following a number of US regulations, in particular, US law S.1790 titled the "National Defense Authorization Act for Fiscal Year 2020" of 20 December 2019, the US courts ordered the transfer of certain Iranian entity assets to the US, including those of the Central Bank of the Islamic Republic of Iran. In this context, the Central Bank requested the Luxembourg Court to rule that the respondent cannot give effect to any order, judgment, or decision issued by an American court on the territory of Luxembourg.

According to the Central Bank, the requested judicial declaration would be useful in establishing that if the respondent complies with US law and its judicial decisions, then it would violate, *inter alia*, the public order of Luxembourg in terms of the immunity from jurisdiction and execution; and, the pre-eminence of Luxembourg Courts on the enforcement of foreign decisions. The respondent contended that under Luxembourg law, banks are not required to obtain an exequatur in order to transfer assets for the execution of

a foreign judgment unless a coercive action by Luxembourgish police officers is needed for such an execution. The respondent further maintained that failing to comply with US decisions would lead to civil and criminal sanctions against it, including the possible seizure of assets it holds in the US on behalf of its clients.

The District Court of Luxembourg first found that, according to national laws, the exequatur is needed for acts of execution on property or coercion on people. The Court continued that the respondent's analysis of the effect of American enforcement decisions on assets held in Luxembourg is incorrect. According to the Court, the means of coercion of foreign jurisdictions cannot replace the jurisdiction of Luxembourg courts. Addressing the respondent's claim that it would face punishment in the US for disobeying the US court's decisions, the Luxembourg Courts held that such sanctions do not currently exist and that it is also not excluded, that the US court take into account this Luxembourg's decision and refrain from sanctioning the respondent in the future.

The Court concluded that the respondent would not be able to comply with any order, judgment or decision made, based directly or indirectly on US law S.1790 titled the "National Defense Authorization Act for Fiscal Year 2020" of 20 December 2019, or other relevant laws. Therefore, it cannot proceed with the transfer of the assets held in its account in Luxembourg prior to any exequatur decision by the Grand Duchy of Luxembourg. The Court also imposed a penalty payment of EUR 10,000,000 on the respondent for each act that contravenes the ban imposed on it.

Nasim Zargarinejad

Construction of the Kamal Khan Dam on the Hirmand (Helmand) River

International Environmental Law

Hirmand River is an important transboundary water resource shared by Iran and Afghanistan. This river originates from Hindu Kush mountains in Afghanistan which after crossing the Sistan plain, flows into Hamoun Lake. This lake consists of three wetlands: Pouzak wetland, Sabari wetland, and Helmand wetland. In addition to their environmental value, these wetlands are also economically and socially important for Iran and Afghanistan and

are registered in the list of Wetlands of International Importance under the Ramsar Convention (1971).

The Kamal Khan dam constructed over the Hirmand River is part of Afghanistan's water management projects through which it emphasizes the absolute territorial sovereignty doctrine in the non-navigational uses of transboundary watercourses and seeks to control water resources that leave its territory and promote its political positions.

The construction process of Kamal Khan dam was finished in 2021. This dam can store 52 million cubic meters of the Hirmand River water and divert its overflow to Gowd-I Zerrah (Zerrah depression). Therefore, according to environmental experts, water intake in this dam has caused the drying up the Hamoun lake, dust storms in the Sistan region of Iran and disruption of the supply of drinking water to the residents of this area. Pursuant to the 1973 Hirmand River Water Treaty, Afghanistan is obliged to provide Iran with 820 million cubic meters of water annually. Furthermore, in accordance with Article V of this Treaty, Afghanistan shall take no action to deprive Iran, totally and partially, of its water right to the water of the Hirmand River.

Accordingly, the construction of the Kamal Khan dam and diversion of the flow of the Hirmand River by Afghanistan is not only incompatible with its obligations in the 1973 Helmand River Water Treaty but also violates the customary principles of international water law, namely the principle of equitable and reasonable utilization of transboundary waters, the obligation not to cause significant harm, the general obligation to cooperate in water management and the obligation of protection and preservation of international watercourses ecosystems. Moreover, this action contradicts Afghanistan's commitment to cooperate and ensure the enforcement of the right to water and the right to a healthy environment for the basin residents.

Mahnaz Rashidi

Environmental Protection

Amendment of Forest Tree Cutting Fees, 15 March, 2021

The Board of Ministers amended the subject of Article (15) of the Law on the Protection and Exploitation of Forests, Rangelands – approved in 1967 – and its subsequent amendments according to the table attached to the resolution. Due to the significant increase in inflation, the amounts of taxes, including firewood, have been increased and modified.

Protocol on the Protection of Biodiversity, Annexed to FCPMECS, 17 October 2021

Protocol on the Protection of Biodiversity, annexed to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (FCPMECS), was finally approved by the parliament of Iran on 17 October 2021. The Caspian Sea is a unique ecosystem and includes a large number of habitats and species of great national, regional and global importance that need support, protection and restoration, and the need to ensure sustainable and rational use. In this regard, the countries of the Caspian Sea, including Iran, have many commitments in this field. Contracting parties based on their national laws and taking into account Article 9, paragraphs 1 and 2, Article 11, and Article 30 of this additional document and individually or jointly take all appropriate measures to support, protect and restore the marine environment of the Caspian Sea; use the natural reserves of the Caspian Sea in a way that does not cause any damage to the marine environment and biological resources.

Organizing Tourism in the Forests of the North and Northwest of the Country, 31 October 2021

This plan was adopted by the Iranian Board of Ministers, with the priority of developing Makran beaches. The most important goals of this plan include the following:

1. Adoption of integrated management of tourism at trans-departmental and inter-departmental levels.
2. Modifying the structure of laws and regulations in order to facilitate the processes of beach and forest tourism development.
3. Coordination between executive bodies and public and private sector stakeholders.
4. Informing and creating a culture in the field of sustainable tourism development.

Approval of Regulations for Coordination, Prevention and Management of Dust Phenomenon, 30 May 2021

According to the proposal of the Environmental Protection Organization and based on Article 148 of the Constitution, the Board of Ministers approved the rules for dealing with dust storms. Based on these regulations, the National Dust Council was established. This Council aims to make policies, determine strategies, synergize and coordinate between the executive bodies to carry

out the necessary measures at the national and regional level, as well as monitor the executive actions of the bodies in order to reduce the effects and consequences of the dust phenomenon.

Ali Mashhadi

Protection under International and Domestic Law

Human Rights

Directives of the Head of the Judiciary Regarding the Manner of Publishing Court Judgments and Holding Open Courts, 18 May 2021

Iranian laws and regulations, including the Iranian Constitution, the Criminal Procedure Code of Iran ("CPC"), and a by-law issued by the head of the Judiciary on 18 May 2021 ("by-law") recognize the right to an open hearing. To provide a brief overview of this indispensable part of the right to a fair trial in Iran's legal system, three questions need to be addressed. First of all, what does open or public hearing mean? The second question is, what is the legal basis for this? Thirdly, to what extent does Iran's legal system follow such a rule?

The note to Article 352 of the CPC defines a public hearing as one in which the public can attend judicial proceedings without being hindered. When a court is open, people who do not even have a role in the case, such as journalists, can attend. In this regard, according to Article 7 of the by-law, a trial is public "when there are no obstacles to the presence of real persons or journalists and members of the media, considering the capacity of the court."

Under certain exceptions, Principle 165 of the Iranian Constitution recognizes the general and fundamental rule on open hearings in Iranian courts. This principle provides that: "Trials are to be held openly and members of the public may attend without any restriction unless the court determines that an open trial would be detrimental to public morality or order, or if in cases of private disputes, the parties to the dispute request that the trial is held in a closed session."

According to Article 352 of CPC, court hearings are public unless one party requests a closed hearing in cases of "forgivable crimes." In addition, in case of certain family disputes and crimes against decency, and where an open hearing would disturb public safety or religious or ethnic sentiments, the court may issue an order for a closed hearing.

Under Article 6 of the by-law, trials in courts are conducted in public, except in the cases listed in Article 352 of the CPC, where the court orders the trial to be held in closed sessions.

In conclusion, open or public hearings are accepted as a general rule in Iran's legal system, and the circumstances in which a court can rule against it is specified in Article 352 of the CPC. Accordingly, trials by default are open to the public, and closed trials are subject to the decision of the court which is taken under the circumstances specified in this article.

It should be noted that the vague and broadly defined circumstances under which the right to an open hearing is to be applied and judges' wide interpretive powers may affect the sound and full application of such a rule and enjoyment of this right.

Khalil Rouzegari Agbalag

Implementation of Human Rights Treaties – Universal Declaration of Human Rights – The Right to Nationality

Ms. X versus Civil Registration Office (*Case No. 14004739000153801*6), *Appeal Court of Mazandaran Province, 20 May 2021*

Article 976 of the Civil Code of Iran addresses the issue of nationality and specifies the persons who are considered nationals of Iran. One of the most challenging situations in which the issue of nationality is raised is when a child is born to an Iranian mother and a non-Iranian father or a father with unknown nationality. Iranian civil law is silent in this regard, and this has caused problems for children under these circumstances. In the following case, it can be seen that judges of the Mazandaran Court of Appeal tried to prevent statelessness by referring to domestic laws and international legal instruments. In order to protect the identity of the disputing parties, the names will not be mentioned.

In this case, Ms. X, after the birth of her child, referred to the Civil Registry Office of the city of Tonekabon to announce the birth and to request the issuance of a birth certificate. However, due to the fact that the child's father did not have Iranian nationality, the Civil Registry Office refused to issue a birth certificate for the child. Following this, the issue was raised before the Court of First Instance of Tonekabon, and at the first stage, the Court ruled that the Civil Registry Office was required to issue a birth certificate. After the issuance of this judgment, the Civil Registry Office objected to the judgment, and, accordingly, the matter was reviewed by the Mazandaran Court of Appeal.

The judges of the Court of Appeal firstly stated that based on Article 1(a) of the Civil Registration Law enacted in 1976 (amended in 1985), one of the duties of the Civil Registration Office is to register births and issue birth certificates. On the other hand, according to Article 16(1) and (2) of the same Law, this is the responsibility of the father or mother to announce the birth; in the case at hand, after the birth, the child's mother went to the Registry Office to obtain a birth certificate. In addition to the above arguments, the Court of Appeal also cited Article 41 of the Iranian Constitution, according to which: "Nationality of Iran is an inalienable right of every Iranian."

After stating the above-mentioned provisions of the Iranian domestic laws, the Court of Appeal tried to protect the "right to nationality" by relying on international instruments, including treaties. For this purpose, the Court referred to Article 15 of the Universal Declaration of Human Rights of 1948, Article 24(2) and (3) of the International Covenant on Civil and Political Rights of 1966 of the United Nations General Assembly, and Article 7(1) of the Convention on the Rights of the Child of 1989, and Article 5(3)(d) of the Convention on the Elimination of Racial Discrimination of 1965. Accordingly, from these provisions, the Court of Appeal concluded that every person has the right to have a nationality. In addition, it observed that in its General Comment No. 17 of 1990, the UN Human Rights Committee emphasized the immediate action of the registration of birth and nationality and that the government has no right to deprive individuals of the right to nationality in any way.

Finally, in order to prevent the child from becoming stateless and to prevent the violation of the rights enumerated in the three generations of human rights, especially the right to education of the child, the judges upheld the decision of the Court of First Instance and recognized the obligation of the Civil Registry Office to issue a birth certificate for the child.

Mona Karbalaye Amini

Judicial Proceedings into Downing of Ukrainian Airline, Flight 752

International Humanitarian Law

Subsequent to the official statement of the Iran Joint Chief of Staff on 11 January 2020 in regard to the downing of the Ukraine International Airlines (UIA) passenger plane, the Judicial Organization of Armed Forces commenced its investigation that led, on 17 March 2021, in issuing an indictment against 10 officials and acquittal of other suspects. The objection of the families of the

deceased passengers to the decision of acquittal was not successful. The Court proceedings are still ongoing at the military court. The indictment is not publicly available.

Meanwhile, on 30 December 2020, the Cabinet adopted a Decree, which came into force on 5 January 2021, assigning the Iran Ministry of Roads & Urban Development to represent and settle any claims of individuals related to the shooting of the UIA plane with a default compensation fee of 150 thousand dollars for each passenger. A claim of compensation above the mentioned amount requires evidence of proof. The Decree emphasizes that its adoption is without any prejudice to criminal proceedings which will be ongoing or that will be carried out in the future.

Draft Convention on Crime against Humanity

Statement:

- Sixth Committee of the 76th Session of the United Nations General Assembly on "Prevention and Punishment of Crimes against Humanity" (Agenda item 83) New York, 13 October 2021

…
Iran, in continuation of its previous stances, stressed that the definitions of crimes against humanity as reflected in the draft did not derive from universal instruments. It also took the position that no legal lacunae existed on the topic. In this way, Iran raised doubt whether "a new convention would build up a significant development forward except cluttering the *lex lata* in this topic." It further suggested linking this discussion to the work on the principle of universal jurisdiction.

Cyberspace and the Application of IHL

Statement:

- **The "Zero Draft" of the report of the OEWG on developments in the field of information and telecommunication in the context of international security, General comments of the Islamic Republic of Iran, 18 February 2021**

In continuation of its approach, Iran, in its comments on the zero draft of the report of the Open-ended Working Group on Security of and in the Use

of Information and Telecommunications Technologies, reiterated its previous position that "… it should be emphasized that IHL should never and cannot ever be interpreted to apply in any way that gives legitimacy resorting to conflict in any domain, particularly in the field of ICT in the context of international security. Prevention of ICT weaponization in cyberspace is fundamental." In more general terms, the representative of Iran in the First Substantive Session of the Open-ended Working Group on Security of and in the Use of Information and Telecommunications Technologies which was held in New York, on 13 December 2021, stated that "… while the principles of international law as well as the principles and purposes of the UN Charter apply to the ICTs in the context of international security, we believe that the existing international law cannot adequately meet the requirements of cybersecurity such as securing safe cyberspace." In light of this, Iran advocates for adopting a new legally binding instrument "in which the rights and responsibilities of all stakeholders can be defined in a balanced manner."

Katayoun Hosseinnejad

Responses to Threats and Attacks

The Use or Threat of Force

Letters in Reaction to Sabotage Attack against Natanz Fuel Enrichment Plant

Following an interview with the New York Times given by the former Prime Minister of Israel (https://www.nytimes.com/2021/08/24/world/middleeast/israel-bennett-biden-iran.html), Iran submitted a letter to the UNSC stating that: "in his recent interview, the Israeli regime's Prime Minister has confessed, though implicitly, to Israel's covert attacks on Iran's peaceful nuclear programme and brazenly stated that the regime will continue such attacks." (S/2021/758, 27 August 2021) Iran called this kind of threats as a gross violation of international law and Article 2(4) of the UN Charter which "must not be tolerated by the international community and the Security Council." (ibid) Having said that, Iran maintains that it "reserves its inherent right under international law to take all necessary measures to protect and defend its citizens, interests, installations and sovereignty against any terrorist or disruptive acts." (ibid) This letter was sent to the UNSC as a follow-up to the letter Iran sent on 12 April, following an electricity disruption that took place in the Natanz Fuel Enrichment Plant (Shahid Ahmadi Roshan Plant). (A/75/852–S/2021/347,

13 April 2021) Regarding the electricity disruption, Iran called this "deliberate targeting of a highly sensitive safeguarded nuclear facility – with the high risk of potential release of radioactive material" as a war crime and also reckless criminal nuclear terrorism. While "recalling the long record of the Israeli regime in sabotage operations against our peaceful nuclear activities," Iran stressed that it "reserves its right under international law to take all necessary measures to protect and defend its citizens, interests and installations against any terrorist or disruptive acts." (ibid)

Moreover, following the continuous threats made by the Israeli authorities against Iran and its nuclear facilities, in several letters to the UNSC, Iran called these statements a "gross violation of Article 2 (4) of the Charter of the United Nations" and stated that: "we reserve our inherent right to self-defence to decisively respond *to any threat or wrongful act* perpetrated by the Israeli regime." (see: e.g.: S/2021/72, 22 January 2021; S/2021/103, 2 February 2021; S/2021/706, 4 August 2021; S/2021/794, 14 September 2021; S/2021/872, 13 October 2021; S/2021/951, 15 November 2021; and S/2021/1059, 17 December 2021) (emphasis added)

Letters in Reaction to the US Acts and Statements

In the year 2021, Iran continued to complain to the UN Security Council about what it calls "the US military adventurism in the Persian Gulf and Oman Sea." Following some military acts by the US in the region, including the flight of a number of the US long-range strategic bombers over the Persian Gulf, Iran wrote to the UNSC and maintained that: "such military adventurism is in clear contradiction with the purposes and principles of the United Nations and has serious ramifications for regional and international peace and security, the United Nations Security Council is expected to compel the United States to abide by the principles and rules of international law and stop these unlawful measures. Likewise, the international community should demand that the United States put an end to its destabilizing measures in such a volatile region as the Persian Gulf." (S/2020/1326, 4 January 2021) In this letter, Iran has stated that: "[…] while the Islamic Republic of Iran does not seek conflict, our ability and resolute determination to protect our people and to defend our security, sovereignty, territorial integrity and vital interests, as well as to respond decisively to any threat or use of force against Iran, must not be underestimated." (ibid)

The US, on several occasions in its letters to the UNSC (see: e.g. S/2021/202, 3 March 2021 and S/2021/614, 30 June 2021) reported that: "the United States, in the exercise of its inherent right of self-defense, as reflected in Article 51 of the Charter of the United Nations, has undertaken targeted strikes against

facilities at two locations in Syria and one location in Iraq near the Iraq-Syria border" (S/2021/614), The US further stated: "[t]hese facilities were used by *Iran-backed militia groups* that have been involved in a series of unmanned aerial vehicle and rocket attacks against United States personnel and facilities in Iraq." (ibid) (emphasis added)

In Response, Iran repeatedly denied its involvement "directly or indirectly, in any armed attack by any entity or individual against the United States in Iraq and, accordingly, firmly rejects any claim to attribute to Iran, explicitly or implicitly, any attack carried out against American forces in Iraq." (S/2021/257, 15 March 2021; see also: S/2021/623, 6 July 2021) Furthermore, Iran declared that the US is presenting "an extremely arbitrary interpretation of Article 51 of the Charter of the United Nations" (S/2021/257). In the same vein, Iran has contended: "[t]he argument of the United States that such attacks were conducted to 'deter' the Islamic Republic of Iran and the so-called 'Iran-backed militia groups' from conducting or supporting further attacks on United States personnel or facilities has no factual or legal ground, as it is founded on mere fabrication as well as arbitrary interpretation of Article 51 of the Charter of the United Nations. The attacks by the United States are conducted in flagrant violation of international law, particularly Article 2 (4) of the Charter." (S/2021/623)

Pouria Askari

Enlisting Certain American State Officials by Iran's Ministry of Foreign Affairs, 19 January 2021

On 19 January 2021,Iran's spokesperson of the Ministry of Foreign Affairs stated that the Ministry in implementing the Act "Countering Human Rights Violations, Adventurous, and Terrorist Actions of America in the Region," adopted by the parliament of Iran, sanctioned a number of American individuals for committing terrorist crimes, which is a serious threat to regional and international peace and security, and because of the violation of fundamental rules and fundamental principles of international law, including human rights, was included in the sanctions list of the Islamic Republic of Iran. Some of these persons are former US President Donald Trump, former Secretary of Defense, State, Treasury and CIA.

These individuals have been sanctioned for reasons such as "issuing orders and leading the assassination operation of General Qasem Soleimani and his companions, organizing and supporting terrorist acts against the Islamic Republic of Iran, creating, financing, providing weapons and training to terrorist groups, all-round support for the repressions of the Zionist regime

against the Palestinian people, especially the terrorist actions of this regime in the assassination of the scientist Mohsen Fakhrizadeh, the implementation of cruel, illegal and unilateral sanctions against the Islamic Republic of Iran and the Iranian people, and the deliberate action to impose special living conditions on Iranians, including, by preventing access to provide food, medicine, services and medical equipment, support for repressive regimes in the region and support for crimes against humanity and war crimes of the aforementioned regimes in Yemen, active and all-round communication with the terrorist group of the hypocrites and political, propaganda and cultural support for this group, which have committed numerous terrorist acts against the interests of the government and citizens of the Islamic Republic of Iran."

The spokesperson of the Ministry of Foreign Affairs also expressed that according to international legal principles, the imposition of unilateral sanctions is a blatant violation of the fundamental principles of international law incorporated into the United Nations Charter and contrary to international rules, including international humanitarian law and human rights law. Based on this, Iran reserves its right to take the necessary measures to counter US international violations in all fields.

Abdollah Abedini

State Practice of Asian Countries in International Law

Japan

*Kanami Ishibashi**

Protection under International and Domestic Law

Human Rights

Unconstitutional Deportation – Case in Which the Right to a Trial Was Found to Have Been Violated; Tokyo High Court, 22 September 2021

The appellants, who are nationals of Sri Lanka, remained in Japan beyond their period of stay, and after receiving a disposition of non-recognition of refugee status, they were issued deportation orders on the grounds that they were illegally staying in Japan. Thereafter, the appellants filed objections to the disposition of non-recognition of refugee status. However, the day after they were notified of the decision to dismiss the objections, the deportation orders were executed, and they were deported to Sri Lanka by way of collective repatriation.

The appellants sought state redress on the grounds that they did not have enough time to file suits for revocation of the decision not to grant refugee status, and that their right to a trial under Article 32 of the Constitution had been violated.

The first trial court (Tokyo District Court, 27 February 2020) dismissed the appellants' claim on the grounds that the government did not violate Article 32 of the Constitution.

The court of appeals affirmed the appellant's claim as follows: A deportee can file a revocation action even before the decision on the appeal against the disposition of non-recognition of refugee status is made. In addition, by obtaining a court decision to suspend the execution of the deportation order based on a petition in conjunction with the filing of a revocation action, it is possible for a deportee to suspend the execution of the deportation order and seek judicial remedies for repatriation.

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It is also stipulated that the period for filing a revocation action begins to run from the date the parties are informed of the decision. This means that a revocation action can be filed even after a decision to dismiss an objection to a disposition of non-recognition of refugee status has been made.

The instruction system under Article 46 of the Administrative Case Litigation Law, introduced by the 2004 amendment, requires the administrative agency to provide the party against whom the disposition was made with appropriate information regarding the filing of the revocation action, such as the defendant and the time limit for filing the action. This system was established with the aim of effectively guaranteeing the opportunity for judicial review.

Additionally, the respondent (the government) is required by the Guidelines for the Handling of Refugee Appeals to promptly notify the deportee of the outcome of the appeal, including the decision to dismiss the appeal.

The purpose of these requirements is to ensure that deportees have time to decide whether to file a lawsuit or return to their country of nationality.

In light of the provisions and purposes of these laws and regulations (including the handling guidelines), it should be said that even if the provision of Article 52, paragraph 3 of the Immigration Control Act that deportees should be promptly sent back to their countries exists, it is unacceptable to deprive a deportee of an opportunity to undergo judicial review regarding his/her eligibility for refugee status.

Although the appellants had appeared at the Tokyo Regional Immigration Bureau for the procedure for renewal of the provisional release permit, they were not notified of the decision to dismiss the objection at that time. The government notified the appellants only after more than 40 days since the decisions were made. The government dared to delay the notification of the decisions to dismiss the objections until just before the repatriation in order to implement the repatriation as scheduled before the appellants filed their lawsuits.

Accordingly, the government has substantially deprived the appellants of the opportunity to have a judicial review of their status as refugees.

The government has violated the appellants' right to a trial as guaranteed in Article 32 of the Constitution and has violated Article 31 (guarantee of due process) and Article 13, which is linked to Article 31.

The government accepted the Tokyo High Court ruling and did not appeal to the Supreme Court.

Wishma Case: Serious Problems with Japan's Immigration Law Exposed

The death of a Sri Lankan woman in an immigration facility in March 2021 exposed a major problem in Japan's immigration system, and this issue continues to be addressed today.

On 4 March 2022, Wishma's mother and her two sisters filed a lawsuit in the Nagoya District Court against the government, claiming that Wishma died because the government continued to illegally detain her and failed to provide her with necessary medical care and seeking approximately 156 million yen in damages. The history of the case based on the complaint is provided below. It should be noted that this background is based on the complaint.

According to the complaint, the events leading up to the death are alleged to include (1) repeated requests for hospitalization and intravenous fluids, which were not complied with, (2) derogatory words made to Wishma.

The derogatory words included (a) "milk out your nose" for not being able to drink the beverage properly and having to take it out; (b) when she was not clear about what she was saying, the staff asked, "Are you high on drugs?"; and (c) When she said "Alo," a staff member said, "Alon alfa?" (glue), which is inappropriate in the context.

Rathnayake Liyanage Wishma Sandamali was born on 5 December 1987, in Sri Lanka, and she is the eldest daughter of Suryalatha and her husband (who died in 2013). She arrived in Japan on 29 June 2017 and began attending a Japanese language school in Chiba Prefecture but stopped attending after May 2018. Since April 2018, she has been living in Shizuoka Prefecture with her ex-boyfriend, but with the expiration date of her stay (29 September 2018) approaching, she and her ex-boyfriend applied for refugee status on 21 April 2018.

The reason for the application was that her ex-boyfriend had "gotten into trouble with an underground organization in Sri Lanka" and had threatened her. In accordance with the application for refugee status, the change of status to "Designated Activities" was approved, but on 22 January 2019, the application for permission to extend the period of stay was denied, and she lost her status of residence. On the same day, she withdrew her application for refugee status.

On 19 August 2020, she reported to a police box stating that she had no relatives in Japan. On the same day, she was arrested for violation of the Immigration Control Act, and on the following day, she was handed over to the Nagoya Immigration Bureau and detained under a detention order.

At that time, she stated that she wanted to return to Sri Lanka because her boyfriend had kicked her out of their house, and she had nowhere else to go and no job.

She had 1,350 yen in her pocket at the time.

On 20 August 2020, when her detention at the Nagoya Immigration Office began, she was in good health.

(1) Situation in January 2021

On 4 January 2021, she filed her first application for permission for provisional release. The reason for the application was: "I was being violated by my Sri Lankan boyfriend. The boyfriend sent a letter to me at the immigration office. In the letter, he wrote that he would find me in Sri Lanka and punish me. He also wrote that his family was waiting for me to take revenge. I am very worried that if I stay at the immigration office, I will receive another letter from him, and he will threaten me." A letter from her former boyfriend was also submitted as evidence. In the case of provisional release, her supporters offered to accept Ms. Wishma into their home as an underwriter.

However, the provisional release was not granted, and Wishma's health deteriorated, and she began to suffer from nausea, reflux of gastric juices, and other symptoms.

On 22 January 2021, her weight decreased from 84.9 kilograms at the beginning of her stay to 72 kilograms, a decrease of 12.9 kilograms.

From 22 January to 26 January 26, she underwent an electrocardiogram, blood tests, X-rays, and urinalysis.

On 28 January, she vomited blood in her vomit and told the staff, "Take me to the outside hospital right now. The doctor today is not listening to me. I can't go to the hospital even though I've gotten so sick. Do you want me to die?" On 29 January, a supporter who visited her made a request that she be taken to an outside hospital.

On 31 January, Nagoya immigration officials moved her to a single room, where she remained until her death.

(2) Situation in February 2021

By 3 February at the latest, she was unable to walk on her own and began to use a wheelchair. On 5 February, she was examined by an internist at an outside hospital. The doctor wrote in his medical report, "If she cannot take her medication internally, then she will be admitted to the hospital with an intravenous infusion." However, she was neither given an intravenous drip nor hospitalization.

On 8 February, the Nagoya Immigration Office explained to the supporter that, in relation to the medical examination at an outside hospital on 5 February, the doctor took the patient back to the immigration office without administering an intravenous drip because the drip would take a long time and would result in the same condition as hospitalization. The supporter requested that she be hospitalized and given an intravenous drip.

