Asian Yearbook of International Law

Volume 24
2018

BRILL | NIJHOFF

Asian Yearbook of International Law

Asian Yearbook of International Law

Volume 24 (*2018*)

BRILL
NIJHOFF

LEIDEN | BOSTON

The Development of International Law in Asia-Korea (DILA-KOREA), as the secretariat of DILA, is responsible for the management of DILA along with the Asian Yearbook of International Law and Asia Pacific Ocean Law Institutions Alliance. DILA-KOREA has generously provided financial support so that Volume 24 (2018) is available as open access.

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISBN 978-90-04-43777-7 (hardback)
ISBN 978-90-04-43778-4 (e-book)

This book is printed on acid-free paper and produced in a sustainable manner.

Asian Yearbook of International Law

VOLUME 24 (2018)

The titles published in this series are listed at *brill.com/ayil*

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.

The Asian Yearbook of International Law

Launched in 1991, the *Asian Yearbook of International Law* is a major internationally-refereed yearbook dedicated to international legal issues as seen primarily from an Asian perspective. It is published 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 objects of the Yearbook are twofold: 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 includes Senior Editors So Jin Kim (Editor-in-Chief), In Hyuk Hwang (Managing Editor), Yeonsoo Lim, and Dajeong Lucy Kim; and Junior Editors Eojin Yoo, Ji Min Ryu, Ji Hun Park, Josephine Grace Mann, Soyeon Moon, and Yaeeun Shin.

Contents

Articles

Legal Materials

Literature

DILA Events

Editorial Note

The 2018 edition (volume 24) of the *Asian Yearbook of International Law* has special feature articles on the practice of Asian states from the perspective of Third World Approaches to International Law (TWAIL) and is followed by two main articles; 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 the Foundation for the Development of International Law in Asia (DILA) in the year 2018.

1 Articles

The special feature articles were drawn from papers that were presented at the 2019 DILA-Korea International Conference on Asian State Practice in International Law from the Perspective of TWAIL held in Seoul, Korea from November 7 to 9, 2019. The purpose of the conference was to discuss the issues related to the global South and assess how the dynamics of international politics and transnational interactions have influenced and redefined international law.

The first article provides a historical case study in "The Centenary of the League of Nations: Colonial India and the Making of International Law" by Amritha V. Shenoy of Kathmandu School of Law. Next, Thamil Venthan Ananthavinayagan of Griffith College follows with a look at the sources of international law, in particular customary international law in "Breaking Bad Customs: Involving the Idea of *Opinio Juris Communis* in Asian State Practice." After, Ravi Prakash Vyas and Rachit Murarka, both of Kathmandu School of Law, provide a TWAIL perspective of human rights in "Understanding Human Rights from an Eastern Perspective: A Discourse." Jay Ramasubramanyam from Carleton University then examines the refugee issue in "Subcontinental Defiance to the Global Refugee Regime: Global Leadership or Regional Exceptionalism?" Next, Dwayne Leonardo Fernandes and Devahuti Pathak examine "Harmonizing UNCITRAL Model Law: A TWAIL Analysis of Cross Border Insolvency Law." This is followed by the "Use of Force as Self Defence against Non-State Actors and TWAIL considerations: A Critical Analysis of India's State Practice" authored by Srinivas Burra of South Asian University. The last special

feature article is a look at the issue of international dispute resolution in "The 'ASEAN Way': A Sore Thumb for ASEAN Solidarity in the Face of an Ailing Global Trade System?" by Noel Chow Zher Ming of Tradewin Asia.

The special feature section is followed by the first main article entitled, "A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration" by the National Institute for South China Sea Studies. Next, Yudan Tan examines "Prosecuting Crimes against Humanity before International Crimes Tribunal in Bangladesh: A Nexus with an Armed Conflict."

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 2018 state practice of their respective countries.

1 *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 2018 calendar year.

2 *State Practice of Asian States in the Field of International Law*

The state practice section is intended to offer readers of the Yearbook an outline and summary of the activities undertaken by Asian states that have a direct bearing on international law. The national correspondents, listed in the table of contents, have undertaken the responsibility to report on the state practice of their respective countries during the 2018 calendar year. Their submissions describe how these states are applying international law in their domestic legal systems and in their foreign relations.

III Literature

1 *Book Review*

For this edition of the Yearbook, Seokwoo Lee, of the Board of Editors, gives his review of *History and International Law: An Intertwined Relationship* published in 2019 by Edward Elgar Publishing.

2 *Bibliographic Survey*

Soyeon Moon of Handong International Law School in Pohang, Korea prepared the bibliography for 2018 which provides information on books, articles, notes, and other materials dealing with international law in Asia.

IV DILA Activities

The 2018 edition of the Yearbook concludes with a report on the activities undertaken by DILA in the year 2018, namely the annual DILA International Conference and DILA Academy and Workshop that was held on April 21 to 22, 2018 in Yogyakarta, Indonesia at the Islamic University of Indonesia.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief

Special Feature: Asian State Practice in International Law from the Perspective of