On 10 February, the supporter again requested that she be hospitalized and given an intravenous drip, but Nagoya Regional Immigration Bureau responded that she was fine because she was being given an oral rehydration solution, and that they would respond if her fever persisted. On the same day, the supporter also asked the Nagoya Immigration Office to immediately release her on parole if she was not hospitalized and given an intravenous drip.

On 15 February, "urobilinogen 3+," "ketone body 3+," and "protein 3+" were detected in the urine.

On 16 February, a decision to deny the first application for provisional release was announced. The reasons for the denial were that "granting provisional release would make repatriation more difficult" and "it is necessary to deny provisional release once to make them understand the situation and strongly persuade them to return home."

On the same day, the commissioned orthopedic surgeon recommended that Wishma see a psychiatrist.

On 18 February, another doctor at the Agency's clinic indicated that Ms. Wishma should see a psychiatrist. At that time, she was unable to walk, eat, or go to the toilet on her own, and she needed assistance from staff members to lead her daily life. She repeatedly vomited and complained of physical numbness. She would enter the visiting room with a bucket in case she vomited when visiting with her support person, and in fact, she repeatedly vomited, causing the visit to be canceled or the visit to not take place.

On 22 February, the second application for permission for provisional release was filed. The reason for this application was that he was not feeling well and wanted to go to an outside hospital for treatment.

On 23 February, her weight had dropped to 65.5 kilograms. This was a decrease of 19.4 kilograms from the 84.9 kilograms she weighed at the beginning of her stay. On the same day, she complained of feeling unwell and told the guard, "I'm dying. Take me to the hospital. Please take me to the hospital. I need an IV. Call an ambulance." and other such words, and complained that she wanted to be treated at an outside medical institution and have an intravenous drip given to her.

(3) Situation in March 2021 (Wishma's death)

On 1 March, she complained to the nurse that it was like there was electrical work going on in her head and that her eyes were blurry. When the guard saw that she could not swallow café au lait properly and spurted it out through her nose, he remarked, "It's milk out of my nose."

On 3 March, she complained of pain when a nurse moved her limbs and other parts of her body during rehabilitation. After the visit on the same day, a supporter told the Nagoya Immigration Office, "If you don't do anything, she will die. I want you to hospitalize her immediately and put her on an IV." The staff replied, "The schedule is fixed."

On 4 March, Nagoya Immigration sent her to an outside hospital for a psychiatric examination. The doctor prescribed 100 milligrams of quetiapine and 5 milligrams of nitrapazem (both per tablet), which the guard duty worker had Wishma take.

On 5 March, Wishma was lying on the bed in a limp state, hardly moving her body by herself, and often uttered only "ahh" or "uhhh" when the guards asked her questions. When she said, "Alo …," The guard asked back, "Aron Alpha?" The guard was unable to measure blood pressure or pulse rate.

On 6 March, in the morning, Wishma was unable to express herself clearly when the guard asked her questions and could only say "ah" or something like that. The guard asked Wishma, "Hey, are you high on drugs?"

From around 1:00 PM on the same day, Wishma became almost motionless and did not respond to the guard's calls. The staff requested emergency medical transport at approximately 2:15 PM and attached an AED device and performed cardiac massage. At around 3:25 PM, Wishma was confirmed dead at the hospital, where she was transported.

(4) Investigation report by the Immigration and Immigration Control Agency

On 10 August 2021, the Immigration and Immigration Agency released its investigation report and issued a warning to the director general and then deputy director of the Nagoya Immigration Bureau, and a strict warning to the security supervisor and two others. At a press conference, Minister of Justice Yoko Kamikawa apologized, saying, "If we had constantly reexamined the basics of protecting lives, we could have dealt with the situation in a more accommodating manner."

The report points out inadequate awareness among guard duty workers and staff, an inadequate system for grasping, reviewing, and giving instructions by Nagoya Bureau officials, inadequate personnel structure, and a lack of information sharing and system for medical response on holidays, and describes measures for improvement.

However, the report did not examine whether the detention of Ms. Wishma was in accordance with the Constitution and international human rights law in the first place, and it is necessary to continue to monitor how the problems are identified and improved after 2022.

Abolition of the Immigration Control and Refugee Recognition Act Amendment Bill

The current Immigration Control Act (Immigration Control and Refugee Recognition Act) is a 1982 amendment to the Immigration Control Ordinance (promulgated in 1951), which was also amended in 1990 and 2018.

However, the Immigration Control Act still faces many criticisms today. One of those criticisms is that detention without a time limit and detention without judicial review is a violation of Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

In addition, there are other issues, such as the fact that according to the Immigration and Immigration Control Agency (Immigration Bureau) Security Division, foreigners in detention have died in facilities or while on provisional release. Since 2007, there have been a total of 17 cases, consisting of 10 death cases due to illness, 5 cases of suicide, and 2 cases of unspecified causes of death. Furthermore, another issue was that there were many lawsuits related to the Immigration Control Act.

To address these problems, a bill to amend the Immigration Control Act was submitted to the Diet on 19 February 2021. However, criticisms of the amendment erupted, and the proposal was scrapped.

According to the Immigration Control and Refugee Recognition Agency, the outline of the proposed amendment to the Immigration Control Act of 2021 was as follows:

(1) On the premise of promptly deporting foreigners who are not allowed to stay, the Immigration Bureau will appropriately and promptly determine whether they are foreigners who should be allowed to stay or not. The procedures for granting special permission for residence will be made more appropriate. Establish procedures to protect foreign nationals who should be protected in the same way as refugees (Supplementary Protection Subjects).

(2) Promptly deport foreigners who are not permitted to stay in Japan. Exceptions will be made to the suspension of deportation during the refugee status process. Establish a system to order foreigners who refuse to leave to take such action as deportation. Measures will be taken to encourage foreigners who should be deported to leave the country voluntarily.

(3) Prevent prolonged detention and implement more appropriate treatment. Establish a system of supervision as an alternative to detention. Review the current requirements for provisional release. Take measures to ensure more appropriate treatment in detention facilities.

The following specific points were raised as issues with the proposed amendment to the Immigration Control Act of 2021:

(a) No upper limit on the period of detention;
(b) Opportunities for judicial review were not established;
(c) The scope of persons eligible for complementary protection is narrow;
(d) Lifting the effect of suspension of repatriation in principle for those who have applied for refugee status three or more times may violate the principle of non-refoulment;
(e) A system of deportation orders enforced by means of punishment is not necessary;
(f) The position of the custodian in the system of control measures is incompatible with that of a supporter or lawyer;

Regarding point (f), the Japan Federation of Bar Associations issued a statement on 26 February, pointing out the problem as follows:

> The Japan Federation of Bar Associations points out the problem as follows:
>
> Supervision measures in lieu of detention are supposed to be a system that prevents unnecessary detention and allows the subject to live in society, and supporters and lawyers are supposed to be the supervisors in this system. However, there is a serious problem in the fact that the supervisor is obliged to supervise the subject's living conditions and compliance with the conditions of the permit and to report such conditions to the government, and the subject can be penalized for non-compliance. In other words, the above obligation to notify the government would force the supporter to play the role of a supervisor, which is incompatible with the position of a supporter, making it difficult for the supporter to become a supervisor. In addition, lawyers, as representatives of various applications to the authorities and litigants, are obliged to protect the interests of the subject and to maintain confidentiality, but this position is incompatible with the supervisor's obligation to notify the authorities, making it difficult for lawyers to be appointed as supervisors. Thus, as a result of the strict notification requirements imposed on the custodians, it is difficult to find persons to serve as custodians, and the objective of the system to avoid unnecessary detention cannot be achieved.

Also, on 31 March, the UN Human Rights Council's Special Rapporteur and Working Group on Arbitrary Detention strongly urged the Japanese government to reconsider the case, expressing concern that it violates international human rights law.

It is as follows:

1. Article 9 of the International Covenant on Civil and Political Rights states that individual liberty is the principle, with the exception of detention and restrictions on individual liberty, but the proposed amendment would require that detention be mandatory and that it be "reasonable" not to detain a deportee until such time as he or she can be repatriated. The concern is that "custodial measures" would only be applied in exceptional cases where the Chief Examiner finds, in his/her discretion, that it is "reasonable" not to detain the deportee until such time as the deportee can be repatriated.
2. The proposed amendment does not envisage judicial review of the issuance of a detention order in migration (immigration control) and does not meet relevant international human rights standards, such as Article 9(4) of the International Covenant on Civil and Political Rights.
3. The Human Rights Committee, in its General Comment No. 35 on Article 9, "liberty and security of person," states that detention in the course of proceedings for immigration control "must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time." However, since the amendment does not clearly stipulate a maximum period of detention, it may implicitly allow for indefinite detention prior to deportation. We also believe that indefinite detention based solely on an individual's immigration status may amount to torture and ill-treatment.
4. The proposed amendment would, in principle, lift the automatic stay of deportation proceedings, including deportation itself, for those who apply for refugee status for the third time or more, for example, those who refuse to be deported would be subject to a deportation order and penalties, including imprisonment for up to one year or a fine. Concerns have been raised regarding the principle of non-refoulment. The principle of non-refoulment is characterized by its absolute nature, without any exceptions. Also, in the context of the principle of non-refoulement, the child must be given higher consideration.

5. We note with regret that the proposed amendment does not contain an explicit prohibition on the detention of children in migration (immigration), including children without guardians or separated from their caregivers and children with their families.

On 9 April, the Office of the UN High Commissioner for Refugees expressed "very grave concern" on this issue. Moreover, on 11 May, 124 scholars of international human rights law and constitutional law issued a statement calling for "a fundamental reconsideration, including the possibility of abolition," on the grounds that the proposed amendment "does not meet international human rights standards." In response to such strong opposition, the decision was made to abolish the draft in May.

Today, two years later, the act to partially amend the Immigration Control Act was again submitted to the Diet on 7 March 2023. Basically, the contents of the 2021 amendment replaced, for example, the requirement for periodic reports by supervisors in the supervisory measures system, which was strongly criticized by the Japan Bar Association in the 2021 amendment, was omitted.

The 2023 amendment to the Immigration Control and Refugee Recognition Act is based on the following basic concepts:

1. Ensure that those who should be protected are protected.
2. Establish a certification system for persons eligible for complementary protection.
3. Make the procedures for special permission for residence even more appropriate.
4. Further improve the operation of the refugee recognition system.

1. Those foreign nationals who are not allowed to stay in Japan should be deported as soon as possible.

(1) Make exceptions to the effect of suspension of repatriation during refugee status procedures. The current provisions of the Immigration Control Act that uniformly suspend deportation during refugee status procedures (effect of suspension of deportation) will be revised to allow the following persons to be deported even during refugee status procedures.

(a) Those applying for refugee status for the third time or later;
(b) Persons who have been sentenced to prison for 3 years or more; or
(c) Terrorists, etc.

However, even for those applying for refugee status for the third time or later, if they submit "materials showing reasonable grounds" to be recognized as refugees or persons under complementary protection, repatriation will be suspended, so to speak, as an exception to the rule of exceptions.

(2) A system will be established to order the deportation of foreigners who have no means to be forcibly removed. Among foreigners who refuse to leave Japan, the following persons could not be deported under the current law because there is no means to force their deportation. Therefore, a system will be established to order only these persons to leave Japan within a set time limit under certain conditions.

(a) Those whose repatriation destination is a country that does not receive its own citizens who refuse to be deported; and

(b) Those who have committed acts of obstruction of repatriation on board aircraft in the past. By establishing penalties, and by providing that criminal penalties may be imposed for failure to comply with the order, we encourage the above-mentioned persons who refuse to leave to return to their home countries on their own.

(3) Measures will be taken to encourage foreigners who should be deported to return home voluntarily. For those foreign nationals who meet certain requirements among those who should be deported, the period until they can re-enter Japan (landing refusal period) after their deportation from Japan will be shortened. This will encourage more foreigners who should be deported to return home voluntarily.

2. Even until the alien is deported, he/she should not be unnecessarily detained, and if he/she is detained, he/she should be treated appropriately.

(1) Establish a system of "supervisory measures" as an alternative to detention. A "supervision system" will be established in which a relative, acquaintance, or other person who has consented to supervise the person is selected as a "custodian" and under his/her supervision, deportation proceedings are carried out without detention, while preventing escape, and etc.

The current Immigration Control and Refugee Recognition Act will be changed from the "detention in principle" rule to a "supervisor" system, whereby a decision will be made on a case-by-case basis as to whether a person should be detained or placed under supervision, taking into consideration the degree of disadvantage to the person in question as well as the degree of risk of escape. The individual placed under supervision and his/her caretaker will be required to report and notify necessary matters, but the caretaker's obligations will be limited so as not to place too heavy a burden on the caretaker. In order to prevent prolonged detention, a system will be introduced whereby the necessity of detention will be reviewed every three months, and those who do not need to be incarcerated will be placed under supervision. The current immigration control system is sometimes referred to as the "all-case detention system," but under the revised law, as described above, a choice between

detention and supervision will be made for each individual case, and the "all-case detention system" will be fundamentally changed.

(2) Review the nature of the provisional release system. In line with the establishment of the supervision system, the provisional release system will be defined as a measure to temporarily release an inmate for health or humanitarian reasons, as was the original purpose of the system, and the distinction between the use of the provisional release system and the supervision system will be clarified. In particular, the Act clearly stipulates that a request for provisional release for health reasons should be based on a doctor's opinion.

(3) Take measures to ensure appropriate treatment in detention facilities. In order to secure full-time doctors, special exceptions will be made to the provisions of the National Public Service Law that hinder the hiring of full-time doctors, and the requirements for dual employment will be relaxed. Other necessary provisions will be established to ensure the implementation of proper treatment in detention facilities, such as medical examinations for detainees every three months and human rights training for staff.

In response, on 18 April 2023, the Special Rapporteurs of the UN Human Rights Council sent a joint letter to the Japanese government requesting a review in 2023, as they did in 2021, on the grounds that the proposed amendment violates international law.

On 3 May 2023, the Japanese government, responded as follows.

> The bill to revise the Immigration Control Act submitted to the current Diet session addresses the problems of deportation evasion and long-term detention that have arisen under the current Immigration Control Act, as well as the establishment of a system to ensure the protection of those who are facing a humanitarian crisis and should truly be protected. It aims to provide an integrated solution to the issue of maintenance under the current Immigration Control Act.
>
> This bill not only responds appropriately to the situation surrounding immigration administration, such as the acceptance of refugees caused by the Russian Federation's aggression against Ukraine, etc. but also sincerely accepts various comments on the old bill submitted to the Diet two years ago, amended the points that should be amended in the old bill.

The amendment was passed on 9 June 2023.

Environmental Protection through Law/Regulation

International Environmental Law

Significant Increase in Greenhouse Gas Reduction Targets: Prime Minister Suga Announces 46% Greenhouse Gas Reduction Target

On 22 April 2021, a meeting at the Global Warming Prevention Headquarters was held, and the Cabinet approved the Global Warming Prevention Plan.

Japan declared its greenhouse gas reduction target for 2030 to be a 46% reduction compared to 2013, and that it will continue to challenge for a higher target of 50%.

At the Headquarters for the Promotion of Global Warming Countermeasures held on 17 July 2015, the Cabinet decided on "Japan's Draft Commitment" for a greenhouse gas reduction target for 2030 of 26.0% below the 2013 level and submitted it to the Secretariat of the United Nations Framework Convention on Climate Change on the same date. This decision represents a significant increase in the target compared to six years ago. Prime Minister Suga said, "Decarbonization is an issue that cannot wait, as we are experiencing extreme weather events around the world, such as torrential rains, forest fires, and heavy snowfall. At the same time, we have declared 'carbon neutrality by 2050' and have been working on it as a pillar of our growth strategy, with the belief that addressing climate change will be a driving force for the strong growth of our economy."

And in this context, he raised the following items as priorities.

(1) maximizing the use of renewable energy and other decarbonized power sources;
(2) providing stimulus measures to encourage investment, and supporting regional decarbonization;
(3) creating a "Green International Financial Center" to attract global capital estimated at 3,000 trillion yen; and
(4) supporting the global decarbonization transition, including Asian countries.

Act on Promotion of Resource Recycling of Plastics (*Act No. 60 of 2021*)

This Act takes measures to promote plastic resource recycling (3R (Reduce, Reuse, Recycle) + Renewable) by all entities including businesses, consumers, and national and local governments involved, from product design to plastic waste disposal.

The Act was enacted on 4 June 2021, promulgated on 11 June 2021 of the same year, and came into effect on 4 April 2022.

While previous acts, such as the Containers and Packaging Recycling Law and the Home Appliance Recycling Law, have focused on recycling after certain products have been disposed of, this act incorporates the idea of a circular economy, such as designing products so that they do not generate waste in the first place.

To briefly introduce this law, this law addresses the marine plastic waste problem (plastic used in all aspects of daily life becomes plastic waste and pollutes the marine environment, affecting a variety of living creatures such as sea birds, sea turtles, and fish), climate change (global warming increases the intensity and frequency of typhoons and floods), and the amount of plastic that flows into rivers and oceans has been increasing and the tightening of regulations on waste imports in other countries such as the need for domestic processing has increased due to the 2019 revision of the Basel Convention, which makes waste plastics subject to regulations. The importance of further promoting resource recycling has increased.

Businesses involved in plastic resource recycling can be categorized into manufacturers, sellers/providers, and emitters.

Manufacturers are required to meet the design guidelines for plastic-using products and obtain design certification during the design and manufacturing phases. In the emission, collection, and recycling phases, manufacturers are required to cooperate with local governments and consumers for voluntary collection and recycling.

Businesses that sell and supply products are required to rationalize the use of specified plastic-using products such as forks and spoons, drinking straws, toothbrushes, clothes hangers, etc., during the sales and supply phases. They are also required to voluntarily collect and recycle them during the emission, collection, and recycling phases.

Waste generators are required to reduce emissions and recycle during the emission, collection, and recycling phases.

Consumers must endeavor to separate and discharge plastic-use product waste. In addition, consumers must endeavor to reduce the discharge of plastic-use product waste and to use materials obtained through recycling of used plastic-use products.. or materials made from such materials (Article 4, Paragraph 2, Item 3).

The national government shall provide necessary guidance and advice to business operators who provide specified plastic-used products (Article 29). Municipalities are responsible for the sorted collection and recycling of plastic-using product waste (Chapter 5).

Looming Ocean Discharge of Treated Water from Nuclear Power Plants

Experts have been discussing the ALPS (Advanced Liquid Processing System) treated water (water that has been purified to below regulatory standards for radioactive materials other than tritium using ALPS, etc.) resulting from the Fukushima Daiichi Nuclear Power Plant accident (11 March 2011).

On 13 April 2021, the Japanese government decided to discharge ALPS-treated water into the ocean. According to TEPCO's plan, a large amount of seawater will be mixed with the treated water to dilute the tritium to less than 1/40th of the Japanese safety standard and then discharged about 1 km offshore via an undersea tunnel.

At that time, the start date for the ocean discharge of ALPS-processed water was set at about two years later. In fact, on 13 January 2023, at a meeting of the relevant cabinet ministers, the government said that the discharge would begin in the spring or summer of 2023.

The Japanese government states that the tritium concentration is 1/40th of the Japanese safety standard and 1/7th of the World Health Organization (WHO) drinking water guideline and that the impact on the human body and the environment is extremely small.

The International Atomic Energy Agency (IAEA), at the request of the Japanese government assistance, is to conduct a rigorous review (assessment) of safety from before to after the release of radioactive materials. The report confirmed that TEPCO had conducted a detailed analysis of the safety of related facilities, which was the main content of the implementation plan, that precautionary measures had been precisely implemented in the design and operational procedures of the facilities, and that the radiation impact assessment was based on a comprehensive and detailed analysis, and that the radiation impact on humans was significantly lower than the level specified by the regulatory authority.

In May 2022, IAEA Director General Rafael Grossi visited the Fukushima Daiichi Nuclear Power Plant and commented, "We at the IAEA can confirm that when the treated water is released into the Pacific Ocean, it will be done in full compliance with international standards and the release will not cause any harm to the environment."

IAEA officials visited Japan from 29 May to 2 June 2023, for a comprehensive review mission of the ocean discharge of ALPS-treated water at TEPCO's Fukushima Daiichi Nuclear Power Station.

However, the neighboring countries have expressed serious opposition to the ocean discharge.

On 16 March 2023, Sun Xiaobo, Director General of the Disarmament Bureau of the Ministry of Foreign Affairs, held a press conference in Beijing, China, listing concerns about the safety of treated water and the reliability of post-release monitoring, and criticizing Japan, saying that "there should be other means other than ocean discharge, but they have not been fully considered." Sun also said that if Japan were to force ocean discharge, he would oppose it in cooperation with Russia and other neighboring countries as well as South Pacific nations.

South Korea has expressed concern at the IAEA's 2022 annual meeting that contaminated water will be discharged into the sea, and in May 2023, a delegation of South Korean experts was dispatched to the site.

The Pacific Islands Forum (PIF) is asking for a postponement of the ocean release until safety can be confirmed. For example, to address this PIF concern, in February 2023, Prime Minister Kishida held a meeting with the PIF delegation and stated that, as the prime minister of Japan with a responsibility to the Japanese people and the international community, he would not accept the release of contaminated water that would endanger the lives of his own citizens and those of Pacific Island nations and adversely affect human health and the marine environment.

There is also serious opposition to the release of radioactive materials in Japan.

On 30 April 2021, the "Fukushima Cooperative Council for the Promotion of Local Production for Local Consumption" (abbreviated as "Fukushima Net2," consisting of 22 organizations of agriculture, forestry, fisheries, and consumers in Fukushima Prefecture) issued a "Joint Statement on the Decision to Discharge ALPS Processed Water to the Sea." The statement stated that they oppose the ocean discharge until they are convinced that steady progress can be made and that the reconstruction of all industries in the prefecture will not be hindered by uncertainty and harmful rumors.

Local fishing cooperatives and other groups in Japan have also opposed it. In 2015, the government and TEPCO promised in writing to the Fukushima Prefectural Fisheries Federation that they would not undertake any disposal (ocean release) without the understanding of all concerned parties. In the FY2021 supplementary budget, the government set aside a 30-billion-yen fund that includes the cost of purchasing fishery products in the event of harmful rumors, etc. The FY2022 supplementary budget also established a 50-billion-yen fund for fishermen to support the continuation of the fishing industry.

As of June 2023, however, preparations are steadily underway for the release of water. Over the plan to dilute the treated water that accumulates at the

Fukushima Daiichi Nuclear Power Plant and discharge it into the sea, TEPCO began on 5 June 2023, to fill the undersea tunnel that sends treated water to the offshore discharge port with seawater. By filling the undersea tunnels with seawater, the diluted treated water poured in from the land side will be sent to the offshore discharge port. The Japanese government has not changed its policy to begin discharging the water into the sea by this summer.

Nuclear Weapons

Use or Threat of Force

Japan's Position on the Entry into Force of the Treaty on the Prohibition of Nuclear Weapons (TPNW)

On 21 January 2021, the Treaty on the Prohibition of Nuclear Weapons (TPNW) entered into force as a treaty aimed at the complete elimination of nuclear weapons.

The preamble to the treaty mentions the unacceptable suffering suffered by Hibakusha, Japan, which has a security treaty with the United States, however, did not participate in the Nuclear Weapons Convention Negotiating Conference that adopted the treaty. Nor did it participate as an observer at the first meeting of the Conference of the States Parties (21 June 2022).

The Japanese government's position is expressed on the website of the Ministry of Foreign Affairs as follows:

> Japan is the only war-bombed country, and the government shares the goal of the Nuclear Weapons Convention to eliminate nuclear weapons. On the other hand, North Korea's nuclear and missile development is an unprecedented, serious, and imminent threat to the peace and stability of Japan and the international community. Since it is difficult to deter an adversary like North Korea, which has hinted at the use of nuclear weapons, with conventional weapons alone, it is necessary to maintain the deterrence of the United States, which possesses nuclear weapons, under the Japan-U.S. Alliance.

It is important to consider both humanitarian and security perspectives when working for nuclear disarmament, but the Nuclear Weapons Convention does not take the security perspective into account. Participation in a treaty that immediately outlaws nuclear weapons would undermine the legitimacy of the U.S. nuclear deterrent and put the lives and property of Japanese citizens at

risk, which would create problems for Japan's security. In addition, the Nuclear Weapons Convention has not gained support not only from the nuclear weapon states that possess nuclear weapons, but also from non-nuclear weapon states that, like Japan, are exposed to the threat of nuclear weapons.

The Japanese government, from the standpoint of its responsibility to protect the lives and property of its citizens, needs to pursue a path to advance nuclear disarmament in a steady and realistic manner while appropriately addressing real security threats. We will persistently pursue realistic and practical initiatives, acting as a bridge in the international community, including the nuclear weapon states and the countries that support a nuclear weapons convention.

State Practice of Asian Countries in International Law

Korea

*Buhm-Suk Baek**

Immunity of States from Jurisdiction

Sovereign/State Immunity

***Decisions of Seoul District Court on Damage Claims by the Japanese Comfort Women Victims* (*Seoul District Court Decision 2016Ga-Hap505092 decided on 8 January 2021 and Seoul District Court Decision 2016Ga-Hap580239 decided on 21 April 2021*)**

It is interesting to note that within three months, the same court consisting of different benches has rendered an opposing decision whether Japan enjoys sovereign immunity over the mobilization of the comfort women and operation of comfort stations by Imperial Japan. Whereas one rejected applying the state immunity doctrine and ordered the defendant to pay compensation for damages, the other resorted to the principle of state immunity leading to a dismissal of the case. The plaintiffs had been forcefully recruited as comfort women by Imperial Japan during the war of aggression, confined in comfort stations, and exposed to constant violence, torture, and sexual assaults. Having inflicted grave physical and psychological damages, the plaintiffs claimed that Japan, the successor of Imperial Japan, should pay compensation.

Both benches began by assessing customary international law on state immunity as neither Korean laws nor international treaties on state immunity entered into force by Korea exists. The benches agreed that the contested acts are not essentially *acta jure gestionis*. However, the January and April rulings were divided into two major issues: whether the acts committed by Imperial Japan constituted an exception to the rule and whether the acts were conducted during an armed conflict.

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The January bench determined that the acts were not conducted during an armed conflict and constituted an exception to the rule. Regarding the procedural aspect of the law of state immunity, the January ruling seems to counter the jurisprudence established in the Jurisdictional Immunities of the State case in which the ICJ distanced the procedural aspect of the law of immunity from the substantive rule. (para. 58) The court explained that state immunity is in regard to procedural requirements as it is a theory applied to determine jurisdiction before assessing merits. It, however, viewed that procedural rule ought to be construed to the effect that it best realizes the rights and status under the substantive rule. The court explained that procedural rule may at times, limit the realization of rights under the substantive rule to a certain degree and that such substantive rights and legal order should neither become non-existent nor distorted. In other words, the court viewed that the procedural nature of the law of state immunity cannot be separated from the substance of the matter in question. See also Supreme Court en banc Decision 2015Da232316, decided on 18 October 2018.

Having assessed the international trend over state immunity, the court confirmed that customary international law does not exempt all acts conducted by a state from the jurisdiction without exceptions. Specifically, even if the contested acts are sovereign in nature, the court determined that it can exercise jurisdiction since the defendant is not subject to state immunity. It is because acts of systemic mobilization of comfort women and comfort women stations violate international *jus cogens* norms, falling under the exception to the rule. The court did not deny that states enjoy immunity for acts conducted during armed conflict. Yet, the court found it difficult to conclude that Imperial Japan's deceit and abduction of the Plaintiffs in mobilizing them as comfort women had been conducted during an armed conflict since the battlefronts of the Asia-Pacific War did not include the Korean Peninsula.

In sum, the court ruled that it had met the jurisdictional requirements for the court to exercise jurisdiction over the case. Furthermore, having reviewed the merits, the court recognized that the recruitment of comfort women and operation of comfort women stations violated the following international law: *the Hague Convention IV* (annex to the Convention: Regulations Respecting the Laws and Customs of War on Land-Section III: Military Authority over the Territory of the Hostile State-Regulations Article 46 reads as follows: Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected), *International Convention for the Suppression of the Traffic in Women and Children* (this is in line with Article 2 of the International Convention for the Suppression of the White Slave Traffic which stipulates that any person who, to gratify the passions

of others, has by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint, hired, abducted or enticed a woman or a girl of full age for immoral purposes, even when the various acts which together constitute the offence were committed in different countries, shall also be punished), *Convention to Suppress the Slave Trade and Slavery* (referring to the Special Rapporteur Gay J. McDougall Report of the UN Sub-Commission on the Promotion and Protection of Human Rights in which comfort women have been described equivalent to sex slaves, the court viewed mobilization of comfort women in violation of the provision on the abolition of slavery under the League of Nations' Slavery Convention) and *International Labor Organization Forced Labor Convention* (*No. 29*). Accordingly, it upheld that Japan is obligated to pay reparations for psychological damages caused by the illegal acts of Imperial Japan unless otherwise specified. Overall, the January decision highlighted that the doctrine of state immunity must not be used to allow states that violated peremptory norms to inflict severe damages on individuals of other states to evade reparations.

On the other hand, the April bench decided that the defendant enjoys sovereign immunity, considering international human rights treaties, the Korean Constitution, and international customary law, citing the legal reasoning of the ICJ in the *Jurisdictional Immunities of the State* case in 2012. First, the court held the mobilization of the plaintiffs as comfort women qualify as "illegal acts within the territory of the forum state during armed conflict" by reiterating the conditions set forth by the ICJ regarding acts committed in the course of conducting an armed conflict. While the defendant's recruitment of comfort women had taken place within the territory of Korea, the court noted that it was designed to preserve the combat power of the Japanese Imperial army to relieve their sexual desires and prevent sexually transmitted diseases. Furthermore, it maintained that a crystallized general practice has not yet been established, denying state immunity for sovereign acts, which are illegally committed in the territory of the forum state.

Second, regarding whether *jus cogens* exception to the state immunity is granted for severe human rights violations, the court maintained the position of the ICJ. The seriousness of the breach and the degree of damage cannot be considered a criterion for judging the existence of jurisdiction. It emphasized that the procedural rule of State immunity does not conflict with the substantive law of human rights as ICJ did in the *Jurisdictional Immunities of the State* case.

The principle of state immunity is neither permanent nor absolute, and it has been revised continuously following the changes in international order over the years. However, the Apil ruling explicitly referred to the Agreement on

the Settlement of Problems Concerning Property and Claims and on Economic Cooperation Between the Republic of Korea and Japan (hereinafter "the 1965 Claims Agreement") and the 2015 Agreement on the Japanese Military "Comfort Women" Issue (hereinafter "the 2015 Comfort Women Agreement"). The court then clearly stated that it does not see itself as being able to resolve the issue of forced sex slavery committed by another sovereign state. The rationale is that highly sensitive political matters should fall under the purview of the executive and legislative branches of the government according to relevant constitutional provisions. Therefore, it is not appropriate for an unelected judiciary to review the legitimacy of measures taken regarding those matters. The court's decision seems to align with the doctrine of judicial *self-restraint*. Yet despite the rapid development of international human rights law, it admitted that international law is, unfortunately still state-centric.

* In its merits, ICJ ruled that state practice in the form of judicial decisions supports the proposition that state immunity for **acta jure imperii continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a state in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State**. That practice is accompanied by opinio juris, as demonstrated by the positions taken by states and the jurisprudence of a number of national courts, which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by states in connection with the work of the International Law Commission regarding state immunity and the adoption of the United Nations Convention or, so far as the court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases. In light of the foregoing, the court considers that customary international law continues to require that a state be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, paras. 77–78. (emphasis added)

Remedies & Specific Cases (Japan's Wartime Korean Forced Labor Compensation Case)

State Responsibility

***Decision of Supreme Court on Damage Claims* (*Supreme Court Decision 2021Ma5961 decided on 10 September 2021*)**

The Supreme Court overruled the re-appeal by the Complainant, Mitsubishi Heavy Industries, where their assets were seized after the judgment had been made final on the damage claims by the Korean victims of forced labor by Imperial Japan. The Complainant argued that the contested matter should be resolved through deliberation by the Conciliation Committee established according to Article III of the 1965 Claims Agreement. But instead, the court decided the order of seizure, depriving the Complainant's right to request the Conciliation Committee for interim measures either suspending or restricting the compulsory execution of the assets. Therefore, the Complainant claimed that the enforcement measures go against the principle of good faith or equity, and as a result, their assets should not be executed.

However, the court decided that the argument could not be upheld either as a ground of disapproval of the execution order or as a legal obstacle for enforcement. It reaffirmed that there is no error in the judgment rendered by the lower court in light of the relevant legal principles and laws applied.

Treatment of International Law by Domestic Courts – Treaties

Relationship between International & Domestic Law

***Decision of Seoul District Court on Damage Claims* (*Seoul District Court Decision 2020GaDan5268428 decided on 23 April 2021*)**

In August 2019, Pan-Pacific Airlines notified a departure delay to the Plaintiffs waiting to be on board the plane expected to leave Mactan-Cebu International Airport at 11 PM and arrive at Incheon International Airport a day after at 5 AM Not being able to get on board the plane, the Plaintiffs moved to an accommodation provided by the airline at 5 AM, a day after the delay. Accordingly, the Plaintiffs departed by a different flight, 13 ~ 27 hours delayed from the expected scheduled time, and requested the airlines to pay compensation for damages.

The Court ruled that the Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on May 1999 (hereafter, "the Montreal Convention") prevails over domestic laws of the Republic of Korea since both the country of arrival and departure are State Parties to the Montreal Convention. Therefore, it found that the Defendant is liable to pay compensation for damages under Article 19 of the Montreal Convention because the Plaintiffs departed later than the expected departure time. The airline challenged the admissibility, claiming that the Court does not have jurisdiction over the case. But, the Court affirmed jurisdiction since the Plaintiffs claimed to 'the court at the place of destination' provided under Article 33 of the Montreal Convention.

* The Montreal Convention came into force in 2007 in the Republic of Korea and in 2015 in the Philippines. Article 19 (Delay) stipulates that "the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." Article 33 (Jurisdiction) stipulates that "1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination."

Application of Treaties to the State

Treaties

Decision of Constitutional Court on a Constitutional Complaint: a Case of Inaction to Settle the Dispute under Article 111 of the 1965 Claims Agreement (Constitutional Court of Korea Decision 2014HunMa888 decided on 31 August 2021)

The decision was made available only after seven years since the Complainants made a constitutional complaint arguing that the inaction of the Korean government to settle the matters of the Korean war criminals is unconstitutional. The Complainants are individuals who, after the Pacific War broke out during the Japanese occupation of Korea, were forcibly recruited and served as a guard of Allied detainees at a prisoner-of-war camp in a Southeast Asian country. Following the end of the war, they were prosecuted and punished as Class B and Class C war criminals (hereinafter "Korean B/C War Criminal")

in a war crimes trial convened by the Allied powers. The family members of the deceased Korean B/C War Criminals also have joined the complaint. Most Korean B/C war criminals have not received compensation from the Japanese government since they lost their Japanese nationality following the Treaty of Peace with Japan (also known as the San Francisco Peace Treaty).

The court found it difficult to consider the issue of Korean B/C War Criminals' damage claims as the same as the issue of the compensation claims held by comfort women, atomic bomb victims, or others. The damage claims of the Korean B/C War Criminals are the result of enforcing an international judgment. It is not subject to the 1965 Claims Agreement. Yet, the court did acknowledge the regrettable fact that Korean B/C War Criminals were forcibly recruited as prisoner-of-war guards of the Allied detainees under the command of the Imperial Japanese military. It also recognized that those War Criminals were prosecuted before international war crimes tribunals and sentenced to punishments for absence of proper assistance.

Also, the court noted that Korea actively incorporated international customary and treaty law into domestic law, requiring the punishment of individuals committing any crimes of aggression, crimes against humanity, or war crimes to be imposed through an international war crimes trial. Furthermore, it also enacted and put into effect the "Act on Punishment, etc. of Crimes under Jurisdiction of the International Criminal Court." Taking these facts together, the court explained that all domestic state agencies of the Respondent should respect the international law status of international war crimes tribunals and the effect of their judgments. Accordingly, as to Korean B/C War Criminals' damage arising from the punishments following the international war crimes trials, the court did not uphold that the Respondent had a concrete duty to take the dispute settlement procedures pursuant to Article 3 of the 1965 Claims Agreement. In other words, the complaint is non-justiciable concerning such damage.

Next, the court found it unclear whether there was an actual dispute between Korea and Japan over the interpretation of the 1965 Claims Agreement concerning Japan's responsibility for Korean B/C War Criminals' damage arising from the forced recruitment by Imperial Japan. Even if a dispute over the interpretation of the 1965 Claims Agreement does exist between Korea and Japan concerning Japan's responsibility for such damages, it cannot be said that Respondent has failed to fulfill its duty derived from Article 3 of the 1965 Claims Agreement. It is because of Respondent's diplomatic discretion and its constant demands to Japan through diplomatic channels, including those for general settlement and damages on the issues concerned.

In their dissenting opinion, four justices contended that Respondent's failure to take the dispute settlement procedures in Article 3 of the 1965 Claims

Agreement is unconstitutional. They noted that Korean B/C War Criminals, acknowledged as "victims or casualties of forced recruitment" by the truth commission established under a Truth-Seeking Act, are entitled to claims against Japan. In terms of their nature, such claims are not as essentially different from the claims for the damage by survivors of comfort women and forced labor.

Interpretation of Treaties

***Decision of Constitutional Court on a Constitutional Complaint* (*Constitutional Court of Korea Decision 2016HunMa1034 decided on 30 September 2021*)**
The Complainants are the victims and families identified through a truth-seeking procedure under the Framework Act on Settling Past History for Truth and Reconciliation (hereinafter "the Truth and Reconciliation Act"). They argued that the Minister of the Interior and Safety and the Minister of Justice failed to carry out their duty to recover the victims' dignity and recommend reconciliation between the victims and the perpetrators. The Complainants claimed that such failure led to an infringement of their rights to effective remedy guaranteed under the Convention against Torture. Furthermore, it constitutes inaction of the Respondents.

Dismissing the case, the court explained that a specific human right for individuals to seek damage claims directly against the State Party in the absence of a legislative procedure could not be derived from Article 14 of the Convention. However, Article 14 (1) stipulates that "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation." The court found it difficult to interpret this Article as clearly entitling individuals to seek remedies without any domestic legislative procedure. Also, Article 14 (2) reads that "Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law." In other words, such compensation can only be understood as being made through a regulation consistent with the domestic legal system. Therefore, the court held that neither an individual's right to seek remedy against the State Party nor a concrete obligation to compensate for the damages claims brought by the Complainant be derived directly from the Convention against Torture.

Specific Bilateral Relations Issues (Inter-Korean Relations)

International Relations & Cooperation

Decision of Constitutional Court on a Constitutional Complaint (Constitutional Court Decision 2016Hun-Ma364 decided on 27 January 2022)

The Complainants argued that their fundamental property rights ensured in the Constitution had been infringed due to the Respondents' decisions. The decisions in question have been made in line with the fourth nuclear test and the long-range missile launch conducted by North Korea earlier in 2016. Accordingly, North Korea stopped all cooperative joint projects, deported people residing in the Complex, and froze the asset of Korean enterprises.

In a unanimous decision, the Court rejected the complaint made by some Complainants, who were enterprises that invested in the Kaesong Industrial Complex, against a series of acts decided by the Respondents that led to a complete shutdown of the operation of the industrial complex. Such acts included the decision of the President of Korea to shut down its operation completely, and the formulation of a plan by the Unification Minister for withdrawal from the industrial complex and his notification to the relevant businesspersons, the release of a statement declaring a complete shutdown of the industrial complex, and enforcing the decision. The key question addressed in the case was whether the Respondents' decision to shut down the Kaesong Industrial Complex entirely had infringed the fundamental rights of the Complainants. The Constitutional Court dismissed the complaint brought by the cooperative enterprises as the shutdown decision was not directly relatable to their fundamental rights. Specifically, the Court held that the Respondent's decisions do not directly apply to the enterprises in a cooperative relationship with those directly invested in the Kaesong Industrial Complex. It further explained that even if damages such as a reduction in operating income were inflicted, it could not be construed as a direct effect caused by the decision but because of the indirect economic ties with the enterprises to which the decisions were directly applied.

The Court acknowledged that the shutdown decision, adopted as a countermeasure in response to the critical situation posed by North Korea's nuclear weapon development, was highly political and included a decision of the President on national security matters. Despite the nature of the act, fundamental rights such as freedom of business have been restricted due to the decision, and such restrictions would be in violation of the Constitution unless

grounded on the Constitution and Act. However, the Court decided that the shutdown measure is in accordance with Article 18(1)(2) of the Inter-Korean Exchange and Cooperation Act and was adopted to contribute to the maintenance of international peace and security, referring to the Security Council resolutions that adopted economic measures and further calling upon North Korea to stop nuclear weapon development and experiments including UN Security Council Res. 1718 (2006); 1874 (2009); 2087 (2013) and 2094 (2013). Also, referring to the responsibilities and duties of the President provided by Article 66 of the Constitution and Article 11 of the Government Organization Act, the Court decided that the President has the power to decide to shut down the Kaesong Industrial Complex to counter North Korea on the grounds of national security and international cooperation. Accordingly, the Court rejected the Complaints of the enterprises invested in the complex since the restriction of rights is grounded in the Constitution and Act of Korea.

In short, the decision confirmed that even if the decision to shut down the Kaesong Industrial Complex completely was highly political, it should be based on the Constitution and Act if it were to restrict the people's fundamental rights. However, at the same time, it approved that such a decision was consistent with Korean and international law.

* Article 18 (1)(2) (Orders for Adjustment for Cooperative Projects) of the Inter-Korean Exchange and Cooperation Act stipulates that "(1) The Minister of Unification may order a person who carries out a cooperative project to adjust any matter in relation to the details and conditions of the cooperative project or the period of validity for approval, etc. in cases falling under any of the following subparagraphs: Provided, That the Minister shall consult with the head of a relevant administrative agency in advance if deemed important: 2. Where it is necessary to contribute to international agreements for the purposes of maintaining international peace and security."

* Article 66 (2) and (3) of the Constitution of Korea provides that "The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution, and shall have the duty to pursue sincerely the peaceful unification of the homeland."

* Article 11 (President's Administrative Supervisory Authority) of the Government Organization Act stipulates that "The President as the head of the Government shall direct and supervise the heads of all central administrative agencies, as prescribed by statutes."

Environmental Protection through Law/Regulation

International Environmental Law

***Framework Act On Carbon Neutrality and Green Growth for Coping with Climate Crisis* (*Act No. 18469*)**

The Framework Act was enacted on 24 September 2021 and entered into force on 25 March 2022. The purpose of this Act is to strengthen policy measures to reduce greenhouse gases and adapt to climate change to prevent serious impacts of the climate crisis, thereby protecting the ecosystem and contributing to the sustainable development of the international community. In the same vein, the Act requires the government to cut its greenhouse gas emissions in 2030 by 35% or more from the 2018 levels and consists of several policy measures to achieve carbon neutrality by 2050 (chapter 2). In addition, the Act establishes the national carbon-neutral green growth master plan (chapter 3), the 2050 Carbon Neutral Green Growth Committee (chapter 4), and the Climate Response Fund (Chapter 10). With the adoption of this Act, Korea becomes the 14th country in the world to make 2050 carbon neutrality implementation into law.

Implementation of Human Rights Treaties

Human Rights

***Decision of Supreme Court on Permission for Adoption of a Minor Child* (*Supreme Court en banc Order 2018Seu5 ordered on 23 December 2021*)**

Major issues of this decision were whether grandparents could adopt their grandchildren and the standards and elements to be considered by the Court in making such a determination. The Court reversed and remanded the previous decision, upholding that the re-appellant is permitted to adopt their grandchildren. The Court viewed adoption as a legal process establishing a filial relationship for those not originally tied to a parent-child relationship by birth. The Civil Act of Korea only requires consent and permission. It does not preclude the adoption of a blood relative unless the child is an ascendant or a person of older age. Therefore, the Court decided that there are no reasons to view that the adoption of a grandchild by his/her grandparent, which allows for establishing a parent-child relationship, is impossible considering the meaning and essence of adoption.

If the requirements for adoption are satisfied and the adoption secures the child's welfare, the Court may approve the adoption even when a grandparent files such a request. In such a case, however, the grandparent-grandchild relationship does not cease, and the adopter remains as parents to the child's biological father or mother even after adoption. Accordingly, the Court found it necessary to closely examine the impact of such circumstances on the child's welfare. It further examined additional conditions for adoption, such as whether the grandparent has the substantial intent to establish an adoptive parent relationship with the child rather than maintaining the relations as a caregiver of the child and whether the purpose of adoption is sole to provide constant and permanent care and protection to the child as a parent rather than to benefit from possible merits other than the welfare of the child, like the acquisition of nationality, inheritance or socioeconomic benefits arising from adoption.

Moreover, the Court found that the consent of the child's biological parents should be confirmed, provided they have been given sufficient information on the nurturing of the child or on adoption, including the procedure and the possibility of reversing the adoption. It further noted the necessity of the family court to conduct a family fact-finding hearing and consultation. The Court expressly acknowledged the child's rights to be heard in the adjudication to grant permission for adoption, even those under the age of thirteen, citing Article 12 of the Convention on the Rights of the Child (CRC). Whereas the Convention ensures such rights to those 'capable of forming his or her own views' regardless of age but weighing the views based on age and maturity, the Civil Act does not expressly recognize the rights of a child under age thirteen whose express consent is not required for adoption. It is the view of the Court that if the adoptee is able to form his or her opinion even when the child is under thirteen, the child's opinion needs to be heard in a manner appropriate during the fact-finding hearing.

The Court also reviewed whether a stepparent-stepchild relationship can be naturally formed between the grandparent and child, examining the following elements: the age of the child and the grandparent, the background leading to the adoption of the child, and whether the child's biological parents are alive and if so, whether there has been an interaction between the child and his or her biological parents. The Court advanced that the decision granting permission for adoption should be made to the possible extent to positively affect the welfare of the child, weighing the pros and cons of adoption, which may differ depending upon individual and specific circumstances.

Three Justices out of the fourteen justices dissented from the decision. They maintained that the adoption of a minor grandchild, a lineal blood relative of

the grandparent, cannot be naturally understood in light of the original meaning of the parent-child relationship. Moreover, they expressed concern that it is likely to provoke the child to experience identity confusion. The Justices shed light on the fact that a child is entitled to the right to be cared for by his or her parents. This principle is well-grounded in international norms and domestic laws, which is also supported by various social security and guardianship systems in Korea. They expressed that it would be inappropriate for the grandparent, who should be supporting and aiding the child's biological parents as the closest lineal ascendant to them, to assume the parental status as a caregiver owing to the incompetence of the biological parents whose socioeconomic status is low. They argued further that adoption by grandparents could be admitted only under the condition that the above cause of anxiety is resolved for good, as granting permission for adoption should be rigorously regulated in a case where grandparents file a request for permission for the adoption of their grandchildren. Therefore, the Justices indicated that the re-appeal should have been rejected as the family court has broad discretion to decide whether to permit adoption for the child's welfare.

* Article 877 (Prohibition of Adoption) of the Civil Act of Korea stipulates that "No ascendant or person of elder age shall be adopted."

* Article 12 of the CRC stipulates that "States Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child and the Child shall be provided the opportunity to be heard in any judicial proceedings affecting the Child."

Protection under International and Domestic Law (Refugees)

***Decision of Seoul High Court on a Claim for Cancellation of Administrative Disposition* (*Seoul High Court Decision 2021Nu34345 decided on 19 April 2022*)**

The Plaintiffs are a married couple from the Islamic Republic of Pakistan. They categorized themselves as falling under 'the status of a member of a specific social group' since they are 'those who married against the will of their families, belonging to a different caste or tribe' who need protection under Article 2 (1) of the Refugee Act. The Plaintiffs asserted that there is a well-grounded fear that they will confront threats, be detained or get assaulted, or even get murdered by their family if they are sent back to Pakistan. Also, they alleged that they would face persecution when returning to Pakistan, and the chances of

receiving adequate protection from Pakistani authorities due to corruption and acquiescence of judicial and investigative organs were low. Therefore, they argued that the administrative disposition not to acknowledge them as refugees must be annulled.

The Court first acknowledged that Pakistan has traditionally been a patriarchal society where women are subject to the control and protection of a male family member. Accordingly, most people view marriage as a type of transaction or exchange between other families. The harm to the family's reputation may be recovered by causing physical damage to the woman who brought dishonor to the family. Furthermore, the Court referred to cases where the wife may be confined, assaulted, or even in extreme cases, murdered when the spouse is from a lower caste. The Judgment specifically refers to such crimes, especially concerning murder, as 'honor killing.' Also, referring to the fact that honor killing per population occurs the most in Pakistan and, moreover, the fact that the previous residential area of the Plaintiffs tops in crimes committed against women, the Court took note of documents such as the 2017 Report of the UN Committee Against Torture that still hundreds of cases of honor killing is widely committed and most are left unpunished or not prosecuted (UN Doc. CAT/C/PAK/CO/1), or even not reported to the relevant investigative authority as it occurred within a family despite the revisions made in the Pakistani laws. The Court further indicated that in March 2020, the UN Committee on the Elimination of Discrimination against Women recommended that Pakistan legislate additional shelters for women victims to improve awareness of investigative and judicial authorities, expressing regret that consistent discriminatory customs against women like honor killing still prevails in Pakistan. (Concluding observations on the fifth periodic report of Pakistan, UN Doc. CEDAW/C/PAK/CO/5).

Next, the Court determined that 'those who married against the will of their families, belonging to a different caste or tribe' can be seen as 'the status of a member of a specific social group' under Article 2 (1) of the Refugee Act on three grounds. Firstly, the marriage goes against their origin's widely accepted custom or family norms. Secondly, the Plaintiffs will likely be subject to persecution (assault, forced divorce, marriage, homicide) by their families. Such acts can be seen as 'persecution' under the Refugee Convention. And thirdly, they cannot expect adequate protection from the nation of their nationality. The Court viewed the Plaintiffs are subject to serious infringement of their human dignity and discrimination, such as a threat to their fundamental freedom of marriage and sexual self-determination rights, beyond mere social criticism just because the applicants married against the will of their tribes and family.

The Court decided that the Plaintiffs are refugees with a well-grounded fear of being persecuted when sent back to their country. Moreover, the Court did not uphold the claim of the Defendant (Chief of Incheon Immigration Office) that the possibility of being persecuted against the Plaintiffs has become extinct due to the significant improvement in the situation of Pakistan and viewed that it would be difficult to expect the Plaintiffs to easily locate an alternative haven for them to be free from persecution. Accordingly, the Court upheld the Plaintiff's claim and reversed the first trial.

* Article 2 (Definitions) of the Refugee Act stipulates that "1. The term 'refugee' means a foreigner who is unable or does not desire to receive protection from the nation of his/her nationality in well-grounded fear that he/she is likely to be persecuted based on race, religion, nationality, the status of a member of a specific social group, or political opinion, or a stateless foreigner who is unable or does not desire to return to the nation in which he/she resided before entering the Republic of Korea in such fear."

State Practice of Asian Countries in International Law

Malaysia

*Mary George**

Introduction

Malaysian Strategic Plan 2021–2025

The overarching thrust of Malaysia's Foreign Policy since independence in 1957 has been to safeguard Malaysia's sovereignty and defend its national interests. As the geopolitical ecosystem evolved, so too did Malaysia's diplomacy in building a just and equitable global community of nations. (WISMA PUTRA, STRATEGIC PLAN 2021–2025, at p. 8, accessed at, https://www.kln.gov.my/documents/8390448/8414662/Strategic+Plan+2021-2025.pdf/83e7a511-2820-4ccf-b65f-797f14964d5c, 7 January 2023.)

For this purpose, the Ministry of Foreign Affairs (Wisma Putra) adopted the forward-looking Malaysian Strategic Plan 2021–2025 meant to guide Malaysian diplomats in maneuvering the challenges over the next five years. (WISMA PUTRA STRATEGIC PLAN 2021–2025 – See Foreword by YB Dato' Seri Hishammuddin Tun Hussein, Minister of Foreign Affairs of Malaysia at p. 1; See also Foreword at p. 3 by YBhg. Dato' Sri Muhammad Shahrul Ikram Yaakob Secretary-General Of The Ministry Of Foreign Affairs Of Malaysia, https://www.kln.gov.my/documents/8390448/8414662/Strategic+Plan+2021-2025.pdf/83e7a511-2820-4ccf-b65f-797f14964d5c, 7 January 2023.)

Under the Strategic Plan, Malaysia remains committed to all bilateral, regional and multilateral engagements. The Strategic Plan states that ASEAN will continue to be the bedrock of Malaysia's foreign policy due to its geographical proximity and geopolitical strategic interests to the nation. It also underscores the importance of regional collective peace and prosperity. With the Strategic Plan as the blueprint, Wisma Putra will continue to play a meaningful role between Malaysia and the international community for the betterment of humankind, consistent with Malaysia's prosper-thy-neighbor principle. The Strategic Plan takes cognizance of the 2030 Agenda for Sustainable Development Goals (SDGS). (WISMA PUTRA STRATEGIC PLAN 2021–2025, at p. 5.) At the multilateral fora, Malaysia,

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1) is committed to multilateralism for the promotion of global peace, security and prosperity;
2) upholds the principles of international law as evidenced in Malaysia's record in peacekeeping operations under the United Nations; and
3) participates in the deliberations towards finding practical solutions to various global issues including the Non-Aligned Movement, the Organisation of Islamic Cooperation and the Commonwealth.

Under the Strategic Plan, to reinvigorate Malaysia's role in the multilateral platform, (WISMA PUTRA STRATEGIC PLAN 2021–2025 at p. 10), seven strategic thrusts, were adopted as follows:

Strategic Thrust 1: Strengthen and Consolidate Bilateral Diplomacy. (WISMA PUTRA STRATEGIC PLAN 2021–2025 at p. 37–41).

Strategic Thrust 2: Engage Effectively in Multilateral Diplomacy. (WISMA PUTRASTRATEGIC PLAN 2021–2025 at pp.43–45).

Strategic Thrust 3: Proactive Role in ASEAN. (WISMA PUTRA STRATEGIC PLAN 2021–2025 at pp. 47–51).

Strategic Thrust 4: Uphold Sovereignty and Integrity of Maritime Areas. (WISMA PUTRA STRATEGIC PLAN 2021–2025 at pp. 53–56).

Strategic Thrust 5: Provide Effective and Timely Services to the Ministry's Stakeholders and Clients. (WISMA PUTRA STRATEGIC PLAN 2021–2025 at pp. 57–59).

Strategic Thrust 6 – Provide Effective Strategic Communication and Public Diplomacy. (WISMA PUTRA STRATEGIC PLAN 2021–2025 at pp. 61–63).

Strategic Thrust 7 – Strive for Excellence in Human Capital. (WISMA PUTRA STRATEGIC PLAN 2021–2025 at pp. 65–68, 75).

Diplomatic & Consular Relations

Institutional Relations

Diplomatic Missions

No new missions were established in 2021. Therefore, the most recent missions are as follows:

1) Melbourne May 2011,
2) Ashgabat December 2011,
3) Nanning June 2015,
4) Xi'an October 2016,

5) Baku April 2016,
6) Holy See March 2016, and
7) Istanbul July 2020. (WISMA PUTRA STRATEGIC PLAN 2021–2025 at p. 87.)

Treatment of International Law by Domestic Courts – Treaties, Custom, Judicial Decisions

The State in International Law

Immunity from the Criminal Jurisdiction of Diplomat

International law – Immunities – Immunity from prosecution – Whether former Director ('appellant') of Asian International Arbitration Centre ('the Centre') was immune from criminal prosecution for acts done while he was Director Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors, FEDERAL COURT (PUTRAJAYA) – CIVIL APPEAL NO 01(f)-38-12 OF 2020(W), [2021] 5 MLJ 209

This case arose between Mr. Sundra Rajoo, the Appellant who was the retired director of the Asian International Arbitration Centre (AIAC/'the Centre'), and the Minister for Foreign Affairs Malaysia, the Respondent, where the latter denied Mr. Sundra Rajoo immunity from criminal prosecution. Mr. Sundra Rajoo claimed immunity from criminal prosecution within Malaysia for an offense of criminal breach of trust under section 409 of the Malaysian Penal Code for having sold copies of a book on arbitration that he wrote with permission from the Centre. The Minister for Foreign Affairs of Malaysia, the respondent, denied Mr. Sundra Rajoo's immunity from the criminal suit. The AIAC is an international inter-governmental organization comprising 47 member states. A host-country agreement signed between the AIAC and the Government of Malaysia gave the Centre various privileges and immunities both to the Centre and its staff to allow it to function as an independent arbitral institution. Mr. Sundra Rajoo claimed he was entitled to immunity from the criminal suit under the Malaysian International Organisations (Privileges and Immunities) Act 1992 ('Act 485') that was amended in 2011 by the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) (Amendment) Regulations 2011, in respect of acts and things he had done in his capacity as the Director. The Secretary-General of the Centre had neither waived Mr. Sundra Rajoo's immunity nor had given the Malaysian authorities his consent to prosecute Mr. Sundra Rajoo. Furthermore, Mr. Sundra Rajoo contended that it was with the permission of the AIAC that he had written the impugned book, sold the copies thereof and transmitted the royalties to the Centre. The High Court affirmed his immunity from criminal prosecution.

The Court of Appeal reversed the High Court's decision. The Federal Court affirmed the decision of the High Court and the criminal charge was thereby declared a nullity.

The Federal Court was unanimous in its decision and upheld the High Court's verdict that Mr. Sundra Rajoo, the Appellant, had immunity, including criminal immunity, as a former Director of the Centre for acts done within his official capacity, as follows:

> [60] It is pertinent to state that we were guided by the general aim of the purpose of the immunity which was granted, to wit, to protect and preserve the inviolability of AIAC, its documents and its archives. Where the Malaysian former High Officer acts in his official capacity, the purpose of conferring that immunity remains the same whether the nature of the proceedings against him are civil or criminal unless the Host Country Agreement or Act 485 provided otherwise. [2021] 5 MLJ 235.
> [66] To reiterate, we found that the appellant acted within the scope of his function such that he is entitled to the immunity sought, that the appellant's functional immunity included immunity from criminal proceedings … because the appellant acted in his capacity as Director of AIAC and as such the immunity was to safeguard the interests of AIAC. In other words, the immunity was not to benefit him but to respect the integrity and independence of … AIAC under the terms of the Host Country Agreement. [2021] 5 MLJ 236.

A Child's Right to Bail under the Convention on the Rights of the Child

Applicability of International Human Rights Conventions in Malaysia – Child commits non-bailable criminal offense under national law – Position under the Convention on the Rights of The Child

MACK (a child) v Public Prosecutor [2021] MLJU 2342 Malayan Law Journal Unreported HIGH COURT (KOTA BHARU) Criminal Trial/Perbicaraan Jenayah NO DA-44-56-09/2021, 16 November 2021

In MACK (a child) v Public Prosecutor, the Public Prosecutor brought a drugs-related charge against a 16-year-old Applicant who was a child, before the Sessions Court of Kota Bharu, in the state of Kelantan. The Applicant was charged under section 12(2) of the Dangerous Drugs Act 1952 ("Act 234") punishable under section 39A (2) of the same Act together with three others accused of having in their possession 43.6-grams of dangerous drugs, Methamphetamine. This was a non-bailable offense under Act 234 upon which no bail could be granted. [2021] MLJU 2342 at para 17.

The bail application was made under section 388 of the Criminal Procedure Code (CPC) pending trial by the child Applicant. The question before the Court was two-fold: (1) was a child under Act 234 entitled to bail under the Convention on the Rights of the Child ("UN Convention") putting the best interest of the child applicant forward as Malaysia was a party to the Convention and (2) what was the position of international law rules and norms in the domestic legal system of Malaysia. This case note does not address the latter question but only addresses the former question of bail.

On the question of bail, the Court held that, as the child Applicant was already charged, the relevant law on bail pending trial as discussed earlier, should apply. The CPC as general law could not supersede the specific law. The law as it stood in regards to person charged under Act 234 was clear that if the offense was punishable with imprisonment for more than five years, no bail should be granted. There was no specific provision under Act 234 that dealt with the arrest, investigation and criminal trial in respect of a child. [2021] MLJU 2342 at para 28.

In Malaysia, the national legislation related to children was the Child Act 2001 ("Act 611"). The act was promulgated to consolidate and amend all laws on the care, protection and rehabilitation of children and to provide for matters connected therewith and incidental thereto. These include matters connected to the arrest, investigation and criminal trial of a child. [2021] MLJU 2342 at para 25. Further, the Court held that Act 611 did not provide any assistance for this court to entertain this application. The treatment of a child could not be the same as of an adult person. Nevertheless, such recognition must be by way of an amendment to Act 611 or Act 234 by the Parliament and could not be made by judicial pronouncement. [2021] MLJU 2342 at para 29.

The Court dismissed the application and concluded that the Court was satisfied that it should not entertain the application and, accordingly, dismissed the application. [2021] MLJU 2342 at para 30.

Human Rights Conventions and the Importance of National Legislation

Applicability of International Human Rights Conventions in Malaysia – Child commits non-bailable criminal offense – Importance of the role of national legislation

MACK (a child) v Public Prosecutor [2021] MLJU 2342 Malayan Law Journal Unreported HIGH COURT (KOTA BHARU) Criminal Trial/Perbicaraan Jenayah NO DA-44-56-09/2021, 16 November 2021

(Same facts as in 3.1.2)

On the question of international law in Malaysia and of human rights treaties in particular, the Court held:

> Under Article 40 of the UN Convention, States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which considers the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. Among others, the State party shall ensure that every child alleged or accused of having infringed the penal law is at least guaranteed to be presumed innocent until proven guilty according to law. [2021] MLJU 2342 at paras 6 and 7.

Article 40 on the Convention on the Rights of a Child:

> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> (i) To be presumed innocent until proven guilty according to law;

With regard to the UN Convention on the Rights of the Child, the Court was of the opinion that such a document was not legally binding. It was merely a statement of principles devoid of any obligatory character and not part of our municipal law. [2021] MLJU 2342 at para 18.

In para [20], in Than Siew Beng & anor v Ketua Pengarah Jabatan Pendaftaran Negara & ors [2016] 6 CLJ 934, on the applicability of the International Human Rights Convention in an application of citizenship by a child under the age of 18, under the Federal Constitution, the Court held as follows:

> [20] As the UDHR is merely a declaration, it is not a legally binding document for this court to give effect. The UDHR is applicable in Malaysia only to the extent that it is not inconsistent with the Federal Court. The provisions of the UDHR must be read together with section 4(4) of the Human Rights Commission of Malaysia Act 1999 (Act 597) which provides as follows: For the purpose of this Act, regard shall be held to the UDHR 1948 to the extent that it is not inconsistent with the Federal Constitution.

In other words, even though the Executive has ratified a treaty and the treaty binds the Government under international law, it has no legal effect domestically unless the legislature passes a law to give effect to that treaty.

Implementing International Economic Law – Business, Sale, Contract, Tax, Competition Law

International Economic Law

Legislation and Administrative Regulations

Malaysia – Double Taxation Relief – enactment of subsidiary legislation, (MY) DOUBLE TAXATION RELIEF (THE GOVERNMENT OF UKRAINE) ORDER 2021 (P.U.(A) 223/2021), [Perb:0.6869/112 JLD.2 (SK.2); PN(PU2)80/XLVII(2)]

In exercise of the powers conferred by subsection 132(1) of the Income Tax Act 1967 [Act 53] and subsection 65A(1) of the Petroleum (Income Tax) Act 1967 [Act 543], the Minister of Finance, Tengku Datuk Seri Utama Zafrul Bin Tengku Abdul Aziz, adopted the Double Taxation Relief (The Government of Ukraine) Order 2021. Section 2 of the Double Taxation Relief Order 2021 declared that the arrangements specified in the Schedule had been made by the Government of Malaysia with the Government of Ukraine with a view to affording relief from double taxation in relation to Malaysian tax and Ukraine tax (as defined in each case in the arrangements) and that it is expedient that those arrangements shall have effect. The Government of Malaysia and the Government of Ukraine signed the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (hereinafter referred to as the "Agreement"), and adopted a protocol thereto, namely, Protocol To The Agreement Between The Government Of Malaysia And The Government Of Ukraine For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To The Taxes On Income, on 4th August 2016.

The Schedule to Order 2021 sets out the Agreement Between the Government of Malaysia and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect To Taxes On Income. This Agreement provides for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and applies to persons who are residents of one or both of the Contracting States. The taxes covered by this Agreement are taxes on income imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied. Taxes on income include all taxes imposed on total income or on elements of income, taxes on gains from the

alienation of movable or immovable property and taxes on the total amounts of wages or salaries paid by enterprises. The Malaysian taxes subject to this Agreement are: (i) the income tax; and (ii) the petroleum income tax. The Ukrainian taxes subject to this Agreement are (i) the individual income tax; and (ii) the tax on profits of enterprises. This Agreement also applies to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement, in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States are required to notify each other of any significant changes that have been made in their taxation laws. For the purposes of this Agreement, unless the context otherwise requires, the terms 'Malaysia' and 'Ukraine' are described as:

> (a) the term "Malaysia" means the territories of the Federation of Malaysia, the territorial waters of Malaysia and the sea-bed and subsoil of the territorial waters, and the airspace above such areas, and includes any area extending beyond the limits of the territorial waters of Malaysia, and the sea-bed and subsoil of any such area, which has been or may hereafter be designated under the laws of Malaysia and in accordance with international law as an area over which Malaysia has sovereign rights or jurisdiction for the purposes of exploring and exploiting the natural resources, whether living or non-living;
>
> (b) the term "Ukraine" when used in a geographical sense, means the territory of Ukraine, its continental shelf and its exclusive (maritime) economic zone, including any area outside the territorial sea of Ukraine which in accordance with international law has been or may hereafter be designated, as an area within which the rights of Ukraine with respect to the seabed and subsoil and their natural resources may be exercised;

The term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, and also includes that State, any political subdivision, local authority or a statutory body thereof. Where an individual is a resident of both Contracting States, then his status shall be determined as follows:

> (a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

(b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has a habitual abode;

(c) if he has a habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

(d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, then the competent authorities of the Contracting States shall settle the question by mutual agreement.

The Protocol to the Agreement clarifies that with reference to Article 1, in the case of Malaysia, the Agreement does not apply to persons carrying on Labuan business activities under the Labuan Business Activity Tax Act 1990. The term "Labuan business activity" refers to Labuan business activities as defined under subsection 2(1) of the Labuan Business Activity Tax Act 1990.

The United Nations Framework Convention on Climate Change 1992

International Environmental Law

Statement By Mr. Tuan Ibrahim Tuan Man, the Honourable Minister of Environment and Water Malaysia for Cop-26/Cmp-16/Cma-3 Resumed High-Level Segment, 9–10 November 2021 **(See Malaysia Third Biennial Update Report to the UNFCCC, https://unfccc.int/documents/267685, 19 January 2023. Ibid. Statement by Mr. Tuan Ibrahim Tuan Man, Honourable Minister of Environment and Water Malaysia for COP-26/CMP-16/CMA-3 resumed high-level segment, 9–10 November 2021.)**

The Malaysian Minister for Environment and Water commenced his address with a warm welcome to the United Kingdom government as the new COP-26 Presidency. The Ministerial address considered the serious impact of global warming and the unprecedented challenges from the COVID-19 pandemic. The Minister pointed out that Malaysia recognised the urgency to build back through green recovery and to this end had communicated its updated Nationally

Determined Contribution to unconditionally reduce its economy-wide carbon intensity (against GDP) of 45% in 2030 compared to the 2005 level, covering seven (7) GHG instead of 3 GHG areas previously. In addition, the nation hoped to achieve net-zero GHG emission target earliest by 2050, pending the completion of its Long-Term Low Emissions Development Strategy by 2022. (See MALAYSIA THIRD BIENNIAL UPDATE REPORT TO THE UNFCCC, https://unfccc.int/documents/267685, 19 January 2023. Ibid. STATEMENT BY MR. TUAN IBRAHIM TUAN MAN, HONOURABLE MINISTER OF ENVIRONMENT AND WATER MALAYSIA FOR COP-26/CMP-16/CMA-3 RESUMED HIGH-LEVEL SEGMENT, 9–10 NOVEMBER 2021.) To achieve these objectives, the following measures would need to be implemented:

1) carbon pricing policy in phases to support national efforts to reduce GHG emissions;
2) achievement of 31% of renewable energy capacity for power generation in 2025 and 40% in 2035 in national power grid through its Malaysia's Energy Transition Plan to 2021–2040;
3) aspiration for 100% of government fleets to be non-internal combustion engine (ICE) vehicles by 2030;
4) maintenance of at least 50% forest cover as pledged during the Rio Earth Summit 1992;
5) implementation of natural-based solutions as a basis to reduce long-term impacts through planting of a 100 million trees;
6) movement towards Zero Waste directed to landfill through the Waste to Energy concept and to increase its recycling rate target to 40% by 2025;
7) transformation of cities in Malaysia towards low carbon pathway as outlined under the National Low Carbon City Masterplan; and
8) increase the long-term resilience towards climate change impacts through the development of the National Adaptation Plan. (See MALAYSIA THIRD BIENNIAL UPDATE REPORT TO THE UNFCCC, https://unfccc.int/documents/267685, 19 January 2023 at p. 2)

Besides, these measures, Malaysia's two largest energy companies have agreed to achieve net-zero emissions target by 2050. Further, Malaysia supported the Global Methane Pledge and the Glasgow Leaders Declaration on Forests and Land Use. To increase environmental integrity and robust accounting for NDC implementation and establishment of cooperative agreements, Malaysia wished to work with all parties in COP26 to complete the Paris Rulebook to achieve the 1.5 degrees Celsius goal. However, for the implementation of the Paris Rulebook, it would require additional finance, technology transfer and capacity building for developing countries. In this regard, Malaysia urged developed countries to fulfill their obligations under the Paris Agreement. (STATEMENT BY MR. TUAN IBRAHIM TUAN MAN, HONOURABLE

MINISTER OF ENVIRONMENT AND WATER MALAYSIA FOR COP-26/CMP-16 /CMA-3 RESUMED HIGH-LEVEL SEGMENT, 9–10 NOVEMBER 2021, https:// unfccc.int/sites/default/files/resource/MALAYSIA_cop26cmp16cma3_HLS_EN.pdf, 19 January 2023. See also The Edge Markets, COP 26: Malaysia focusing on climate ambitions, financing, carbon markets, https://www.theedgemarkets .com/article/cop-26-malaysia-focusing-climate-ambitions-financing-carbon -markets, 19 January 2023.)

Malaysia's Third Biennial Update Report to the United Nations Framework Convention on Climate Change 1992

Malaysia signed the United Nations Framework Convention on Climate Change (UNFCCC) on 9 June 1993 and ratified it on 17 July 1994. Subsequently, Malaysia ratified the Kyoto Protocol on 4 September 2002. Malaysia signed the Paris Agreement on 22 April 2016 and ratified it on 16 November 2016. As Malaysia is a State Party to the 1992 UNFCCC, it prepared the Malaysia's Third Biennial Update Report (BUR3) according to Decision 2/CP.17 of the UNFCCC and submitted it on 31 December 2020 in fulfilment of the Nation's Nationally Determined Contribution under the UNFCCC, the Paris Agreement (Malaysia, Biennial Update Report (BUR3), https://unfccc.int/documents/267685, 19 January 2023) and as an output of the United Nations Development Programme – Global Environment Facility (UNDP-GEF) Project. The BUR3 Report sets out the NDC for four sectors namely, (1) energy; (2) industrial processes and product used; (3) agriculture, forestry and other land use, and (4) waste sectors, as follows:

(1) the estimations of anthropogenic emissions and removals in four sectors, namely energy; industrial processes and product used; agriculture, forestry and other land use, and waste sectors with time series estimates from 1990 to 2016;
(2) the mitigation actions and their effects in 2016;
(3) the estimation of GHG emissions avoidance from three sectors, namely the energy, waste and forestry sectors;
(4) the future mitigation action targets and the implementation key enablers at national and sub-national level;
(5) the constraints, gaps and needs to build up Malaysia's capacity to address climate change effectively; and
(6) Institutional governance by the National Steering Committee, Technical Working Groups and Sub-Working Groups. (Malaysia, Biennial Update Report (BUR3), https://unfccc.int/documents/267685, 19 January 2023. Executive Summary, p. xvi)

The BUR3 contains four chapters. Chapter 1, entitled "National Circumstances," covers the period up to the year 2016 for the four sectors mentioned above and includes statistics where available. For example, Chapter One provides,

> Over the past four decades, increasing temperature trends of 0.130C to 0.240C per decade have been observed. However, the long-term trends in rainfall is less pronounced … To catalyze investment and economic growth, Malaysia launched an Economic Transformation Programme (ETP) covering the period 2010–2020 in 2010. (xvii) Development, planning and implementation including for climate change, are coordinated by the Economic Planning Unit under the Prime Minister's Department in consultation with the Ministries. These are carried out through the five-year development plans. Since the Second Biennial Update Report submission to the UNFCCC in 2018, there has been a change in the national focal point to the UNFCCC, under which the national focal point currently resides under the Ministry of Environment and Water. Operational matters on climate change are guided and endorsed by the National Steering Committee on Climate Change (NSCCC). Technical Working Groups were established under the National Communication and Biennial Update Report National Steering Committee to prepare national communications and biennial update reports to the UNFCCC. In addition, a National Steering Committee on REDD plus (NSCREDD) was established in 2011 to guide the development of a national REDD plus strategy for implementation. (Malaysia, Biennial Update Report (BUR3) https://unfccc.int/documents/267685, 19 January 2023. Executive Summary, p. xvi Today, the focal point is the Ministry of Environment and Water.)

Chapter 2 on National Greenhouse Gas (GHG) Inventory highlighted that the GHG inventory detailed the anthropogenic emissions and removals for the year 2016 for the four sectors mentioned above as follows:

> The inventory contained time series estimates from 1990 to 2016 for all the sectors that were recalculated to reflect updated activity data and emission factors. These GHG inventory estimates were obtained following the 2006 IPCC Guidelines for National Greenhouse Gas Inventories. … In 2016, in terms of GHG emissions, the energy sector remained as the largest contributor of emissions where it accounted for 79.4% of the total emissions, followed by the IPPU and the waste sectors, where both

> contributed to about 8.6% of the total emissions respectively .... the agriculture sector contributed the lowest emissions at 3.4% while land use ... was a net sink. In terms of gaseous, CO2 emissions amounted to 80% of the total GHG emissions (xviii) in 2016. CH4 emissions were 17% of the total emissions, while both N2O and F-Gases emissions were at 2% respectively. (Malaysia, Biennial Update Report (BUR3), https://unfccc.int/documents/267685, 19 January 2023. Executive Summary at p. xvii.)

Chapter 3 examined Mitigation Actions and Their Effects and stated that Malaysia's key strategy to mitigate greenhouse gas emissions lay in the energy, waste, and forestry sectors. Mitigations in the other sectors, industrial processes and product used and agriculture sectors, were not quantified yet. (Malaysia, Biennial Update Report (BUR3), https://unfccc.int/documents/267685, 19 January 2023. Executive Summary at p. xviii.) Chapter 4 on Level of Support Received, Constraints, Gaps and Needs, pointed out that the Global Environment Facility was the main source of funding for climate change activities followed by funding received from NGOs. (Malaysia, Biennial Update Report (BUR3), https://unfccc.int/documents/267685, 19 January 2023. Executive Summary at pp. xviii–xix.) The support received was channeled mainly towards developing Malaysia's institutional and technical capacity on reporting obligations to the UNFCCC and implementing mitigation actions that focused on:

(i) energy efficiency in buildings, manufacturing, industrial and transport sectors; and
(ii) clean and green technologies in small and medium industries and low-carbon cities development. (Malaysia, Biennial Update Report (BUR3), https://unfccc.int/documents/267685, 19 January 2023. Executive Summary at p. xvii.)

The fight against COVID-19 has been a constraint towards implementing climate change actions as financial resources were diverted to combat the disease. (Foreword by the Minister of Water and Environment. https://unfccc.int/documents/267685, 19 January 2023.)

Human Rights

No new treaties on human rights were signed by Malaysia in 2021. Therefore, the treaty ratification status for human rights in Malaysia, including treaties that have not been ratified, treaties acceded to, the acceptance of individual complaints procedures, the acceptance of the inquiry procedure and the acceptance of the interstate communication procedure, have remained as follows:

Treaty Ratification Status for Malaysia

Treaties That Have Not Been Ratified

1) Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.
2) Optional Protocol of the Convention against Torture.
3) International Covenant on Civil and Political Rights.
4) Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming to the Abolition of the Death Penalty.
5) Convention for the Protection of All Persons from Enforced Disappearance.
6) Interstate Communication Procedure under the International Convention for the Protection of All Persons from Enforced Disappearance (Art. 32).
7) International Convention on the Elimination of All Forms of Racial Discrimination.
8) International Covenant on Economic, Social and Cultural Rights.
9) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Art. 77). (United Nations Human Rights Treaty Bodies, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN, 19 January 2023. To come into effect, the procedure under Article 77 on individual communications requires a minimum of 10 State parties to make the requisite declaration.)

Treaties Acceded To

1) Convention on the Rights of the Child, 17 February 1995.
2) Convention on the Elimination of All Forms of Discrimination against Women, 05 July 1995.
3) Optional Protocol to the Convention on the Rights of the Child on the Involvement of children in armed conflict, 12 April 2012.
4) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 12 April 2012.
5) Convention on the Rights of Persons with Disabilities 08 April 2008 (signed), 19 July 2010 (ratified).

Acceptance of Individual Complaints Procedures for Malaysia

1) Individual complaints procedure under the Convention against Torture, (Art. 22): –
2) Optional Protocol to the International Covenant on Civil and Political Rights: NO.

3) Individual complaints procedure under the International Convention for the Protection of All Persons from Enforced Disappearance, (Art. 31): –
4) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: NO.
5) Individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination, (Art. 14): N/A.
6) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: YES.
7) Individual complaints procedure under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (Art. 77): –
8) Optional Protocol to the Convention on the Rights of the Child: NO.
9) Optional Protocol to the Convention on the Rights of Persons with Disabilities: NO

Acceptance of the Inquiry Procedure for Malaysia: Conventions That Have Not Been Ratified

1) Inquiry procedure under the Convention against Torture, (Art. 20).
2) Inquiry procedure under the International Convention for the Protection of All Persons from Enforced Disappearance, (Art. 33). (United Nations Human Rights Treaty Bodies, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN, 19 January 2023. CED inquiry procedure does not require specific acceptance by States parties. It applies from the entry into force of the Convention in the country.)
3) Inquiry procedure under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, (Art. 8–9).
4) Inquiry procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (Art. 11).
5) Inquiry procedure under the Optional Protocol to the Convention on the Rights of the Child, (Art. 13).
6) Inquiry procedure under the Convention on the Rights of Persons with Disabilities, (Art. 6–7).

Acceptance of the Interstate Communication Procedure for Malaysia: Conventions That Have Not Been Ratified:

1) Interstate communication procedure under the International Convention for the Protection of All Persons from Enforced Disappearance, (Art. 32).

Conclusion

The year 2021 has been significant for Malaysian State Practice as the Ministry of Foreign Affairs (Wisma Putra) initiated the Malaysian Strategic Plan as a guidance document for Malaysian diplomats to further strengthen Malaysia's efforts in the maintenance of international and regional peace and security. Furthermore, the Federal Court had also given clear rules on the domestic implementation of international law, stating that treaty rules had to be transformed into domestic law for implementation purposes. The Double Taxation Relief Agreement between the Governments of Ukraine and Malaysia was signed and Malaysia's BUR3 update under the 1992 UNFCCC was submitted. Though there were no new ratifications to human rights treaties, the Government of Malaysia was engaged in controlling the COVID-19 pandemic.

State Practice of Asian Countries in International Law

Nepal

Ravi Prakash Vyas and Pranjali Kanel***

History of Interactions between State and International Law and International Community

History and Theoretical Approach of Nepal in International Law

Nepal has always maintained its interaction between state and international law and the international community with high regard. The poignant exchange traced back to the marital relationship between *Bhrikuti*, married to the famous Tibetian King *Tsong Tsen*, has evolved over the years into bilateral and multilateral relationships with legal instruments such as the United Charter as the fulcrum.

On an organizational front, Nepal's interaction with the international community can be traced back to 1769 to an office called *Jaisi Kotha*. It was established to look after foreign affairs specific to Tibet and China. The office's name was changed to *Munshi Khana*. Despite undergoing reorganization, after 1934, the *Munshi Khana* was referred to as the Foreign Department in English correspondence and was subsequently upgraded to the level of Department. There was a decisive shift in the correspondence with the international community from the development and growth of the foreign ministry following the 1950 political revolution in Nepal. Since then, the Ministry of Foreign Affairs has gone under multiple reorganizations, administrative, institutional, and policy level reforms and suffices to render functions related to foreign affairs to date. (MOFA, History, 2021)

Nepal's interactions and conduct of foreign relations have always been determined under the fundamentals of foreign policy under the Constitution of Nepal. On the bilateral level, looking at its geopolitical placement, Nepal has always been committed to maintaining friendly relations with its neighbors.

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For example, it first established bilateral ties with the United Kingdom in 1816 and, over the years, has successfully established bilateral relationships with 172 countries. In 2021, it expanded its interaction with four member states of the international community. (MOFA, Foreign Policy, 2021)

Nepal's Approach to 'Law' and 'International Law'

While Nepal remains committed to upholding its obligations under international law, its conduct is guided by national independence, sovereignty, territorial integrity, freedom, and national unity principles. Article 5 and Article 50(4) of the Constitution of Nepal set out the national interest as a pivotal step even before confirming international law. The constitution shapes Nepal's approach to 'international law' discernible through Nepal's State Policy to "conduct an independent foreign policy based on the UN Charter, non-alignment, principles of *Panchasheel*, international law and the norms promoting peace, taking into consideration of the overall interest of the nation." (Constitution, Art. 51) Its approach to international law is perceptible with its basis on cognizance of the evolving global situation and its foreign relations motto – 'Amity with all, enmity with none.' (MOFA, Report (2020–2021), p. 138)

Sources of International Law

Article 51 of the Constitution of Nepal refers to international law and norms to shape the state's policy and mentions the reviews of treaties and entering and making new treaties. This puts treaties as a primary source of international law in Nepal's case, which it has also acknowledged in its yearly reports. (MOFA, Report (2020–2021)) Additionally, as a party to UN Charter and the ICJ statute, subsequently, the sources of international law are applied similarly to that in the ICJ statute.

Recognition of and by Nepal

Statehood & Sovereignty

Nepal has always had the same position and affirms recognizing one China policy. (MOFA, Report (2020–2021), pp. 4–5)

Authority and Sovereignty over Territory

Territory & Jurisdiction

Article 2 of the Constitution of Nepal vests the authority and sovereignty over the territory of Nepal to the people of Nepal.

Territorial Disputes

Nepal and India continued to maintain their claims over the territories of Kalapani, Limpiyadhura, and LipuLekh. While Nepal looked forward to collecting the necessary information about the people residing in the 'disputed' territory for the 12th National Population and Household Census (Republica, 2021), India published its new map, including the territories of Kalapani, Limpiyadhura, and LipuLekh within the boundaries of India. (NepalLiveToday, 2021)

Theories of International & Domestic Law

Relationship between International & Domestic Law

Nepal's stance on the theory of international and domestic law delves between the Monist and Dualist theories and is rather unclear. The Constitution of Nepal specifies the Constitution to be the supreme law of the land and any other laws inconsistent with it are to be void. Article 279 provides for a dualist lens of approaching law providing constitutional supremacy by enlisting the specifics to ratify, accession, accept and approve treaties. However, Section 9 of the Treaty Act 1990 stipulates that once ratified by Nepal; a treaty is treated as equal to the national law, and in any inconsistency, a treaty provision would prevail over national law. This gives a formative structure to examine Nepal's relationship with the law through a monist approach.

Implementation of Treaties

Nepal did not take new obligations in terms of implementing treaties. Following its participation in the third review cycle under UPR in January 2021,

it is looking forward to considering suggestions concerning the treaty obligation it is already a part of.

Establishment of Diplomatic and Consular Relations

Diplomatic & Consular Relations

Nepal established bilateral diplomatic relationships with the Commonwealth of Dominica, The Gambia, Sierra Leone, and Barbados in 2021, counting its diplomatic ties to 172. Nepal has a list of 28 residential embassies, of which three are for SAARC, the European Union, and the United Nations. (MOFA, 2021)

Admission, Membership, and Participation in International Organization

International & Regional Organizations

The Office of the High Commissioner for Human Rights (OHCHR)
Nepal participated in the third cycle of the Universal Periodic Review of Nepal held during the 37th session of the Human Rights Council UPR Working Group. (MOFA, Report (2020–2021), p. 52)

World Health Organization (WHO)
Nepal participated in and attended the 74th session of the World Health Assembly. It addressed the need to ensure equitable distribution of vaccines to all and prioritize the most vulnerable first.

International Labor Organization (ILO)
Nepal attended the 109th session of the ILO in May 2021. Nepal also advocated for safe, secure, and dignified foreign employment. It called for the international community to ensure the safety, well-being, and access to health care for migrant workers amid the pandemic.

World Trade Organization (WTO)
Nepal participated in the Trade Negotiation Committee (TNC) meetings on 15 July and chaired the Enhanced Integrated Framework (EIF) Board meetings on 26 November 2020 and 17 June 2021. (MOFA, Report (2020–2021), 2021,

p. 47) In its participation, Nepal lobbied for the benefits of the Least Developed Countries (LDCs) and Land-Locked Developing Countries (LLDCs).

Admission, Membership, and Participation in Regional Organization

South Asian Association for Regional Cooperation (SAARC)

Nepal participated in the 16th Informal Meeting of the SAARC Finance Ministers. It was a virtual meeting held on the sidelines of the 54th Annual Meeting of the Asian Development Bank (ADB). Nepal stressed the need for global solidarity, collective response, and cooperation to suppress the transmission of COVID-19 and measures to protect the lives and livelihoods because of COVID-19. (MOFA, Report (2020–2021), p. 40)

Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC)

In March 2021, the Special Session of the BIMSTEC Senior Officials Meeting (S-SOM) was held to prepare for the Ministerial Meeting in April. Nepal participated in the 17th BIMSTEC Ministerial Meeting, which was organized virtually by the organization's current chair, Sri Lanka. Nepal emphasized furthering and deepening regional cooperation. (MOFA, Report (2020–2021), p. 41)

Asia Cooperation Dialogue (ACD)

Asia Cooperation Dialogue, established in 2002, aims to promote interdependence among countries of Asia in all areas of cooperation. (MOFA, February 2018) Nepal participated in the 17th Ministerial Meeting of the ACD. The meeting was hosted virtually by Turkey, the current chair. The conference was themed 'The New Normal and Safe and Healthy Tourism.' (MOFA, Report (2020–2021), 2021, p. 43) Before the Ministerial Meeting, a virtual ACD Senior Officials' Meeting (SOM) was conveyed, during which the members, including Nepal, deliberated on draft texts of the Ankara Declaration of the Ministerial Meeting, and Guiding Principles for the Functioning of the ACD Secretariat. (MOFA, Report (2020–2021), p. 43)

The critical takeaway of Nepal's participation in the Working Group on ACD Blueprint is being able to bring forth an ACD Roadmap which consists of the following six pillars: (MOFA, Report (2020–2021), p. 44)

(i) Connectivity,
(ii) Science, Technology, and Innovation,

(iii) Education and Human Resource Development,
(iv) Interrelation of Food, Energy and Water Security,
(v) Culture and Tourism, and
(vi) Promoting Approaches to Inclusive and Sustainable Development.

Shanghai Cooperation Organization (SCO)

Established in 2001, Shanghai Cooperation Organization (SCO) aims to strengthen confidence and good neighborly relations and promote effective cooperation in politics, trade and economy, science and technology, energy, and counterterrorism. (MOFA, Nepal and SCO, February 2018) Convened under the Chairmanship of the Republic of Tajikistan, Nepal, participated in a virtual meeting of the National Coordinators of the SCO Member States. Nepal expressed interest in attaining the 'Observer State' status of SCO. (MOFA, Report (2020–2021), p. 44)

Non-Governmental Organization and International Law

Individuals & Non-State Actors

Non-Governmental Organizations have always played an essential role in vigilantly monitoring Nepal's requirements to fulfill its obligations under international law. In 2021, multiple NGOs submitted individual and joint submissions under the Stakeholder Submission to the Office of the United Nations High Commissioner for Human Rights for the third cycle of Universal Periodic Review (UPR). (CEDAW/C/NPL/FCO/6, 2021) The list of the NGOs who submitted the reports is enlisted at the end of the summary report.

Bilateral/Multilateral Aid and Disaster Relief; Technical & Development Assistance

International Relations & Cooperation

COVID-19 Related Cooperation

Nepal was part of several COVID-19-related cooperation due to its relationship with the international community. The Ministry of Foreign Affairs, in its bulletin, lists the following as significant COVID-19-related cooperation:

Nepal received medical supplies including Pulse Oximeter, Patient Monitor Medical Ventilator, and Portable Oxygen Concentrator, provided by by the Kuwait Red Crescent Society on 22 July 2021.

The government of Japan assisted Nepal with about 1.6 million doses of AstraZeneca COVID vaccines. Nepal also received 13,000 COVID-19 AstraZeneca vaccines from the Government of the United Kingdom (UK). The Governments of Lithuania and Hungary also supported Nepal with medical equipment and health materials in 2021. China has pledged to provide a total of 4.4 million Vero Cell and CoronaVac vaccines to Nepal under grant assistance. The United States provided Nepal with 1.53 million doses of J&J vaccines on 12 July 2021 as significant humanitarian support. (MOFA, Report (2020–2021), p. 37)

Nepal-India Joint Project Monitoring Committee (JPMC) Meeting on Post-Earthquake Reconstruction (MOFA Bulletin, Vol. 6, No. 2)

India assisted in the post-earthquake reconstruction following the 2015 earthquake in the housing, education, health, and cultural heritage sectors. The JPMC meeting saw satisfaction from Nepal and India on completing 50,000 houses in Nepal's Gorkha and Nuwakot districts.

Millennium Challenge Corporation (MCC)

The Millennium Challenge Corporation (MCC) is a U.S. foreign assistance agency that provides time-limited grants promoting economic growth, reducing poverty, and strengthening institutions. (MCC, 2022) Nepal signed the MCC compact in 2017, and yet to be implemented. A delegation from the U.S. Government's Millennium Challenge Corporation visited Nepal and exchanged views on the USD 500 million MCC-Nepal Compact and its potential for Nepal's economic transformation.

Specific Bilateral Relations Issues

Afghanistan

Nepal and Afghanistan have engaged in bilateral relations since 1961. Following the crisis after the United States Armed Forces withdrew from Afghanistan, the Ministry of Foreign Affairs, Nepal, initiated the evacuation process of the Nepali citizens in Afghan territory. A total of 906 Nepali citizens were evacuated by September 2021. (MOFA Bulletin, vol. 6, no. 1)

Bangladesh

Nepal and Bangladesh agreed to initiate the power trading process by finalizing the trading modalities, transmission system, and regularity issues in the third meeting of the Joint Working Group (JWG) and the Joint Steering Committee (JSC) on Nepal- Bangladesh Cooperation in the Field of the Power Sector was held virtually on 13–14 September 2021. (MOFA Bulletin, vol. 6, no. 1) The meeting focused on utilizing Nepal's hydropower potential for mutual benefit.

China

Apart from COVID-19 assistance, Nepal and China share bilateral relations on other fronts. China and Nepal have bilateral relations in the railway sector. In 2021, Nepal and China held the 7th meeting on enhancing cooperation in the railway sector.

India

Trade

India remains Nepal's largest trade partner and source of tourists. It was also one of the most prominent investors in Nepal. Nepal's export to India was NPR 106 billion, and its import was NPR 971 billion as of July 2021. (MOFA, Report (2020–2021))

Railway

India has assisted in completing 34.9 km out of 68.72 km of rail link under the Jaynagar – Bijalpur – Bardibas rail link project. The assistance in rail operation enhances trade and commercial activities and facilitates easy movement of people. India handed over the Jaynagar-Kurtha Rail Section to Nepal in October 2021. (MOFA Bulletin, vol. 6, no. 2)

Security Coordination Meeting

India and Nepal have an open border resulting in both sides facing the problem of illegal cross-border activities. India and Nepal held the 5th coordination meeting between Armed Police Force (APF), Nepal, and Sashastra Seema Bal (SSB) in October 2021. (MOFA Bulletin, vol. 6, no. 2) The meeting reviewed the progress made on the security scenario at the Nepal-India border. It deliberated on measures to enhance mutual coordination and continued cooperation for regulating illegal cross-border activities.

France

Nepal-France Agreement On The Functioning Of French Cultural Centre (MOFA Bulletin, vol. 6, no. 3)

Nepal and France signed the updated Agreement on establishing and functioning of the Alliance Française in Kathmandu on 27 December 2021. The Agreement aims to facilitate the smooth functioning of the French Cultural Centre in Kathmandu.

Qatar

In the 5th meeting of the Joint Committee on Nepal-Qatar Bilateral Labour Agreement, representatives from Nepal and Qatar agreed to review, upgrade or amend the existing labor agreement. They also discussed issues on exploring opportunities for a skilled Nepali workforce in Qatar, establishing technical training centers in Nepal, and reintegrating returnee Nepali migrant workers. (MOFA Bulletin, vol. 6, no. 3)

Regional Cooperation Initiatives

Non-Aligned Movement (NAM)

Nepal, a founding member of NAM, participated in the High-level Commemorative Meeting to mark the 60th anniversary of the movement. Nepal emphasized that NAM should reclaim its rightful place and initiate decisive actions for the poor, weak, and vulnerable countries. (MOFA Bulletin, vol. 6, no. 2)

South Asian Association for Regional Cooperation (SAARC)

Regional cooperation has remained a prominent feature of Nepal's foreign policy. (MOFA, Report (2020–2021)) Nepal participated in the 15th and 16th Informal Meetings of SAARC Finance Ministers. Nepal hosted the virtual Informal Meeting of the SAARC Council. It emphasized the significant role of SAARC in bringing substantive improvement in the lives and livelihood of people in the region.

Diplomatic Solution of Disputes

Settlement of Disputes

One of Nepal's prominent issues in the international community remains with India, which concerns the territory of Kalapani, Limpiyadhura, and LipuLekh. Nepal and India have both recourses to diplomatic measures to address the dispute. The sixth meeting of the Nepal-India Joint Commission held in

January 2021 discussed reviewing the Peace and Friendship Treaty of 1950. (MOFA, Report (2020–2021), p. 11)

International and Regional Trade Treaties and Bodies

International Economic Law

Nepal became the 147th member of the World Trade Organization (WTO) in 2004. In the same year, Nepal became a member of the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC). It additionally ratified the South Asian Association for Regional Cooperation (SAARC) Agreement on a South Asian Free Trade Area (SAFTA). Under SAFTA, the eight SAARC nations have pledged to cut tariff rates on a product-by-product basis.

International Financial Institutions

International Development Association (IDA), part of the World Bank (WB) and Asian Development Bank (ADB), continues to remain the major international financial institution contributing as a donor agency in Nepal.

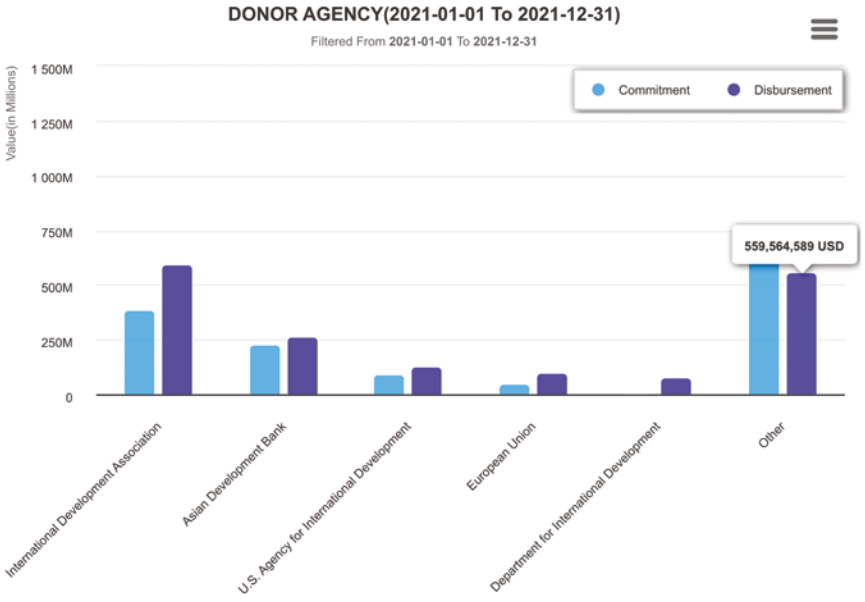

FIGURE 1 Donor agencies in Nepal for the year 2021
SOURCE: AID MANAGEMENT INFORMATION SYSTEM FOR NEPAL, DATABASE

Asian Development Bank (ADB)

> In 2021, the Asian Development Bank's (ADB) support to the Government of Nepal for the COVID-19 response measures included resources for containment and prevention, protection of vulnerable groups, and relief for small businesses. (Nepal and ADB, Asian Development Bank)

ADB committed a USD 165 million loan to procure about 15.9 million dosages of COVID-19 vaccines. The project supports Nepal's National Deployment and Vaccination Plan. (ADB, 2021) The Government of Nepal and the Asian Development Bank signed a USD 5 million grant for the Prevention and Control of coronavirus disease (COVID-19) through WASH and Health initiatives in Secondary and Small Towns on July 2021. (IECCD, vol. 9, no. 2, 2021)

World Trade Organization (WTO)

Nepal has been a member of the World Trade Organization (WTO) since 2004. Nepal participated in the Trade Negotiation Committee (TNC) meetings held on 15 July and chaired the Enhanced Integrated Framework (EIF) Board meetings held on 26 November 2020 and 17 June 2021. Nepal actively lobbied for the benefits of the Least Developed Countries (LDCs) and Land Locked Developing Countries (LLDCs) in all engagements. The Government of Nepal and the World Bank signed USD 150 million (Rs. 17.78 billion) concessional loan agreement to support Nepal's resilient recovery from the COVID-19 pandemic, protect the most vulnerable, and support sustainable growth on June 27, 2021. (IECCD, vol. 9, no. 2, 2021)

Rights of Landlocked & Geographically Disadvantaged States

Law of the Sea

Nepal is a landlocked country with China and India as its neighboring countries. As a landlocked country and as a party to the World Trade Organization (WTO), Nepal has a right to transit through the neighboring countries. Nepal has, in previous years, signed multiple transit treaties with India and China.

In 2021, Nepal and Bangladesh signed 'Exchange of Letters' on the designation of the Rohanpur-Singhabad railway route as an additional transit route for the movement of traffic-in-transit between Nepal and Bangladesh and for third-country transit trade. (MOFA, Report (2020–2021), p. 75)

Bringing attention to the importance of the Indian Ocean in the external trade for landlocked countries like Nepal (Bharat Paudyal, 2021), Nepal addressed the 5th Indian Ocean Conference held under the theme of "Indian Ocean: Ecology, Economy, Epidemic" in Abu Dhabi, the United Arab Emirates, on 5 December 2021. It highlighted the need for an enlightened approach to economic cooperation in the region to enhance intra-regional trade and investments. (MOFA Bulletin, vol. 6, no. 3, 2021)

Accession and Reservations to International Human Rights Treaties

Human Rights

Nepal did not enter into new international human rights treaties in 2021.

Implementation of Human Rights Treaties

Under its state policy, the Constitution of Nepal allows a review of treaties concluded in the past and allows the conclusion of treaties and agreements based on equality and mutual interest. Section 9 of the Treaty Act 1990 states that even if the treaty to which Nepal is a party is inconsistent with the domestic laws, the treaty provisions shall be enforceable as that of Nepalese laws. This is in contradiction to the Constitutional provision, which requires the Nepalese law to be applicable in cases where the treaty provisions are inconsistent with the domestic law. No specific legal instrument guides the implementation of human rights treaties, and one must rely on the requirement under the Constitution and the Treaty Act.

Despite the ambiguity in the law, the National Human Rights Commission (NHRC) is an independent constitutional body whose function heavily relies on monitoring and checking the implementation of human rights situations according to the state obligation. (Constitution; Art 249) Confirming the Paris Principles and accredited as category 'A,' the NHRC of Nepal monitors the human rights situation and enjoys independence in fulfilling its mandate. The NHRC plays an essential role in carrying out periodic reviews of the relevant laws relating to human rights and making recommendations to the Government of Nepal for necessary improvements and amendments to such laws.

Other than domestic mechanisms, the international human rights treaties' implementation is also overlooked by Nepal's participation in the periodic review. It is common knowledge that ratifying a treaty means states parties willingly submitting their domestic legal system, administrative procedures, and other national practices to periodic review by committees of independent experts. (UN Nepal) Nepal submits its report to the Treaty Bodies, which allows the state to be transparent about treaty implementation and subjects itself to international scrutiny over its mechanism. In 2021, Nepal submitted a State Party report as Follow-up to the Concluding Observations of the Committee on the Elimination of Discrimination against Women adopted on 14 November 2018. (CEDAW/C/NPL/FCO/6, 2021)

Protection under International and Domestic Law

Nepal is a party to the seven core treaties, which are:

a) Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)
b) International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
c) International Covenant on Civil and Political Rights (CCPR)
d) International Covenant on Economic, Social, and Cultural Rights (CESCR)
e) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
f) Convention on the Rights of the Child (CRC)
g) Convention on the Rights of Persons with Disabilities (CRPD)

Treaty obligations under these core nine treaties have implemented into domestic legislations, including the The Act Relating to Children, 2018, Compensation Relating to Torture Act, 1996, Safe Motherhood and Reproductive Health Rights Act, 2018 and fundamental rights under the Constitution of Nepal. This protection under international and domestic law has been guaranteed before 2021 by Nepal.

Nepal's delegation participated in the 37th Session of the Human Rights Council Working Group on Universal Periodic Review in January. It was marked with a positive, with the Nepali delegation welcoming the Special Rapporteur on the right to food and Special Rapporteur on extreme poverty and human rights. The Foreign Minister, while addressing the President and the members of the Working Group, pointed out Nepal's role in protecting and respecting human rights, the part of human rights mechanisms and Non-Governmental

Organizations (NGOs), and affirmation of Nepal mainstreaming SDGs in the national development plans and policies to realize them by 2030. (MOFA, Report (2020–2021), pp. 145–154)

Specific Human Rights Incidents or Cases

Rights of the Women

In February 2021, the Department of Immigration, Nepal, proposed a policy requiring women below the age of 40 to require permission and recommendation from their families and local government before any international travel. (Mandal; Baral, 2021) The policy was received with immediate criticism citing the policy as being not just gender discriminatory but also violating the international human rights obligation Nepal has to fulfill. The Department suggested that it would help prevent trafficking, but the policy did not come into force. (Amnesty International, Nepal, 2021)

Concern over NHRC's Independence

UN Human Rights expressed concern regarding the independence of Nepal's National Human Rights Commission (NHRC) after the recent appointment of new members which they considered to be inconsistent with international standards. Currently, the NHRC enjoys the category 'A' status according to the Paris Principles. Still, the experts expressed that Nepal failed to implement the extensive guidelines of the Sub-Committee on Accreditation (SCA), based on which the NHRC was conferred its 'A' status. (OHCHR, Press Release, 2021)

Application of Hague & Geneva Conventions

International Humanitarian Law

Nepal has been a party to the Geneva Conventions since 1964 but has not acceded to the Additional Protocols. Nepal is currently working on a draft titled the Geneva Convention Acts bill, but it has yet to see the light of day.

State Practice of Asian Countries in International Law

Philippines

Rommel J. Casis and Michael T. Tiu, Jr.***

Relationship between International & Domestic Law

Implementation of Treaties

JUDICIAL DECISION – Withdrawal from the Rome Statute and Its Effects

SENATORS FRANCIS "KIKO" N. PANGILINAN, FRANKLIN M. DRILON, PAOLO BENIGNO "BAM" AQUINO IV, LEILA M. DE LIMA, RISA HONTIVEROS, AND ANTONIO "SONNY" F. TRILLANES IV VS. ALAN PETER S. CAYETANO, SALVADOR C. MEDIALDEA, TEODORO L. LOCSIN, JR., AND SALVADOR S. PANELO [G.R. No. 238875. 16 March 2021.]

PHILIPPINE COALITION FOR THE INTERNATIONAL CRIMINAL COURT (PCICC), LORETTA ANN P. ROSALES, DR. AURORA CORAZON A. PARONG, EVELYN BALAIS-SERRANO, JOSE NOEL D. OLANO, REBECCA DESIREE E. LOZADA, EDELIZA P. HERNANDEZ, ANALIZA T. UGAY, NIZA CONCEPCION ARAZAS, GLORIA ESTER CATIBAYAN-GUARIN, RAY PAOLO "ARPEE" J. SANTIAGO, GILBERT TERUEL ANDRES, AND AXLE P. SIMEON, petitioners, vs. OFFICE OF THE EXECUTIVE SECRETARY, REPRESENTED BY HON. SALVADOR MEDIALDEA, THE DEPARTMENT OF FOREIGN AFFAIRS, REPRESENTED BY HON. ALAN PETER CAYETANO, AND THE PERMANENT MISSION OF THE REPUBLIC OF THE PHILIPPINES TO THE UNITED NATIONS, REPRESENTED BY HON. TEODORO LOCSIN, JR., respondents. [G.R. No. 239483. 16 March 2021.]

INTEGRATED BAR OF THE PHILIPPINES, petitioner, vs. OFFICE OF THE EXECUTIVE SECRETARY, REPRESENTED BY HON. SALVADOR C. MEDIALDEA, THE DEPARTMENT OF FOREIGN AFFAIRS, REPRESENTED BY HON. ALAN PETER CAYETANO AND THE PERMANENT MISSION OF THE REPUBLIC

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OF THE PHILIPPINES TO THE UNITED NATIONS, REPRESENTED BY HON. TEODORO LOCSIN, JR., respondents. [G.R. No. 240954. 16 March 2021.]

In 2011, the Philippines became a State Party to the Rome Statute. In February 2018, the Prosecutor of the International Criminal Court (ICC) Fatou Bensouda (Prosecutor Bensouda) commenced the preliminary examination of the atrocities allegedly committed in the Philippines pursuant to the Duterte administration's "war on drugs." A month later, the Philippines announced that it was withdrawing from the ICC. On 16 March 2018, the Philippines formally submitted its Notice of Withdrawal from the ICC to the United Nations, which was received by the UN Secretary-General. Petitioners argued that the President's unilateral withdrawal from the Rome Statute was unconstitutional, being bereft of Senate concurrence. They prayed that the withdrawal be declared void ab initio, and that the executive be directed to notify the UN Secretary-General of the cancellation of the notice of withdrawal. The Supreme Court dismissed the petitions finding them to be moot and academic. The Court reasoned that the President had already done all that was necessary to be withdrawn and that there was no legal mandate for the President to cancel the withdrawal.

The Court reiterated the premise that, as the primary architect of foreign policy, the president enjoys a degree of leeway to withdraw from treaties. However, such discretion is limited by the Constitution and the laws. Thus, the president cannot unilaterally withdraw from a treaty if there is subsequent legislation which affirms and implements it. Conversely, a treaty cannot amend a statute. When the president enters into a treaty that is inconsistent with a prior statute, the president may unilaterally withdraw from it, unless the prior statute is amended to be consistent with the treaty.

The Court further stated that the extent of legislative involvement in withdrawing from treaties is determined by the circumstances of entry into the same. Thus:

> Where legislative imprimatur impelled the president's action to enter into a treaty, a withdrawal cannot be effected without concomitant legislative sanction. Similarly, where the Senate's concurrence imposes as a condition the same concurrence for withdrawal, the president enjoys no unilateral authority to withdraw, and must then secure Senate concurrence.

The Court concluded that the president can withdraw from a treaty as a matter of policy in keeping with the legal system, such as if a treaty is unconstitutional

or contrary to provisions of an existing prior statute. However, the president may not unilaterally withdraw from a treaty (a) when the Senate conditionally concurs, such that it requires concurrence also to withdraw; or (b) when the withdrawal itself will be contrary to a statute, or to a legislative authority to negotiate and enter into a treaty, or an existing law which implements a treaty.

Making & Concluding Treaties – Negotiation – Accession – Ratification – Deposit – Registration – Internal Constitutional Arrangements

Treaties

Judicial decision – Ratification of Treaties

Senators Francis "Kiko" N. Pangilinan, Franklin M. Drilon, Paolo Benigno "Bam" Aquino IV, Leila M. De Lima, Risa Hontiveros, and Antonio "Sonny" F. Trillanes IV vs. Alan Peter S. Cayetano, Salvador C. Medialdea, Teodoro L. Locsin, Jr., and Salvador S. Panelo [G.R. No. 238875. 16 March 2021.]

Regarding ratification of treaties, the Court differentiated the definition of treaties under the Vienna Convention on the Law of Treaties and under domestic law. In Philippine domestic law, treaties are characterized as "international agreements entered into by the Philippines which require legislative concurrence after executive ratification. This term may include compacts like conventions, declarations, covenants and acts."

Treaties under the Vienna Convention include all written international agreements, regardless of their nomenclature. In international law, no difference exists in the agreements' binding effect on states, notwithstanding how nations opt to designate the document.

However, the law in the Philippines distinguishes treaties from executive agreements. Treaties and executive agreements are equally binding in the Philippines. However, an executive agreement "(a) does not require legislative concurrence; (b) is usually less formal; and (c) deals with a narrower range of subject matters." Executive agreements dispense with Senate concurrence "because of the legal mandate with which they are concluded." They simply implement existing policies, and are thus entered into:

(1) to adjust the details of a treaty;
(2) pursuant to or upon confirmation by an act of the Legislature; or

(3) in the exercise of the President's independent powers under the Constitution.

The raison d'être of executive agreements hinges on prior constitutional or legislative authorizations. (Emphasis in the original, citations omitted) However, this Court had previously stated that this difference in form is immaterial in international law.

Specific Bilateral Relations Issues

International Relations & Cooperation

EXECUTIVE AGREEMENTS/TREATIES – Philippine Secretary of Foreign Affairs Signed the Philippine-United States Aeronautical and Maritime Search and Rescue (AMSAR) Agreement.

Foreign Affairs Secretary Teodoro L. Locsin Jr. and U.S. Embassy Chargé d'affaires John C. Law signed the Philippine-United States Aeronautical and Maritime Search and Rescue (AMSAR) Agreement on 30 July 2021.

The AMSAR Agreement provides delimitations on the search and rescue regions of the Philippines and the United States. In a statement, the Department of Foreign Affairs emphasized that the agreement fosters stronger bilateral cooperation in the field of maritime and aeronautical search and rescue and enhances both countries' effectiveness in assisting persons, vessels, aircraft or other craft in distress. The statement added that the Agreement "will help boost the Philippines' capability to conduct search and rescue operations and save lives."

Intellectual Property (WIPO)

International Economic Law

TREATIES – Accession to the Beijing Treaty on Audiovisual Performances

The Philippines, through the Permanent Representative of the Philippines to Geneva Ambassador Evan P. Garcia, deposited its instrument of accession to the Beijing Treaty on Audiovisual Performances (BTAP) on 28 April 2021. Ambassador Garcia personally handed the instrument of accession to the World Intellectual Property Organization (WIPO) Director General Darren Tang at WIPO Headquarters.

Following the deposit of the instrument of accession, Ambassador Garcia stated that the BTAP guarantees the expansion of the protection given to Philippine musicians, singers, actors, and performers, providing them a uniform and effective umbrella of protection critical in an ever-shifting world. He highlighted the timeliness of the accession, as the Philippine creative economy was severely harmed in 2020, and that this treaty will allow the industry to bounce back and contribute to the economic recovery of the Philippines.

Environmental Protection through Law/Regulation

International Environmental Law

Judicial decision – Government Use of an Area Classified as a Wetland of International Importance

CYNTHIA A. VILLAR, FORMER MEMBER, HOUSE OF REPRESENTATIVES, LONE DISTRICT OF LAS PIÑAS CITY [supported by THREE HUNDRED FIFTEEN THOUSAND EIGHT HUNDRED FORTY-NINE (315,849) RESIDENTS OF LAS PIÑAS CITY] VS. ALLTECH CONTRACTORS, INC., PHILIPPINE RECLAMATION AUTHORITY, DEPARTMENT OF ENVIRONMENT and NATURAL RESOURCES, ENVIRONMENTAL MANAGEMENT BUREAU and CITIES OF LAS PIÑAS, PARAÑAQUE, AND BACOOR [G.R. No. 208702. 11 May 2021.]

Alltech Contractors entered into Joint Venture Agreements with the cities of Las Piñas and Parañaque for the reclamation of land along the coast of Manila Bay. The Philippine Reclamation Authority approved the proposed reclamation projects. After the submission of various plans and the holding of hearings, the Environmental Management Bureau issued an Environmental Compliance Certificate for the project. Petitioner Villar, who was concerned that the proposed project would cause flooding in the adjacent barangays, filed a Petition for the Issuance of a Writ of Kalikasan before the Supreme Court. Villar asked that the reclamation projects be enjoined. The Court issued the writs and thereafter remanded the case to the Court of Appeals (CA) to accept the return of the writ and to conduct the necessary hearing, reception of evidence, and rendition of judgment. The CA denied the Petition. It reasoned that the proposed projects had complied with the legal requirements therefore and that Villar had failed to prove that the projects would expose the residents of the adjacent barangays to catastrophic environmental damage. Before the Supreme Court, Villar argued, inter alia, that the proposed project impinges on the viability and sustainability of the Las Piñas-Parañaque Critical Habitat

and Ecotourism Area (LPPCHEA). She asked the Court to take judicial notice of the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Convention on Wetlands), an international treaty for the conservation and sustainable use of wetland which the Philippines is a signatory, and of the fact that on 15 March 2013, the Convention on Wetlands certified LLPCHEA as a "Wetland of National Importance. The Supreme Court denied the Petition." It found that the classification of the LLPCHEA as a wetland of national importance and did not preclude the Philippine Government from undertaking reclamation projects adjacent to the said wetland.

In explaining its decision, the Court acknowledged the international responsibilities of the Philippines as a Contracting Party of the Convention on Wetlands. It, however, noted that these responsibilities do not mean that a reclamation project alongside or adjacent a designated wetland is absolutely prohibited, considering Paragraph 3, Article 2 of the Convention on Wetlands of International Importance especially Waterfowl Habitat, which states, "[t]he inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated."

Thus, the Court explained that the classification of an area as a wetland of international importance does not diminish the control the government exercises over the wetlands and adjacent areas within its territory, as the government may continue to utilize these areas as it may deem beneficial for all its stakeholders.

Implementation of Human Rights Treaties (e.g., Domestic Laws and Institutions)

Human Rights

Judicial decision – Maternity and the Special Leave Benefits and the CEDAW

HOUSE OF REPRESENTATIVES ELECTORAL TRIBUNAL VS. DAISY B. PANGA-VEGA [G.R. No. 228236. 27 January 2021]

Atty. Panga-Vega was Secretary of the House of Representatives Electoral Tribunal (HRET). In February 2011, she availed of the special leave benefit under Republic Act No. 9710 (RA 9710), otherwise known as the "Magna Carta of Women," in order to undergo a total hysterectomy. One month later, Atty. Panga-Vega informed the HRET Chairperson that she was resuming her duties, and presented a medical certificate indicating that she was fit for work.

The HRET directed Atty. Panga-Vega to complete her two-month special leave. After the HRET denied her reconsideration, she filed an appeal with the Civil Service Commission (CSC). The CSC issued a decision granting the appeal of Atty. Panga-Vega. The Court of Appeals affirmed the CSC decision.

In its Petition, the HRET argued that the CSC should not have applied suppletory the rules on maternity leave to the special leave benefit under RA No. 9710. On the other hand, Atty. Panga-Vega claims that the suppletory application of the rules on maternity leave to the special leave benefit is more in accord with the thrust and intent of RA 9710. The Supreme Court affirmed the decision and found that RA 9710 is social legislation meant to empower women.

In particular, the Court recognized that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) acknowledges the need to guarantee the basic human rights and fundamental freedoms of women through the adoption in the political, social, economic, and cultural fields, of appropriate measures, including legislation, to ensure their full development and advancement.

Consistent thereto, no less than the fundamental law of the land imposes on the State the duty to protect working women by providing safe and healthful working conditions, as well as facilities and opportunities to enhance their welfare, and enable them to realize their full potential in the service of the nation. To fulfill the foregoing obligation under the CEDAW, and the 1987 Philippine Constitution to advance the rights of women, the government of the Philippines enacted RA No. 9710. This law acknowledges the economic, political, and socio- cultural realities affecting women's work conditions and affirms their role in nation-building. It guarantees the availability of opportunities, services, and mechanisms that will allow women to actively perform their roles in the family, community, and society. As a social legislation, its paramount consideration is the empowerment of women. Thus, in case of doubt, its provisions must be liberally construed in favor of women as the beneficiaries.

ADMINISTRATIVE REGULATION – Implementation of the ICCPR and Adoption of the UN Rabat Plan of Act Proposed Test for Speech-Related Offenses

The Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred dated 11 January 2013 or the UN Rabat Plan of Action suggested a high threshold be sought for defining restrictions on freedom of expression,

incitement to hatred, and for the application of article 20 of the International Covenant on Civil and Political Rights. It proposed a six-part threshold test for expressions considered as criminal offences. This test involves an analysis of these factors:

(a) Context;
(b) Speaker;
(c) Intent;
(d) Content and form;
(e) Extent of the speech act; and
(f) Likelihood, including imminence.

In the 2020 Implementing Rules and Regulations (IRR) of Republic Act No. 11479, otherwise known as the Anti-Terrorism Act of 2020 (ATA), the Philippine Anti-Terrorism Council, led by the Department of Justice, adopted five of the six parts of the test proposed in the UN Rabat Plan of Action in analyzing whether the offense of "inciting to commit terrorism" has been committed. Rule 4.9 of the IRR provides, in part:

> Rule 4.9. Inciting to commit terrorism – In determining the existence of reasonable probability that speeches, proclamations, writings, emblems, banners, or other representations would help ensure success in inciting the commission of terrorism, the following shall be considered:
>
> a. Context: Analysis of the context should place the speech, proclamations, writings, emblems, banners, or other representations within the social and political context prevalent at the time the same was made and/or disseminated;
> b. Speaker/actor: The position or status in the society of the speaker or actor should be considered, specifically regarding his or her standing in the context of the audience to whom the speech or act is directed;
> c. Intent: What is required is advocacy or intent that others commit terrorism, rather than the mere distribution or circulation of material;
> d. Content and form: Content analysis includes the degree to which the speech or act was provocative and direct, as well as the form, style, or nature of arguments deployed in the speech, or the balance struck between the arguments deployed;
> e. Extent of the speech or act: Includes such elements as the reach of the speech or act, its public nature, its magnitude, the means of dissemination used and the size of its audience; and

f. Causation: Direct causation between the speech or act and the incitement.

The IRR provides for this framework to ensure consistency with the proviso in Section 4 of the ATA that states that terrorism shall "not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights."

JUDICIAL DECISION – Freedom of Speech and the Constitutionality of the Definition of Terrorism and Related Crimes in the Philippine Anti-Terrorism Act of 2020

ATTY. HOWARD M. CALLEJA, et. al. v. EXECUTIVE SECRETARY, et. al. G.R. Nos. 252578, 252579, 252580, 252585, 252613, 252623, 252624, 252646, 252702, 252726, 252733, 252736, 252741, 252747, 252755, 252759, 252765, 252767, 252768, 16663, 252802, 252809, 252903, 25 2904, 252905, 252916, 252921, 252984, 253018, 253100, 253118, 253124, 253242, 253252, 253254, 254191 & 253420, [7 December 2021]

The 2020 Implementing Rules and Regulations (IRR) of Republic Act No. 11479, otherwise known as the Anti-Terrorism Act of 2020 (ATA) did not adopt the factor of likelihood or imminence proposed in the UN Rabat Plan of Action to analyze hate speech and other speech-related offenses. Instead, it adopted the factor of "causation."

In this Decision, the Supreme Court construed speech-related offenses as not unconstitutional if they followed the standards in the 1969 decision of the Supreme Court of the United States in Brandenburg v. Ohio or the Brandenburg test which includes imminence as one of its determinative elements.

Specifically, the Court stated that constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is (a) directed to inciting or producing imminent lawless action and is (b) likely to incite or produce such action. Thereafter, the Court definitively stated that, to guard against any chilling effects on free speech, provisions on inciting to terrorism should only be considered crimes if the speech satisfies the Brandenburg test based on its nature and context.

Protection under International and Domestic Law (e.g., Women & Children, Migrant Workers, Minorities, Refugees, Indigenous People etc.)

Judicial decision – The UN Declaration of the Rights of Indigenous Peoples and the Protection of the Rights of Indigenous Peoples in the Philippines

DIOSDADO SAMA y HINUPAS and BANDY MASANGLAY y ACEVEDA vs. PEOPLE OF THE PHILIPPINES. [G.R. No. 224469. 5 January 2021.]

The accused in this case are members of the Iraya-Mangyan tribe, who were caught by the police cutting down one dita tree in Oriental Mindoro without a license. They were charged with violating Section 77 of PD 705 as amended, the Forestry Reform Code. The Regional Trial Court and the Court of Appeals found the tribe members guilty. Before the Supreme Court, the accused asserted their right, as indigenous people, under RA 8371, the Indigenous People's Rights Act of 1997 (IPRA), to harvest the dita tree logs. The Supreme Court acquitted the accused, specifically finding that one element of the crime charged, that of cutting and collecting the tree without any authority, was not proven beyond a reasonable doubt.

In the course of its reasoning, the Supreme Court stated that the petitioners relied upon their elders, the non-government organization that was helping them, and the National Commission on Indigenous Peoples, that they supposedly possessed the State authority to cut and collect the dita tree as Ips for their indigenous community's communal toilet. The Court further added that IP rights have long been recognized at different levels of the Philippine legal system, which seek to reconcile the regalian doctrine and the civilised concept of ownership with the indigenous peoples' sui generis ownership of ancestral domains and lands, along with international covenants like the United Nations Declaration on the Rights of Indigenous Peoples, of which the Philippines is a signatory, and Philippine and international jurisprudence which identifies the forms and contents of IP rights.

The Court clarified that this recognition had not been transformed into a definitive and categorical rule of law when it is used as a defense by Ips in criminal cases arising from the exercise of their IP rights. However, the Court added, the confusion as to the true and inescapable merits of these IP rights in criminal cases justifies the claim that petitioners' guilt for this malum prohibitum offense is reasonably doubtful.

Specifically, the Court found that there is reasonable doubt that the petitioners' IP right to log the dita tree existed when taken in light of the more expansive definition of authority under the law, the bundle of petitioners' IP rights both under the Constitution and IPRA, the international covenants like the United Nations Declaration on the Rights of Indigenous Peoples, of which our country is a signatory, and Philippine and international jurisprudence which identifies the forms and contents of IP rights.

JUDICIAL DECISION – The UN Convention on the Rights of the Child and the Abuse and Cruel Treatment of Children

ST. BENEDICT CHILDHOOD EDUCATION CENTRE, INC., and FR. ERNESTO O. JAVIER VS. JOY SAN JOSE [G.R. No. 225991. 13 January 2021.]

San Jose is a preschool teacher at St. Benedict Childhood Education Centre. The parents of AAA, one of San Jose's students, complained that she had refused to let their son go to the comfort room twice, despite him having properly asked for permission; the second time resulted in AAA wetting his pants. After the complaint was brought to the attention of St. Benedict and San Jose, AAA stated that San Jose called him a liar in front of his classmates, which caused them to taunt and bully him. St. Benedict formed an ad hoc committee to investigate the matter which San Jose denied the allegations. After investigation, the ad hoc committee recommended dismissal of San Jose. St. Benedict adopted their findings and dismissed San Jose on the ground of gross misconduct and unprofessional behavior in violation of her duty as a teacher.

San Jose filed a complaint for illegal dismissal before the Labor Arbiter (LA). The LA dismissed the complaint and the National Labor Relations Commission affirmed the decision. However, the Court of Appeals reversed, finding that the penalty of dismissal was too harsh in light of San Jose's 27-year tenure at St. Benedict. However, the Supreme Court reversed the decision.

In deciding the case, the Supreme Court noted that

> the United Nations Convention on the Rights of the Child (UNCRC) to which the Philippines is a signatory, recognizes a child's fundamental right to dignity and self-worth. Thus, disciplinary measures in the school should conform to this right.

After narrating in detail the actions of San Jose, the Court stated the teacher's cruel or inhuman treatment of AAA is not just trivial or meaningless. This makes her misconduct is grave, affecting not only the interest of the school but ultimately the morality and self-worth of an innocent five-year-old child. Her

grave offense to the child merits the forfeiture of her right to continue working as a preschool teacher.

JUDICIAL DECISION – The Nelson Mandela Rules and the Treatment of Persons Deprived of Liberty

THE PEOPLE OF THE PHILIPPINES VS. RAMON "BONG" REVILLA, JR., RICHARD A. CAMBE, and JANET LIM NAPOLES, JANET LIM NAPOLES [G.R. No. 247611. 13 January 2021.]

Janet Lim Napoles was convicted of Plunder relative to the utilization of Senator Ramon "Bong" Revilla, Jr.'s Priority Development Assistance Fund (PDAF). After being sentenced to reclusion perpetua, she appealed her conviction before the Supreme Court. She has been detained at the Correctional Institute for Women pending her appeal. She filed an Urgent Motion for Recognizance/Bail or House Arrest for Humanitarian Reasons Due to COVID-19. She argues that as a person suffering from Type 2 Diabetes, she is at risk of contracting COVID-19 inside the prison. She asserts, inter alia, the Nelson Mandela Rules, provide the basis for the release of persons deprived of liberty (PDLs) in times of public health emergencies. The Supreme Court denied her petition.

The Court explained that the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) contain the universally acknowledged minimum standards for the management of prison facilities and the treatment of prisoners. It safeguards the healthcare and wellness of PDLs, as it provides that those who require specialized treatment or surgery should be transferred to specialized institutions or to civil hospitals. In addition, every prison should have a healthcare service tasked with evaluating and improving the physical and mental health of PDLs. Further, PDLs who are suspected of having contagious diseases be clinically isolated and given adequate treatment during the infectious period. Ultimately, the PDLs' access to health care is a State responsibility, as provided in Rule 24 of the Nelson Mandela Rules.

The Court noted that Republic Act No. 10575 (RA 10575) or "The Bureau of Corrections Act of 2013" and its Revised Implementing Rules and Regulations (Revised IRR) expressly refer and adhere to the standards laid down in the Nelson Mandela Rules. Section 4 of RA 10575 states that the safekeeping of inmates shall include decent provision of quarters, food, water and clothing in compliance with established United Nations standards. The Court also quoted Rule II of the Revised IRR, which declares the state policy of promoting the general welfare and safeguarding the basic rights of every prisoner incarcerated in the Philippine national penitentiary creating an environment

conducive to rehabilitation and compliant with the United Nations Standard Minimum Rules for Treatment of Prisoners (UNSMRTP).

The Court further quoted Rule IV Section 4 (a) of the IRR, which also referred to the UNSMRTP. However, the Court ruled that neither the Nelson Mandela Rules nor the other rules and the worldwide trend to decongest jail facilities due to COVID-19, support the release of PDLs pending the appeal of their conviction of a capital offense.

JUDICIAL DECISION – The Universal Declaration of Human Rights and the Freedom of Movement of Persons Charged with Criminal Offenses

PROSPERO A. PICHAY, JR VS. THE HONORABLE SANDIGANBAYAN (FOURTH DIVISION) and PEOPLE OF THE PHILIPPINES, as represented by THE OFFICE OF THE SPECIAL PROSECUTOR [G.R. Nos. 241742 and 241753-59. 12 May 2021.]

The Office of the Special Prosecutor filed eight cases against Prospero Pichay Jr. with the Sandiganbayan for violation of the Manual of Regulation for Banks, in relation to RA 7653, RA 8791, RA 3019, and malversation. The Sandiganbayan motu proprio issued a Hold Departure Order (HDO) Resolution directing the Bureau of Immigration to prevent Pichay from leaving the country except upon prior written permission from the Sandiganbayan. Pichay filed a motion to lift the HDO but the Sandiganbayan denied his motion. The Sandiganbayan reasoned that the issuance of an HDO was a valid restriction on Pichay's right to travel, as it was done in the exercise of the Sandiganbayan's inherent power to preserve and maintain its jurisdiction over the case and the person of the accused. Pichay filed this Petition before the Supreme Court to challenge the dismissal of his motion. The Supreme Court dismissed the Petition finding that the Sandiganbayan had the inherent power to issue HDOs as a court of justice.

The Court explained that the right to travel and to freedom of movement is a fundamental right guaranteed by the 1987 Constitution and the Universal Declaration of Human Rights (UDHR) to which the Philippines is a signatory.

The Court cited Article 13 of the UDHR which provides that "everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country including his own, and to return to his country."

But the Court ruled that "however, the exercise of one's right to travel or the freedom to move from one place to another is not absolute." "There are constitutional, statutory, and inherent limitations regulating the right to travel."

The Court further clarified that the Constitution and the UDHR should not be construed as delimiting the inherent power of the courts to use all means necessary to carry their orders into effect in criminal cases pending before them. "When a court has the appropriate jurisdiction vested by law, all auxiliary writs, process, and other means necessary to carry it into effect may be employed by such court or officer."

JUDICIAL DECISION – Racial Discrimination and Rights of Workers

ANICETO B. OCAMPO, JR. VS. INTERNATIONAL SHIP CREW MANAGEMENT PHILS., INC. (currently: D'AMICO SHIP ISHIMA PHILS., INC.), ISHIMA PTE. LTD., NORA B. GINETE, and VICTOR C. VELONZA [G.R. No. 232062. 26 April 2021.]

Ocampo was hired by International Ship Crew Management Phils. as Captain of MT Golden Ambrosia. Ocampo was relieved of his duty after it came to light that he had exhibited a racist attitude towards Myanmar crew members. He had allegedly shouted profanity at them, called them 'animals' and rationed their drinking water. Ocampo filed a complaint for illegal dismissal before the Labor Arbiter (LA). The LA dismissed the complaint finding that the dismissal was valid. The National Labor Relations Commission affirmed the LA Decision. The Court of Appeals likewise upheld the validity of the dismissal, reasoning that his racist behavior constituted serious misconduct. The Supreme Court dismissed the petitions.

The Court explained that the petitioner's dismissal was due to this racist treatment of his subordinates, particularly his name-calling and for depriving the subordinates of drinking water. The pattern shown in his conduct demonstrated that he committed such an act deliberately.

More than creating hostile and inhumane working conditions, these incidents also display the petitioner's prejudice against his crew members, who are of different national and ethnic origin. To refer to other human beings as "animals" reflects the sense of superiority the petitioner has for himself and how he sees others as subhuman.

Racial discrimination is a grave issue. Discrimination on the basis of race, nationality, or ethnic origin has deep historical roots and is a global phenomenon that still exists today. Racist attitudes have cost numerous lives and livelihoods in the past as in the present, and they should no longer be tolerated in any way. The State had formally made clear its intention to end racial discrimination as early as the 1960s when the Philippines signed the International Convention on the Elimination of All Forms of Discrimination.

Specific Incidents

International Criminal Law

Judicial decision – Constitutionality of the Definition of Terrorism and Certain Procedures in the Philippine Anti-Terrorism Act of 2020

ATTY. HOWARD M. CALLEJA, et. al. v. EXECUTIVE SECRETARY, et. al. G.R. Nos. 252578, 252579, 252580, 252585, 252613, 252623, 252624, 252646, 252702, 252726, 252733, 252736, 252741, 252747, 252755, 252759, 252765, 252767, 252768, 16663, 252802, 252809, 252903, 25 2904, 252905, 252916, 252921, 252984, 253018, 253100, 253118, 253124, 253242, 253252, 253254, 254191 & 253420, [7 December 2021]

In this case, the Supreme Court decided the merits of the numerous petitions challenging the constitutionality of the Republic Act (R.A.) No. 11479 or the "Anti-Terrorism Act of 2020" (ATA).

The Court reiterated that there is no consensus definition of terrorism in the international community. This is supported by the observation of the UN Office on Drugs and Crime (UNODC) that the 2011 judgment of the Special Tribunal for Lebanon, which had declared that there exists a customary definition of transnational terrorism, has been widely criticized. The absence, however, of an internationally-accepted standard definition of terrorism is not a concern. The principle of incorporation supports the position that "domestic law will prevail in practice, including for constitutional reasons." Thus, the Court has approached the definitional issue primarily from the perspective of Philippine constitutional law and criminal law theory, while recognizing that there will be a time when international law will come into play with some of the other issues of a terrorism case.

The Court ruled that the language of the ATA "shows that it is not overbroad since it fosters a valid State policy to combat terrorism and protect national security and public safety, consistent with international instruments and the anti-terrorism laws of other countries." It is noted that the "ATA's definition of terrorism under the **main part** of Section 4 is congruent with the UN's proposed Comprehensive Convention on International Terrorism." It also noted that "the ATA definition is also similar to the definition as provided under Title II, Article 3 of Directive (EU) 2017/541 of the European Union." Quoting from the Anti-Terror laws of the UK and Singapore the Court noticed that "patterns from the different definitions of terrorist acts in other international

instruments equally bear similarities to the definition adopted under Section 4 of the ATA."

STATEMENTS/COMMUNICATIONS – Request to Defer Investigation by the Office of the Prosecutor into the Philippine Situation

The Republic of the Philippines invoked Article 18(2) of the Rome Statute of the International Criminal Court in requesting a deferral of the Office of the Prosecutor's (OTP) investigation into the Philippine situation and the alleged crimes of humanity committed in the country in the context of the 'war on drugs.'

On 14 June 2021, the OTP requested the Pre-Trial Chamber I (PTC) of the International Criminal Court (ICC) for authorization to open an investigation into the Situation in the Republic of the Philippines between 01 November 2011 and 16 March 2019. This authority was granted by the PTC on 15 September 2021.

Two months after, on 18 November 2021, the OTP notified the PTC of the Philippines' request for deferral under Article 18(2) of the Rome Statute. This provision states that the State being investigated may inform the ICC "that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes" under the Rome Statute, and by virtue of that domestic investigation, request a deferral of the investigation being conducted by the OTP.

In its Request for Deferral through a Letter dated 10 November 2021 sent by the Ambassador of the Republic of the Philippines to the Netherlands, the Philippines justified its request on account of the following:

a. the preliminary investigation being conducted by the Department of Justice (DOJ) using the Philippines Rules on Criminal Procedure and Administrative Order No. 35 which is the mechanism used to investigate extralegal killings;
b. the ongoing investigation and use of administrative procedures of the Internal Affairs Service of the Philippine National Police, including the 52 cases being reviewed by the DOJ;
c. the full functioning of Philippine courts;
d. the availability of judicial remedies such as the writs of amparo and habeas data; and
e. the cooperation of the Philippines under the UN Joint Programme created by UN Human Rights Council Resolution 45/3 entitled "Technical cooperation and capacity-building for the promotion and protection of human rights in the Philippines."

In its Request for Deferral, the Philippines explains that these incidents and items show that it is "investigating or has investigated its nationals or others within its jurisdiction with respect to the alleged crimes against humanity of murder under Article 7(1)(a)" of the Rome Statute.

Nuclear Weapons Doctrine

Use or Threat of Force

TREATIES – Philippine Senate Concurred in the Ratification of the Treaty on the Prohibition of Nuclear Weapons

On 01 February 2021, the Philippines Senate gave its concurrence to the ratification of the Treaty on the Prohibition of Nuclear Weapons (TPNW). Senate Resolution No. 83, which expresses this concurrence, states its premises:

> Whereas the Treaty prohibits States Parties from (i) developing, testing, producing, manufacturing, transferring, possessing, stockpiling, using or threatening to use nuclear weapons; (ii) assisting, encouraging or inducing anyone to engage in said activities; and (iii) allowing nuclear weapons to be stationed, installed or deployed in their respective territories;
>
> Whereas, the Treaty obligates States to provide assistance to individuals affected by the use or testing of nuclear weapons, and to take appropriate measures towards the environmental remediation of contaminated areas;
>
> Whereas, consistent with the Treaty, the Philippines has a comprehensive Safeguards Agreement with the International Atomic Energy Agency, through the Treaty on the Non-Proliferation of Weapons signed on 21 February 1973 and which entered into force on 16 October 1974, and the Additional Protocol thereto, signed on 30 September 1997, and which entered into force on 26 February 2010;

The Department of Foreign Affairs commemorated the entry into force of the treaty for the Philippines on 19 May 2021.

State Practice of Asian Countries in International Law

Singapore

Tara M. Davenport and Zhifeng Jiang***

Recognition of Governments

Statehood and Sovereignty

Singapore did not recognize the Myanmar military regime as the government of Myanmar following the 1 February 2021 coup. Singapore has instead called on all parties in Myanmar to negotiate in good faith and to pursue long-term peaceful political solutions in order to achieve national reconciliation, including a way back to democratic transition.

Extradition

Territory and Jurisdiction

On 24 July 2021, on the Cabinet of Singapore's advice and pursuant to Article 22P(1) of the Constitution of the Republic of Singapore, the President of Singapore remitted the caning sentence imposed on David James Roach, who fled Singapore after committing a bank robbery. As part of the extradition proceedings, the Singapore Government undertook to the United Kingdom Government that Roach would not face corporal punishment in the event that Singapore courts found him guilty of the offenses he was extradited for. The remittance constituted the Singapore Government's fulfillment of the assurance it gave the United Kingdom Government. Singapore also emphasized that assurance was made in light of both States' differing views towards corporal punishment and that the assurance did not affect Singapore's longstanding view that corporal punishment does not constitute torture, cruel, inhuman, or degrading treatment or punishment, or contravene international law.

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Implementation of Treaties

Relationship between International and Domestic Law

Domestic Legislation

The Multimodal Transport Act 2021 came into effect on 28 November 2021 after it was passed by the Singapore Parliament on 5 January 2021 and assented to by the President of Singapore on 5 February 2021. The Multimodal Transport Act 2021 gives effect to the Association of Southeast Asian Nations (ASEAN) Framework Agreement on Multimodal Transport, which was signed on 17 November 2005. Comprising of five Parts, the Act covers, *inter alia*, the registration under the Register of the Singapore competent national body; the issue and contents of the multimodal transport document; the multimodal transport operator's liabilities; and the consignor's duties and liabilities.

The Carriage of Goods by Sea Act 1972 (2020 Revised Edition) came into operation on 31 December 2021. The Act gives effect to The Hague Rules as Amended by the Brussels Protocol 1968 (the Hague-Visby Rules), which provides rules governing the international carriers of goods by sea.

Making and Concluding Treaties – Deposit

Treaties

The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention) entered into force on 16 September 2021 after Singapore deposited its instrument of accession on 18 January 2021. The Apostille Convention abolishes the requirement of legalization and requires every Contracting Party to accept the apostille certificates issued by the Competent Authorities designated by other Contracting Parties.

Bilateral Cooperation – COVID-19

International Relations and Cooperation

Singapore-Australia Dose Sharing Arrangement of COVID-19 Vaccines

Singapore and Australia agreed on a Dose Sharing Arrangement of COVID-19 vaccines on 31 August 2021. According to the Arrangement, Singapore would

first provide Australia with about 500,000 Pfizer-BioNTech mRNA-based vaccine doses and Australia would in exchange, provide the same quantity of vaccine doses to Singapore in the future. On 2 September 2021, Singapore provided about 500,000 Pfizer-BioNTech mRNA-based vaccine doses to Australia. On 18 November 2021, Australia provided Singapore with the same number of doses.

Multilateral Treaty Negotiations

Conclusion of Negotiations on the Pacific Alliance-Singapore Free Trade Agreement

Singapore and the Pacific Alliance (PA), which comprised Chile, Colombia, Mexico, and Peru, concluded negotiations on the PA-Singapore Free Trade Agreement (PASFTA) on 21 July 2021. The negotiations were formally launched in September 2017. The provisions of the PASFTA would pertain to, *inter alia*, tariff elimination, non-tariff measures, investment, cross-border trade in services, international maritime transport services, electronic commerce, government procurement, and legal transparency.

Bilateral Treaty Negotiations

Substantial Conclusion of Negotiations on the United Kingdom-Singapore Digital Economy Agreement

On 9 December 2021, Singapore and the United Kingdom (UK) substantially concluded the negotiations on the UK-Singapore Digital Economy Agreement (UKSDEA). The negotiations were launched on 28 June 2021 and would be Singapore's third DEA. In 2020, Singapore entered its first DEA with Chile and New Zealand, and its second DEA with Australia. The UKSDEA facilitates end-to-end digital trade, establishes rules for a secure digital environment, and promotes bilateral cooperation on matters relating to emerging technologies.

Substantial Conclusion of Negotiations on the Republic of Korea-Singapore Digital Economy Agreement

On 15 December 2021, Singapore and the Republic of Korea (ROK) concluded negotiations on Singapore's fourth Digital Economy Agreement, namely, the Korea-Singapore Digital Partnership Agreement (KSDPA). The KSDPA is Singapore's first DEA with an Asian State. The KSDPA seeks to expand the scope of bilateral cooperation on matters relating to the digital economy

and establish transparent benchmarks to support the effective regulation of the digital economy. According to the 15 December 2021 Press Release by Singapore's Ministry of Trade and Industry, the KSDPA would complement the efforts by Singapore as a co-convenor of the World Trade Organisation Joint Statement Initiative on Electronic Commerce to develop rules governing digital trade.

Treaties

International Economic Law

International Investment Agreement

The Singapore-Indonesia Bilateral Investment Treaty, which was signed on 11 October 2018, entered into force on 9 March 2021. There are five notable features of the BIT. First, the Most-Favoured Nation Treatment does not extend to any investment agreements initialled, signed, or entered into force before 9 March 2021. Second, the provisions on expropriation neither apply to the issuance of compulsory licenses granted in relation to intellectual property rights, nor to the revocation, limitation, or creation of intellectual property rights where such acts are consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the World Trade Organisation Agreement. Third, the BIT provides that Parties may adopt or maintain restrictions on payments, transfers, or capital movements in order to safeguard their balance of payments. Fourth, the BIT contains provisions concerning corporate social responsibility and corruption. Fifth, the BIT provides for Investor-State Dispute Settlement, which would only be available if the investment dispute cannot be resolved within one year from the date on which consultations regarding the dispute were requested.

Treaties – Digital Economy Agreements

The Digital Economy Partnership Agreement (DEPA) between Singapore, Mexico, and New Zealand entered into force for Singapore and New Zealand on 7 January 2021. The DEPA coexists with the Parties' existing international agreements including the World Trade Organisation Agreement. There are four notable features of the DEPA.

First, the DEPA facilitates business and trade through, *inter alia*, rules on paperless trading, cooperation on initiatives to facilitate the adoption of electronic invoicing, and recognition of principles concerning electronic payments. Second, the DEPA fosters business and consumer trust by obligating

the State Parties to adopt certain measures regarding unsolicited commercial electronic messages and online consumer protection. Third, the DEPA fosters close cooperation between the Parties' Small and Medium Enterprises (SME) on the digital economy by creating obligations concerning information sharing and convening a Digital SME Dialogue. Fourth, the DEPA obligates the Parties to cooperate on issues concerning digital inclusion, which encompasses participation in the digital economy by women, rural populations, low-socio-economic groups, and Indigenous Peoples.

Treaties – Bilateral Free Trade Agreements

The Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Singapore (UKSFTA), which was signed on 10 December 2020, entered into force on 11 February 2021. The UKSFTA incorporates many but not all of the provisions of the 2018 European Union-Singapore Free Trade Agreement. The UKSFTA commits both Parties to various obligations concerning, *inter alia*, tariff elimination, reduction of Technical and Non-Tariff Barriers, flexible Rules of Origin for certain exports, and cumulative Rules of Origin.

Treaties – Regional Trade Agreements

The Association of Southeast Asian Nations (ASEAN) Trade in Services Agreement (ATSIA), which was signed on 7 October 2020, was ratified by Singapore on 5 April 2021. The ATSIA seeks to increase trade and investment in the area of services through core obligations relating to National Treatment, Most-Favoured-Nation Treatment, market access, and local presence, as well as senior management and Board of Directors. The ATSIA also stipulates regulatory obligations and disciplines concerning, *inter alia*, the transparency of measures governing trade in services, the manner in which domestic regulation affecting trade in services is administered, and the recognition of licences granted in another ASEAN Member State.

The Regional Comprehensive Economic Partnership (RCEP) was ratified by Singapore on 9 April 2021. Composed of 20 Chapters, the RCEP covers trade in goods and services, temporary movement of persons, investment, intellectual property, electronic commerce, competition, small and medium enterprises, economic and technical cooperation, as well as government procurement. Regarding the settlement of investment disputes, the RCEP currently provides no provisions for Investor-State Dispute Settlements and instead contains a Work Programme for the Parties to enter into discussions no later than two years after the date on which the RCEP enters into force. According to a 26 April 2021 report on "What You Need to Know About the Regional

Comprehensive Economic Partnership Agreement" by Singapore's Ministry of Trade and Industry, the RCEP improves on existing ASEAN Plus One agreements by comprehensively facilitating trade, improving market access for trade in services, enhancing investment rules, and expanding commitments in new areas including competition policy, electronic commerce, and intellectual property rights.

Treaties – Tax Treaties

The Protocol amending the Agreement signed on 28 June 2004 between the Republic of Singapore and the Federal Republic of Germany for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital entered into force on 29 March 2021.

The Agreement between the Government of the Republic of Singapore and the Government of the Republic of Indonesia for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance entered into force on 23 July 2021 (2021 Singapore-Indonesia DTA). The 2021 Singapore-Indonesia DTA, which would be effective from 1 January 2022, updates the pre-existing agreement, which had been in effect since 1992. The updates contained in the 2021 Singapore-Indonesia DTA include, *inter alia*, a capital gains provision, the removal of the limitation of relief to treaty benefits, and standards to reduce treaty abuses.

The Agreement between the Government of the Republic of Singapore and the Government of the Republic of Serbia for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance, which was signed on 26 February 2021 and 5 April 2021, entered into force on 16 August 2021.

The Agreement between the Republic of Singapore and the Federative Republic of Brazil for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance, which was signed on 7 May 2018, entered into force on 1 December 2021.

The Agreement between the Government of the Republic of Singapore and the Government of the Republic of Armenia for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance, which was signed on 8 July 2019, entered into force on 23 December 2021.

The Agreement between the Government of the Republic of Singapore and the Government of the Hashemite Kingdom of Jordan for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance, which was signed on 14 July 2021, entered into force on 30 December 2021.

Memorandums of Understanding

Memorandum of Understanding Implementing the United States of America-Singapore Partnership for Growth and Innovation

Singapore and the United States of America (US) signed a Memorandum of Understanding Implementing the US-Singapore Partnership for Growth and Innovation (PGI) on 7 October 2021. The PGI provides a bilateral platform to strengthen US-Singapore cooperation on matters relating to the digital economy, energy and environmental technologies, supply chain resilience, and healthcare.

Climate Change

International Environmental Law

Treaties – Green Economy Agreements

Singapore and Australia Start Negotiations on Green Economy Agreement

On 11 October 2021, Singapore and Australia jointly announced that both States intend to develop a Green Economy Agreement, which would accelerate their transition towards a green economy through practical trade and investment measures. The negotiations on the Green Economy Agreement started on 22 September 2021 after bilateral discussions during the Sixth Australia-Singapore Annual Leaders' Meeting in June 2021.

Memorandums of Understanding

Chile-Singapore Memorandum of Understanding for Collaboration on Low-Carbon Hydrogen Technologies

Singapore and Chile signed a Memorandum of Understanding (MOU) for Collaboration on Low-Carbon Hydrogen Technologies on 15 February 2021. The MOU seeks to facilitate bilateral cooperation on the use of hydrogen as an alternative energy source.

Singapore and Australia Conduct First Dialogue under the Singapore-Australia Memorandum of Understanding for Cooperation on Low-Emissions Solutions

On 15 October 2021, Singapore and Australia conducted the first annual dialogue under the Singapore-Australia Memorandum of Understanding (MOU) for Cooperation on Low-Emissions Solutions, which was signed on 26 October 2020. The MOU's priority areas of cooperation pertained to

emissions reduction strategies, hydrogen, carbon capture, utilization and storage (CCUS), trade in renewable energies, as well as measurement, verification and reporting (MRV). According to a Joint Communique by Singapore and Australia on 9 November 2021, the progress made thus far, and the future plan pertained to low-emission solutions, large-scale renewable electricity trade, as well as capacity-building efforts aimed at measuring, verifying, and reporting emissions.

Treaties – International Organisation

Law of the Sea

Singapore Signs and Ratifies the Convention on the International Organization for Marine Aids to Navigation

The Convention on the International Organization for Marine Aids to Navigation was signed and ratified by Singapore on 1 March 2021 and 9 March 2021, respectively. The Convention establishes the International Organization for Marine Aids to Navigation as an intergovernmental organization.

Memorandums of Understanding

Memorandum of Understanding Signed between the Maritime and Port Authority of Singapore and the French Directorate of Maritime Affairs

A Memorandum of Understanding (MOU) was signed by the Maritime and Port Authority of Singapore and the French Directorate of Maritime Affairs on 19 April 2021. The MOU seeks to deepen Singapore-France maritime cooperation.

Treaties – Conclusion of Negotiations

Air Law

ASEAN-EU Comprehensive Air Transport Agreement

The Association of Southeast Asian Nations (ASEAN) and the European Union (EU) concluded negotiations on the ASEAN-EU Comprehensive Air Transport Agreement (ASEAN-EU CATA) on 2 June 2021. The ASEAN-EU CATA

will replace the pre-existing bilateral aviation treaties between the individual members of ASEAN and the EU. Under the ASEAN-EU CATA, airlines of every ASEAN and EU Member State can fly up to 14 fifth freedom passenger services and any number of fifth freedom cargo services per week to each Member State.

State Practice of Asian Countries in International Law

Taiwan

*Wendy Wan Chun Ho**

Jurisdiction to Adjudicate

Territory & Jurisdiction

A Group of 7874 Plaintiffs (Vietnamese Nationals)-Versus-Formosa Plastic Group and Others, the High Court Civil Ruling 109 Tai-Kang-Geng-1 No. 39, Judgement Delivered on 31 March 2021

In 2019, 7,875 Vietnamese plaintiffs filed a lawsuit in the Taipei District Court against Formosa Plastics Ha Tinh Steel Corporation (hereinafter "Formosa Plastics Ha Tinh") for illegally discharging wastewater containing toxic chemicals into the waters of Ha Tinh Province in Vietnam. Plaintiffs asserted that the polluted water affected the right to work, right to health and the right to life of spouses of many Vietnamese people.

The Taipei District Court dismissed the case due to lack of international jurisdiction. The plaintiffs later appealed to the Taiwan High Court. The High Court dismissed the case based on the same ground of a lack of international jurisdiction according to Article 15(1) and the proviso of Article 20 of the Civil Procedure Law of Taiwan by analogy.

Both the plaintiffs and the defendants filed an appeal to the Supreme Court of Taiwan. The Supreme Court reversed the dismissal of the High Court decision and remanded the case to the High Court, but turned down the defendants' request in 2020. The Supreme Court held that the international jurisdiction of a country is regulated by the jurisdictional scope of each country and the court cannot interfere with the jurisdiction of other countries over foreign disputes. The High Court held that the Vietnamese court had concurrent jurisdiction court and thus has jurisdiction over the case based on the proviso of Article 20 of the Civil Procedure Law by analogy. It further denied

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the jurisdiction of the defendant's country of residence, Taiwan. The Supreme Court explained that the High Court's decision wrongfully applied the proviso of Article 20 of the Civil Procedure Law by analogy and therefore remanded the case to the High Court.

On 31 March 2021, the High Court reversed the original decision made by the District Court in 2019 and ruled that Taiwan courts have international jurisdiction over the following 13 defendants including Formosa Plastics Corporation, Nan Ya Plastics Industry Corporation, Formosa Chemicals And Fibre Corporation, Formosa Petrochemical Corporation, Formosa Heavy Industries Corporation, Formosa Taffeta Co., LTD., Mai-Liao Power Corporation, China Steel Corporation, Formosa Ha Tinh (Cayman) Limited, Yuan-cheng Chen (President of Formosa Ha Tinh Steel), Wen-Yuan Wang (Chairman of Formosa Plastic Group), Ruihua Wang (Vice Chairman of Formosa Plastic Group), and Shyi-Chin Wang (Director of China Steel Corporation) due to the fact that all above defendants have offices, places of business or residence in Taiwan. The High Court further ruled that it had no international jurisdiction over the other 11 defendants who were foreign corporations and natural persons whose offices, places of business or domiciles were not located in Taiwan.

First of all, the court decided that it had jurisdiction over the above 13 defendants based on Articles 1 and 2 of the Civil Procedure Law by analogy. The Court explained that the current Act Governing the Choice of Law in Civil Matters Involving Foreign Elements did not expressly stipulate how the jurisdiction to hear a case involving foreign elements should be allocated. Therefore, in considering whether a Taiwanese court should have jurisdiction over a civil case involving foreign elements, the courts should apply relevant domestic law by analogy and consider the following factors including the interests of each individual international civil litigation, the case's connections with the forum state, the jurisdiction rules of Civil Procedure Law and the jurisprudence of international civil litigation. Meanwhile, the court should also evaluate the substantive fairness and procedural fairness among parties. Since the above 13 defendants had either a business of place or residence in Taiwan, the court should have personal jurisdiction over them.

Secondly, the court declined the plaintiffs' argument that the first paragraph of Article 20 of the Civil Procedure Law was applicable by analogy for the other 11 defendants whose domicile, office or place of business was not in Taiwan. The Court explained that the claim was against the principle of *actor sequitur forum rei* in Articles 1 and 2 of the Civil Procedure Law. Furthermore, since the place of infringement, in this case, was in Vietnam, the court had no international jurisdiction over the other 11 defendants.

Lastly, the Court also turned down the plaintiffs' claim for emergency jurisdiction. The plaintiffs argued that they had filed a lawsuit in Vietnam and the case was later dismissed without a substantive trial in the Vietnamese courts, so the courts in Taiwan should have emergency jurisdiction over the case. The court found that based on the evidence presented by the plaintiffs, that the Vietnamese court dismissed the case due to the plaintiffs' failure to produce documents to support the claim for damages under Vietnamese law. Hence, the Court had no reason to deem the Vietnamese courts as completely incompetent to hear the case. Therefore, the court found that the plaintiffs' claim for emergency jurisdiction could not be accepted.

International and Regional Trade Treaties and Bodies

International Economic Law

Taiwan's Application to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Taiwan officially submitted an application to join the CPTPP on 22 September 2021. The government issued a document titled Taiwan's Bid for CPTPP Membership, to strengthen its status and determination to join CPTPP. The document first points out that Taiwan has actively engaged with all CPTPP members at various levels in accordance with the accession process assigned by the CPTPP Ministerial Meeting in January 2019. The document further points out that it has reduced job loss, created an attractive business environment for foreign direct investment, promoted fair competition between public and private sectors, and enhanced environmental and labor protection. Additionally, the Ministries across all sectors have consulted with related interest groups and stakeholders to garner support for Taiwan's accession to the CPTPP. The government has also actively taken steps to revamp the current regulation scheme to meet the requirements of CPTPP, such as liberalizing rules for foreign professional license holders, improving the protection of intellectual property rights, lifting market access restrictions on pork and beef and modifying current fisheries regulations. The government has also promised to continue to improve its internal economic structures in alignment with the key policies, objectives and market access commitments to join the CPTPP.

Space Legislation

Air Law & Law of Outer Space

Space Development Act

On 31 May 2021, after lively and detailed discussions, Taiwan's Legislative Yuan passed the Space Development Law, paving the way for Taiwan's space endeavors. Comprising of 22 articles in six chapters, the act is the first national space law in Taiwan. It provides a legal foundation and outlines the national principles for space development.

Chapter 1 of the act clarifies that the act was enacted to promote the development of space activities and industries. It also confirms that the Ministry of Science and Technology (MOST) is the competent authority in charge of space activities and development policies. Chapter 2 of the act reveals the basic principles of space development. It reiterates that space development shall respect international treaties and be based on the principles of environmental protection and sustainable development. Information on space development can be published if it complies with national security and interests.

Chapter 3 of the act explains the requirements and process of conducting space activities. It also requires multi-agency cooperation to promote the space industry. Chapter 4 focuses on the handling of space accidents. It requires the owner or user of a launch vehicle or spacecraft to be liable for damages in an intentional or negligent space accident. The owner or user of a launch vehicle or spacecraft shall provide adequate liability insurance or financial guarantee subject to government approval before the launch may take place. Chapter 5 imposes criminal penalties, including fines and imprisonment for a launch without a permit. A fine will also be imposed for a failure to complete registration or provide information to the government.

Specific Human Rights Incidents

Human Rights

Road to Migrant Fishers' Rights

In recent years, several major cases involving the issues of forced labor on board Taiwanese far-distant fishing vessels have aroused international concern and condemnation. The National Human Rights Commission of the Control Yuan (NHRC), at its 13th meeting held on 8 February 2021, passed a resolution

to "consolidate the investigation cases related to foreign fishermen's rights and make a national foreign fishermen's rights project report." Accordingly, the NHRC released a Foreign Fishermen's Human Rights Special Report under the title of "Road to Migrant Fishers' Rights" on 27 December 2021.

The special report analyzes six cases of forced labor involving foreign fishermen investigated by the Control Yuan. The report identifies the following important issues involved in each case, including discrepancies due to the dual-track regulatory system for domestically hired and overseas-hired fishermen, problems arising from the Flag of Convenience (FOC) vessels, forced labor and corporate responsibility in transnational supply chains, and the possible involvement of relevant international conventions and human rights indicators, and etc. The special report also tries to find answers to each question by conducting on-site surveys and comparing current Taiwanese regulations, Work in Fishing Convention (No. 188) and the International Covenant on Economic, Social and Cultural Rights.

Moreover, the report proposes four practical recommendations. First, it identifies the labor conditions as the most urgent issue. It suggests enhancing labor conditions to ensure equal rights of foreign crew members by providing social insurance schemes, occupational accident and compensation and insurance schemes, sanitary equipment, and safety training. The harmonization of current regulations of distant water fisheries with ILO-C188 and the Labor Standard Act will help to achieve the goal. Second, it clarifies the need to directly regulate FOC vessels through international cooperation when the FOC vessels call at a port in Taiwan. It suggests that the government take proactive measures to closely monitor and regulate the FOC vessels, such as labor inspections or navigation inspections. Third, it raises concerns about the lack of adequate management and supervision mechanism of recruitment agencies by the Fishery Agency. It recommends the Fishery Agency align its current recruitment agency management scheme with the Ministry of Labor. Fourth, it explains that the vulnerability of foreign fishermen derives from the nature of distant water fisheries. Structural weakness, such as wage exploitation, poor working conditions, and a lack of a grievance mechanism, has contributed to the systemic forced labor issues. It suggests the government institutionalize corporate supply-chain responsibility, raise public awareness of the 11 ILO indicators of forced labor, require the vessels to establish multilevel grievance channels and create a multi-agency joint inspection platform to conduct investigation and assessment.

In conclusion, the report asks Executive Yuan to carefully consider the above recommendations and incorporate them into its "Fisheries and Human Rights Action Plan." It also reiterates NRHC's pledge to monitor the progress of government actions to fight against forced labor.

State Practice of Asian Countries in International Law

Thailand

Kitti Jayangakula, Kannaphak Tantasith**, Nattawat Krittayanawat*** and Wilasinee Maijaroensri*****

Making & concluding treaties – Negotiation – Accession – Ratification – Deposit – Registration – Internal Constitutional Arrangements

Treaties

Hague Conference on Private International Law

On 3 March 2021, Thailand deposited the Instrument of Acceptance to the Government of the Netherlands, making Thailand the 88th member of the Hague Conference on Private International Law (HCCH). As a member of HCCH, Thailand will be able to participate in the development of rules of private international law that facilitate and govern cross-border activities in the areas which correspond well with Thailand's interests.

The Hague Conference is an intergovernmental organization with global reach, established in 1893, to develop and refine the rules of private international law and to provide a comprehensive framework that facilitates cross-border cooperation in civil and commercial matters. The HCCH accomplishes this mandate by formulating and implementing multilateral legal instruments that cater to the diverse and evolving global needs of our time. These instruments are designed to address intricate and complex cross-border issues such as the adoption and abduction of children, the abolition of the legalization requirement for foreign public documents, and the recognition and enforcement of foreign judgments in civil and commercial matters.

The HCCH conventions play a critical role in ensuring the protection of individual rights and enhancing the capabilities of businesses while promoting a

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legal system that is well-suited to meet the demands of the ever-increasing frequency of cross-border personal and economic activities. These conventions have proven to be indispensable tools in the development of an international legal system that is effective, efficient, and sensitive to the diverse legal traditions that exist around the world. As a result, the Hague Conference remains an essential forum for the promotion and harmonization of private international law and for the resolution of complex legal issues that arise in cross-border situations.

Kitti Jayangakula

Accession to Various Practices Affecting the Law of the Sea, including UNCLOS

Law of the Sea

Preparedness and Response to Oil Spill/Oil Pollution Incident

Oil incidents occur frequently in Thailand and 2021 is another year of oil spills in the sea. An oil spill is one of the pollutants in the marine environment. Although the International Convention on the Law of the Sea 1982 (UNCLOS 1982) does not directly address the issue of oil spills in the sea, there is a chapter on the protection and preservation of the marine environment in Part XII of the Convention.

To fulfill the obligations set out in UNCLOS 1982, the International Marine Organization (IMO) has created an international convention to protect the marine environment, especially regarding pollution from ships. The international conventions that have been adopted establish a relationship between the marine environment provisions contained in the UNCLOS 1982 and the International Convention on Oil Pollution Preparedness, Response and Co-Operation 1990 (OPRC 1990).

OPRC 1990 aims to provide a global framework for combating major incidents or threats of marine pollution, which requires establishing measures for dealing with pollution incidents, either nationally or in co-operation with other countries, and a national system, for responding effectively to oil pollution incidents. The status of OPRC 1990 was adopted on 30 November 1990 and entered into force on 13 May 1995, when Thailand became a party by accession on 20 April 2000.

In this regard, the Navigation in the Thai Waters Act B.E. 2456 (1913) Section 119 prohibits pouring, dumping, or doing in any way whatsoever that

allows rocks, gravel, sand, soil, mud, ballast, objects, or any waste into the sea within Thai waters, which will cause shallow sedimentation and Section 119 bis prohibit pouring, dumping or doing in any way causing oil and chemicals or anything into the sea within Thai waters that may cause toxicity to live organisms or Environmental or harmful to navigation. However, these provisions do not cover details of the prevention and pollution of the sea arising from vessels. Therefore, the Navigation in the Thai Waters Act is insufficient to support international obligations, that is, it does not meet international criteria and standards.

However, there have currently been other laws, such as the "Regulations of the Office of Prime Minister on the Prevention and Elimination of Oil-Relalted Water Pollution B.E. 2538 (1995)," which is the most current version is the 2004 edition. The law provides principles and reasons for issuing this regulation, for example, the need for a National Plan to Prevent and Eliminate Oil-Related Water Pollution that would facilitate the rapid and efficient implementation of oil spill operations to minimize the damage.

Such Regulations designate the duties and responsibilities of public and private sector organizations to coordinate and mobilize their resources to work together to respond promptly and effectively to oil pollution incidents and to reduce the impact on the environment and natural resources. These regulations comply with the requirements of the OPRC 1990.

From the above-mentioned Regulations, in 2021, a mechanism allowed Thailand to establish the Committee on Prevention and Elimination of Oil-Related Water Pollution (the Committee) (Article 6), which is responsible for setting policies and formulating a national plan for the prevention and elimination of water pollution due to oil. The Committee also controls, regulates, supervises, and is responsible for eliminating oil-related water pollution, monitoring, and evaluating the performance according to the National Oil-related Water Pollution Prevention and Elimination Plan. The plan includes establishing public relations, making press conferences, and reporting the results to the Cabinet (Article 10). Moreover, there are other agencies responsible for various matters under the Regulations, such as the coordination center (operated by the Marine Department) and the operation unit (consisting of the Marine Department, the Royal Thai Navy and the provincial authority).

In case of oil spills, the operation units must promptly implement the protection plan established by the Committee to prevent and eliminate water pollution due to oil. A survey must be conducted to check, gather and consider relevant information such as the type of oil, spill quantity, the direction and speed of the currents, the winds, the weather, and the nature of the environment in that area. The operation units must also choose a method for

eliminating oil stains, including considering the level of leakage. Additionally, the operation units must assess the ability of the person in charge of the operation and the request for additional support from foreign countries. Thereafter, the progress of the implementation of the prevention plan will be reported to the Secretary of the Committee every period. Such reports will be presented to the Committee (Articles 13 and 14).

During an operation, if the operation units need help with their operations, the Coordination Center may request support from government agencies or seek cooperation and private support in the areas of expertise, manpower, premises, tools, materials, chemicals, vehicles, and other items necessary for the operation (Articles 15 and 16).

In addition, the Committee shall appoint a committee to rehabilitate and assess the damage to the environment caused by oil by preparing an action plan for rehabilitation and compensation for damage to the environment from the oil spill-affected area. When the mission is over, the Secretary of the Committee shall prepare a report analyzing the causes of pollution and elimination of such pollution for submission to the Committee (Article 14, Paragraph 2).

In the case of a large oil spill beyond the capacity of the domestic agencies, the Coordination Center shall request and obtain support from other countries in accordance with the agreement or cooperation that has been established.

The above mechanisms to deal with oil spills according to the OPRC 1990 make it possible to fulfill the obligations of UNCLOS 1982 on the substantive provisions, such as Article 199, Contingency Plan Against Pollution, and Article 211, and Pollution from vessels. Thailand has aimed to comply with international obligations, especially concerning oil pollution from ships in Thailand and has made a declaration pursuant to Article 310.

Kannaphak Tantasith
Wilasinee Maijaroensri

Implementation of Human Rights Treaties (Domestic Laws and Institutions)

Human Rights

Abortion Law

On 19 February 2020, the Constitutional Court of Thailand issued Decision No. 4/2563, declaring the provisions of Sections 301 and 305 of the Penal

Code, which govern abortion, to be unconstitutional. The Penal Code, under Section 301, imposes a maximum penalty of three years imprisonment and a fine of up to six thousand Baht, or both, on women who seek an abortion. The Constitutional Court held that this provision contravened the guarantees of equal rights for men and women enshrined in Sections 27 and 28 of the 2017 Constitution, as well as the fundamental right and liberty of all individuals to their life and person.

The Court mandated that the provision of Section 301 be invalidated within 360 days of the decision, namely no later than 13 February 2021. However, the Court found that Section 305 of the Penal Code, which permits legal abortion in cases where the pregnancy arises from offenses related to sexuality, such as rape, or endangers the mother's physical health, did not infringe upon the 2017 Constitution. Nonetheless, the Court directed that Sections 301 and 305 be amended to reflect the present realities of the country.

The Court's decision in this matter marks an important step towards safeguarding the rights of women in Thailand, particularly their right to reproductive autonomy. The decision also highlights the vital role of the judiciary in upholding the principles of constitutional democracy and protecting the fundamental rights of all individuals. By striking down provisions that are inconsistent with constitutional protections, the Constitutional Court has affirmed its commitment to ensuring the rule of law and promoting the advancement of human rights in Thailand.

On 6 February 2021, the Penal Code Amendment Act was promulgated. According to the new provisions of Section 301, a woman who aborts a fetus that is older than 12 weeks shall be liable to no more than six months in prison and/or a fine of one thousand Baht. Furthermore, the new provisions of Section 305 of the Penal Code provide more situations of legal pregnancy termination as following provisions:

Section 301: "A woman who aborts a foetus that is older than twelve weeks shall be liable to no more than six months in prison and/or a fine of ten thousand bath."

Section 305: "The offender is not guilty if:

(1) The pregnancy puts the mother at risk physically or psychologically.
(2) The baby faces a significant risk of developing a physical or mental disorder or disability.
(3) The woman has been impregnated due to rape.
(4) The mother-to-be is convinced there is no other option.
(5) The abortion of foetus that is older than 12 weeks but not exceeding 20 weeks is approved by a doctor or other health professionals as approved by the Ministry of Public Health."

According to the Amendment Act, the aforementioned abortion law provisions came into force on 7 February 2021.

Kitti Jayangakula

Specific Human Rights Incidents and Cases

Central Juvenile and Family Court, Petitioners [Constitutional Court, Decision No. 20/2564, 17 November B.E. 2021]

Facts

The Central Juvenile and Family Court submitted an Objection of both Petitioners (Puangpetch Hengkam and Permsup Sae-eung) in the Civil Black Case No. YorChorPor 1056/2563 requesting the Constitutional Court to decide under the Constitution for an order accepting registration of marriage as both Petitioners are life partners with gender and sexual orientation as female falling for female, or persons with gender diversity spending lives as partners together for over 10 years in the manner of life partners having relationship, role, duty, and responsibility for each other as legal spouses.

On 14 February 2020, both petitioners submitted an application for registration of marriage at the Bangkok Yai District Office, Bangkok. However, the Registrar of Bagkokyai District informed both Petitioners that, as they were a same-sex couple, the registration of marriage could not be granted. The Rule of the Ministry of Interior on Family Registration B.E. 2541 (A.D.1998) stipulates that registration applications shall only be between males and females by birth. Accordingly, the Registrar of Bangkokyai District refused to grant marriage registration as both Petitioners were of the same gender. The request was not complying with the Civil and Commercial Code (CCC), section 1448 which stipulates that "*A marriage can take place only when the man and woman have completed their seventeenth year of age …*"

The opportunity to be granted marriage registration is a basic right all Thai people deserve, the same as other spouses who are females and males by birth. Therefore, they submitted an Objection to the Central Juvenile and Family Court arguing that section 1448 of the CCC is an infringerment of their rights and liberties as prescribed by the Constitution and causes them injury. The rejection of the application breaches human dignity, rights, liberties, and equality of persons, which are equally recognized and protected under the Constitution. This is contrary to or inconsistent with the Constitution, section 4, section 5, section 25, section 26, and section 27. In particular, Section 27 of the

Constitution prescribes that: persons shall be equal before the law and protected under the law equally. Men and women shall enjoy equal rights, shall not be subject to unjust discrimination on the ground of sex differences, and have the liberty to live their lives under the principle of equality according to the provisions of the Constitution. Moreover, in 2015, Thailand enacted the Gender Equality Act B.E. 2558, which is the law that protects the rights, liberties, and equality of people with gender diversity under sections 3 and 17. The act of the Registrar of Bangkok Yai District which refused to grant marriage registration to both Petitioners citing section 1448 is thus unfair discrimination against people and people with gender diversity. The petitioners argue that such refusal is contrary to or inconsistent with the Gender Equality Act B.E. 2558 and core international human rights treaties to which Thailand is a party namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Judgment

The CCC Book V on Family prescribes that only men and women shall have the right to marry under the law. Although it seems to restrict the rights and liberties of persons, section 1448 is a law with the content and reason that is by nature (True law is right reason, harmonious (in agreement) with nature) as well as tradition and custom of the Thai society. Such provisions are not restrictions of rights and liberties of persons, but it was prescribed based on rationality. Furthermore, the current Constitution and laws do not prohibit people of the same sex from spending their lives together or having sexual intercourse. Neither do they prohibit an arrangement for the wedding ceremony, entry into life insurance specifying the life partner as a beneficiary, nor making a will bequeathing property unto the life partner. As for the property jointly earned, it is not prohibited from being co-owned.

Regarding the argument of both Petitioners that the rights as spouses, e.g. to consent to medical treatment, to receive welfare as a spouse, to benefit from insurance, to claim compensation for wrongful acts, or to have rights as a statutory heir, were not conferred on them, such rights do not derive directly from the status of being married but emerge according to what the laws prescribe. Thus, such issues can be solved by the provisions of a specific law. This can be seen from the drafting of the Civil Partnership Bill B.E. ..., which is to confer upon the people of the same sex the right to live their lives together as well as other rights. Therefore, it can be concluded that section 1448 was prescribed based on the nature of humans. The law maintains the existence of the society as well as the tradition and customs that the society adheres to. This is an equal

protection of the rights and liberties of men and women under the law which does not constitute unjust discrimination against persons on the ground of sex differences and does not violate the rights and liberties of other persons.

Nevertheless, according to the context of world society and Thai society, the rights of persons regarding sexual status are accepted more widely. The State should have appropriate measures and encourage people with gender diversity to live their lives together by prescribing a specific law to grant rights to and solve issues as well as problems in the lives of people with gender diversity.

The Court rules that section 1448 of the CCC is not contrary to or inconsistent with the Constitution, section 25, section 26, and section 27, paragraph one, paragraph two, and paragraph three, with a recommendation that the National Assembly, the Council of Ministers, and the relevant State agencies should consider proceeding to enact a law for guaranteeing rights and duties of people with gender diversity as appropriate.

Kitti Jayangakula

Prosecution of Political Protestors

According to the mass protests and demonstrations that occurred in 2020, the Thai government prosecuted political protestors for various charges. The government used the power provided by the Emergency Decree on the Administration in the State of Emergency (2005) to arrest, detain, and put street protestors on trial. There were approximately a thousand people among protestors who were prosecuted by the government, including Parit Chiwarak, Panassaya Sitthijitawattakun, Somyot Pruksakasemsuk, and Arnon Nampa who were the leaders of the protests. Some of them are children, aged younger than 18 years old. The main offenses for a lawsuit, *inter alia*, are lese-majeste under section 112 and sedition under section 116 of the Thai Penal Code (1956), which are the offenses related to national security. In addition, the prosecution of political protestors was implicitly supported by the decision of the constitutional court, No. 19/2564, describing as, under section 49 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), the exercise of the rights or liberties to overthrow the democratic regime of government with the King as the Head of State.

The prosecution of accused protestors was against the principle of the rule of law in some aspects. Firstly, protestors were refused to be given bail by the Court. The court orders refusing to provisionally release protestors implicitly concluded that they would perpetrate the same offense as before they were arrested. The petition for bail of some protestors, in particular Parit Chiwarak and Panassaya Sitthijitawattakun, were denied ten times by the Court until the protestors were finally released. Secondly, having remained the accused,

the protestors were detained in prison, which is the facility for convicted prisoners. They were tacitly presumed to be guilty before the court would hear and judge the case. In addition, the condition of the detention centers was not hygienic. Some detained protestors contracted many kinds of viruses, including COVID-19, which led them to fall into a serious illness. There was no report on how they were cured and recovered from COVID-19 disease. Lastly, child protestors were detained in prison with adult prisoners, which shows that the court did not apply alternatives for the deprivation of liberty of these children but used prison as the first choice. The prosecution, as mentioned above, lasted all year round and was seen as a violation of the human rights convention.

The prosecution of political protestors violates the obligation to respect the rights guaranteed in the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment (CAT), and the 1989 Convention on the Rights of the Child to which Thailand has been a state party. It violates the right to justice under these conventions. Denial to give protestors bail violates article 9, paragraphs 1 and 3 of the ICCPR. Detention of accused protestors in prison violates article 10 paragraph 2(b) and 14 paragraph 2 of the ICCPR. The unsanitary condition of the prison which is an inhumane treatment of the prisoners violates Article 7 of the ICCPR and Article 16 of the CAT. The case of prosecution of child protestors violates Article 10 paragraph 2 (b) of the ICCPR and Articles 37 (b) and (c) as well as 40 (2) (i) and (3) of the CRC. Moreover, as one of the instruments used by the Thai government to suppress political movements, the prosecution violates other rights under these international conventions, such as the right to freedom of expression, right to freedom of assembly, and right to participate in politics.

Nattawat Krittayanawat

The Forced Repatriation of the Registered Cambodian Refugees

The immigration officials of Thailand forcibly returned registered the Cambodian refugees under the threat of grave violations of human rights. Veourn Veasna and Voeung Samnang were arrested by Thai police officers on 8 November 2021 and were deported back to their home country on the next day. After they arrived in Cambodia, they were transferred to the prison facility, Correctional Center 1 (CC1), in Phnom Penh. Both of them were members of the Cambodia National Rescue Party (CNRP) which was the political opponent of the Cambodian government under the leadership of Prime Minister Hun Sen. They were targeted and pursued by that government after the CNRP was dissolved by the government-controlled Supreme Court. They were charged with many criminal offenses by the Supreme Court before they

fled to Thailand in 2020. In addition, both men were registered by the United Nations High Commissioner on Refugees (UNHCR) as refugees. The UNHCR condemned Thailand's failure to protect refugees from deportation leading to a risk of persecution.

The return of the Cambodian political refugees to their country by Thai officials was based on the Immigration Act B.E. 2522 (1979) of Thailand. Section 54 of this law empowers Thai officials to deport an alien from the Kingdom when he enters the Kingdom without permission. Thai officials reiterated that they followed the legal process and border control on the deportation of illegal immigrants with no regards to the political refugee status of the two Cambodians. That repatriation led to their lives to be at risk of severe violation of their fundamental rights guaranteed by international human rights standards.

This repatriation, through the application of the Immigration Act B.E. 2522 (1979), violated the international legal standards of human rights. Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment (CAT), which Thailand has already accessed to be a state party since 2007, provides that a state party should not expel, return or extradite a person to another state in which he will be at risk of torture. Before returning a person to his homeland, the state should carefully consider whether there are reasonable grounds to believe that the destination state has a situation of gross violation of human rights. Similarly, article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED), in which Thailand has remained a signatory state since 2012, also prohibits a state party not to return a person to another state in which he will be at risk of enforced disappearance. Although Thailand has not ratified the CED, she has an obligation, under article 18 of the 1969 Vienna Convention on the Law of Treaties, not to refrain, in good faith, from acts that would affect the object and the purpose of this convention. Thailand should not push any persons under an enforced disappearance in any state. In addition, Thailand violates the rule of article 33 of the 1951 Convention relating to the Status of Refugees which prohibits returning a refugee to any country in which he may be persecuted. Although Thailand has not been a state party to this convention, this rule has become a customary international law binding state which is not a party. Interestingly, the rules of the three articles are based on the principle of *non-refoulement* which is the peremptory norm of international law or *jus cogens*. Peremptory norm is a customary international law that binds all states with no regard to whether any state practice is contrary to this kind of rule.

Nattawat Krittayanawat

State Practice of Asian Countries in International Law

Viet Nam

Trinh Hai Yen and Nguyen Duc Anh***

Introduction[1]

The review of Viet Nam's practice in 2021 focuses on two areas, treaty law and international economic law, which have had significant developments. It discusses the new Law on International Agreement in relation to the Law on Treaties (2016) to highlight its objective of ensuring that commitments with international partners by state agencies are inconsistent with treaty obligations. The latter witnesses intensive treaty conclusion this year as scheduled in the roadmap of implementing multilateral economic treaties to which Viet Nam is a party.

Treaties

State organs at central and municipal levels have entered various agreements in their day-to-day operations with their foreign partners on collaboration and cooperation in their respective areas of competence. The Viet Nam's Law on International Agreements, effective from 1 July 2021, superseding the 2007 Ordinance on Conclusion and Implementation of International Agreements, distinguishes these function-based agreements entered by state organs from treaties under the 2016 Law on Treaties in two new ways.

First, by definition, Article 2.1 of the Law on International Agreements defines "*international agreement*" as "a written agreement on international cooperation between a Vietnamese contracting party, within its functions, tasks, and powers, and a foreign contracting party, which does not give rise to, alter or terminate a right or obligation of the Socialist Republic of Vietnam under international law." Accordingly, the most important elements to

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1 The opinions expressed in this article are solely those of the authors. They do not purport to reflect the opinions or views of any institution they might be affiliated with.

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differentiate between the two types of agreements are (i) treaties involves the State while international agreements are not signed on behalf of the State and (ii) treaties are legal tools shaping State obligations while international agreements are not supposed to formally engage the State. The new Law explicitly excludes certain typical designations of treaties such as "Convention, Treaty, Covenant, Agreement" from the non-exhaustive list of titles that can be chosen for covered international agreements.

Second, since these agreements can be considered as state conduct for the purposes of attribution of responsibility, the new Law understandably introduces detailed mechanisms to ensure that the conclusion of covered agreements would not amount to a breach of other treaty obligations. Under Article 5, the Ministry of Foreign Affairs (MOFA) is tasked with the general unified management of international agreements in cooperation with other ministries or ministerial-level and the People's Committees of provinces which have competence over specialized areas. For the purpose of safeguarding treaty compliance, the MOFA shall provide a written assessment requesting state organs on the conformity of proposed international agreements with relevant international treaties to which Vietnam is a party. The MOFA also has to determine if proposed international agreements entail state obligations for Viet Nam which should be reserved solely for treaty conclusion (Article 29.4). In addition, due to the fact that agreements concluded by state agents have been invoked in investment treaty arbitration cases against Viet Nam, Article 25.3 of the Law on International Agreements requires state organs to seek written consultation from the Ministry of Planning and Investment with regard to its proposed conclusion of an international agreement.

The new Law, therefore, can be considered an effort to institutionalize and improve mechanisms of ensuring treaty compliance as well as the systematic consistency of its legal system. This is of particular importance given Viet Nam's robust treaty-making activities and increasing investor-state arbitrations initiated under investment treaties.

Conclusion and Application of Trade Treaties

International Economic Law

The ASEAN Trade in Services Agreement (ATISA), signed on 7 October 2020, became effective for Viet Nam on 29 October 2021. Negotiated on the basis of the existing ASEAN Framework Agreement on Services (AFAS), ATISA is a

further step for Viet Nam and other ASEAN parties to intensify their service market liberalization. Resolution 131/NQ-CP of the Viet Nam's Government approving the ATISA provides for implementation mechanism, especially with regards to the Non-Conforming Measures (NCM) and necessary changes in domestic laws to ensure compliance with the ATISA.

The UK-Viet Nam Free Trade Agreement (UKVFTA), signed on 29 December 2020, is another trade treaty which has entered into force for Viet Nam this year, on 1 May 2021. This Agreement, as explained in the UK Government report on continuing its trade relationship with Viet Nam, aims to maintain the effect of the EVFTA when the latter ceases to apply to the UK.

The entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2019 and the EU-Vietnam Free Trade Agreement (EVFTA) in 2020 either triggers a direct application of their obligations or requires internalization of treaty provision into Vietnamese legal systems. Resolution No. 72/2018/QH14 on Ratification of the CPTPP and Resolution No. 102/2020/QH14 on ratification of the EVFTA list in their annexes the provisions to be applied directly in Viet Nam. Other obligations will require the promulgation or amendment of domestic laws to be effective within the domestic legal framework. Both resolutions specifically provide that changes should be made in nine Vietnamese laws in the case of the CPTPP and two in the case of the EVIFTA, which have been completed as planned.

Ratifying Intellectual Property Treaties as Part of Trade Treaty Obligations

Viet Nam has included the conclusion of intellectual property treaties and adherence to treaty-based standards of protecting copyright and related rights in its Intellectual Property Strategy by 2030 (Decision No. 1068/QĐ-TTg). Furthermore, under the CPTPP and the EVFTA, as a Party, Viet Nam undertakes to ratify or accede to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) no later than the date of entry into force of CPTPP (Article 18.7.2) and within three years from the effective date of EVFTA (Article 12.5.2). Viet Nam deposited its instrument of accession to the WCT on 17 November 2021, which will take effect with respect to Viet Nam on 17 February 2022. The WPPT is scheduled to accede in 2022 under Decision 121/QĐ-TTg. These accessions are part of Viet Nam's consistent and determined efforts in its international integration process to provide a safe legal environment in digital space for copyright and related rights.

Ratifying ILO Conventions as Part of Trade Treaty Obligations

As CPTPP Parties are generally obligated under Article 19.3.1 to adopt and maintain in their statutes, regulations and practices the labor rights as stated in the International Labour Organization (ILO) *Declaration on Fundamental Principles and Rights at Work and its Follow-up* (*1998*), the EVFTA explicitly requires its Parties to make "continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions" (Article 13.3.a). Under Decision 2528 /QĐ-TTg, Viet Nam started to study the possibility of ratifying the three fundamental ILO Conventions to which it was not a party from 2016 to 2020, namely the Right to Organise and Collective Bargaining Convention (No. 98), the Abolition of Forced Labour Convention (n. 105), the Freedom of Association and Protection of the Right to Organise Convention (No. 87). Pursuant to Decision 121/QĐ-TTg of the Prime Minister dated 24 January 2019 approving the Plan on implementation of the CPTPP, Convention 98, Convention 105 and Convention 87 would be ratified in 2019, 2020, and 2023, respectively. Accordingly, Convention 98 and Convention 105 has entered into force for Viet Nam as of 5 July 2020 (Notice No. 39/2019/TB-LPQT) and 14 July 2021 (Notice No. 24/2021/TB-LPQT), respectively. Viet Nam's Labour Code 2019, effective as of 1 January 2021, has been drafted to ensure consistency with the labor rights under the ILO fundamental conventions. Additionally, mechanisms supervising compliance under these conventions with their observations and direct requests will help the Parties to review and make necessary changes in their domestic legal system.

Conclusion

The new developments in Viet Nam's international law practice reported this year is a continuity of its consistent realization of "proactive and vigorous international integration" (Resolution 22-NQ/TW, 2013). Couched not only with general policies and strategies, as mentioned above, Viet Nam used action plans and roadmaps with specific measures regarding the conclusion and implementation of treaties. Undertaking treaty obligations not only entails legal implications but can also be a political investment for credibility and reputation, which is part of a package tool for international integration. This long-term approach can be sustained for many years to come.

Literature

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Book Review

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Yuji Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (Brill Nijhoff, 2023) Hardcover: 314 pp.

This book looks at the treatment of international law within domestic legal orders. It focuses on the concept of *direct applicability* and sorts out the confusion that arises from related terms, e.g., "domestic legal force," "self-executing," and "right of action."

The author is a judge at the International Court of Justice and, before that, was Professor of Law at the University of Tokyo and Chair of the United Nations Human Rights Committee. As he notes in his Preface, the book builds upon his previous scholarship on the topic, *inter alia*, his 2002 Hague Academy lecture *Domestic Application of International Law*;[1] his book, published in Japanese, *Domestic Applicability of Treaties: What Are "Self-Executing" Treaties?*,[2] where he "attempted to reconstruct the theory of direct application and [propose] a renewed framework of analysis;"[3] and a long line of journal articles and lectures.

The author builds upon the principle that a rule of international law has to have the force of law domestically ("domestic legal force") before it can be applied without the need for further action by domestic authorities ("direct applicability"), but "[s]uch domestic legal force of international law is not a sufficient condition for its direct applicability."[4] Domestic legal force is a prerequisite but is in itself incomplete to enable direct applicability. In his approach, the presumption is that international law is directly applicable domestically provided there is no domestic law excluding it ("grounds to exclude"). The author also notes the need to examine the specific international obligation at stake, and determine whether it is sufficiently precise to be applied directly.

1 378 Recueil des cours de l'Académie de droit international de La Haye, 9–261 (2015).

2 (Tokyo: Yuhikaku, 1985).

3 Y. Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (Brill Nijhoff, 2023), at ix.

4 *Id.* at 150.

At the same time, the book looks at the confusion arising from the term "self-executing," derived mainly from the U.S. concept of self-executing treaties, which has been interchangeably used with "direct effect," the term favored by E.U. law, and "direct application." These terms overlap with other notions, for instance, "invocability"[5] and the question whether the obligation itself is by its nature merely programmatic or whether it can give rise to an actionable claim, or "transformation"[6] and the question whether an international obligation either needs first to be transformed into domestic law, or whether it can be applied qua international law. The author points out that self-executing can be used both to denote international law rules that are "susceptible of being applied without the need of further measures,"[7] whether executive or legislative, and likewise national law, e.g., constitutional provisions that on their own may be too broadly worded such that they can be applied only through further implementing measures.

The book develops these points in the key chapter entitled "Domestic Application of International Law: A Framework of Analysis," where the author, having situated the debate in the context of various approaches and jurisdictions, then develops his theoretical framework, explaining why he prefers the term "direct applicability." Those various contexts are covered in separate chapters. The books begins with the fully international approach comprising, *first*, the key relevant international decision (the Advisory Opinion of the Permanent Court of Justice in *Jurisdiction of the Courts of Danzig*[8]) and, in a later chapter, judgments by other international courts; and *second*, the main international human rights conventions and major multilateral treaties. It also situates the direct applicability concept in separate chapters on the law and practice of the United States and of the European Union. Finally, it extends the concept beyond treaty law and applies it to customary international law.

The strength of the book lies in its encompassing view of a subject that is usually examined from specific angles in national jurisdictions, and how it looks at the competing concepts in a wide range of contexts, e.g., in relation to international human rights instruments; within the U.S. and in E.U. member-states; and as regards not just treaty but likewise customary international law.

5 *Id.* at 125.
6 *Id.* at 151.
7 *Id.* at 146.
8 *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ (ser. B) No. 15 (3 March 1928).

For instance, it examines the role of state intent and rejects that approach as "futile … because such an intention is either non-existent or unclear"[9] in the text or *travaux preparatoires* of the various treaties examined in the book. It looks at the fundamental question of whether direct application is a problem only in dualist and not in monist states where it is a given, and concludes that this debate "has little bearing" even for states that, though dualist, have enabling constitutional clauses or "laws of approval," referring to a legislative act whereby a state consents to a treaty and at the same time makes it directly applicable.[10] Moreover, it asks whether the question of direct applicability arises only in treaties that create individual rights that give rise to a "right of action," and concludes that a treaty can be directly applicable even when it does not create a cause of action for individuals. A treaty "does not by virtue of that fact alone establish a private right of action or confer [upon private individuals] a right to seek particular remedies such as damages."[11] This discussion is most relevant to international human rights conventions, and carries special weight given that the author's scholarship on this topic began with the domestic application of human rights treaties and considering the author's work with the United Nations Human Rights Committee.

Finally, the book brings together in one volume an encyclopedic breadth of relevant material. For instance, on the issue whether direct application is determined by international law or by domestic law, the author combed through the opinions of various authors and publicists in a wide range of jurisdictions, and from classic to contemporary historical periods, including glossators who wrote in various languages in civil law traditions. The reader, by reading the book, is assured that he or she has at his disposal the full range of opinion on the matter.

The book is most timely. International law has increasingly governed not just the relations of states *inter se* but has reached into matters that erstwhile belonged to the domestic jurisdiction of states, pertaining to the rights of private individuals and, to complicate things further, in matters that traditionally belonged to the private sphere. It is in this historical and disciplinal context that we face the question of direct applicability. This phenomenon has manifested itself in many sub-fields of international law, e.g., sources of law, subjects

9 *Id*., at 16.
10 *Id*., at 3.
11 *Id*. at 59.

of international law, state responsibility, and now, as the author deftly demonstrates, the direct application of both treaty and custom law, in its full doctrinal and normative implications.

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International Law in Asia: A Bibliographic Survey – 2021

*Angela Semee Kim**

Introduction

This bibliography provides information on books, articles, notes and other materials dealing with international law in Asia. For this survey, only English language publications that are newly published in 2021 or previously published but had updated editions and were republished in 2021 are listed in this survey. Please refer to early editions of the Asian Yearbook of International Law for earlier bibliographies from earlier editions.

Most, if not all, of the materials can be listed under multiple categories, but each item is listed under a single primary category. However, edited books may appear more than once if multiple chapters from the book are listed under different categories. Readers are advised to refer to all categories relevant to their research. The headings used in this year's bibliography are as follows:

1. General Theories and Asian Culture
2. Sovereignty, Decolonisation, and Territorial Jurisdiction
3. International Dispute Settlement
4. Arbitration
5. International Trade Law, Economic and Commercial Law
6. Investment Law and Insolvency Law
7. Laws on Intellectual Property and Technology
8. Environmental Law and Energy Law
9. Human Rights
10. Migration and Refugees
11. International Humanitarian Law, Criminal Law, and Transnational Crime
12. Law of the Sea
13. Cyber Crime and Security
14. Air & Space Law and Nuclear Law
15. International Relations, Cooperation and Diplomacy
16. Miscellaneous

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DILA Events

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2021 DILA International Conference and 2021 DILA Academy & Workshop

The 2021 DILA Academy & Workshop took place on November 26, 2021 in Gyeongju, Korea with presentations made by Professor Seokwoo Lee of Inha University School of Law on the topic of "The Making of International Law in Korea: From Colony to Asian Power" and Professor Hee Eun Lee of Handong International Law School on the topic of "Is International Law Effective in Maintaining Order within the International System."

The following day on November 27, 2021, the 2021 HGU-DILA International Conference entitled "The Role of International Law and Legislation in Maintaining Peace and Security in Asia" took place online and was co-hosted by Handong Global University and DILA.

The conference opened with a welcome address by Hikmahanto Juwana, Chairman of The Foundation for the Development of International Law in Asia (DILA) and Professor of International Law, Faculty of Law of the Universitas Indonesia and keynote by Kevin YL Tan, Adjunct Professor of National University of Singapore and S. Rajaratnam School of International Studies, Nanyang Technological University.

The conference was conducted with parallel sessions composing of DILA sponsored panels and those sponsored by Handong Global University which included topics such as "Legislative Responses to COVID-19" and "Legal Education and Legislation Studies." The DILA portion of the conference included session one which was on "The Role of International Law in Maintaining Peace and Security in Asia" which was chaired by Professor Hee Eun Lee. The first presenter was Professor Arie Afriansyah of Universitas Indonesia who presented on the "Indonesian Perspective on Foreign Military Activities in the EEZ." Professor Pei-Lun Tsai of National Taiwan Ocean University discussed "Combating Human Trafficking at Sea in East and Southeast Asia: The Role of Port States under International Law." Lastly, Professor Sergey Sayapin of KIMEP University spoke on "A Human Rights Court for Asia?" Professor Wasantha Seneviratne of the University of Colombo served as discussant.

The last session hosted by DILA was examining the "Role of International Law in Asian Countries" which was chaired by Professor Seokwoo Lee of Inha University Law School. Each speaker centered their presentation on specific subjects which included "Environment;" "Trade and Investment;" "Human Rights;" and "Ocean and Territory" which was based on research conducted

for the International Law Association (ILA) Study Group of the Asian State Practice of Domestic Implementation of International Law. The presenters for this session were Professor David Ong of Nottingham Law School (Environment); Ravindran Rajesh Babu of the Indian Institute of Management (Trade and Investment); Thio Li-ann of the National University of Singapore (Human Rights); and Dustin Kuan-Hsiung Wang of National Taiwan Normal University (Ocean and Territory).

The conference then came to a close with final remarks and wrap up by Seokwoo Lee and Hee Eun Lee.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief

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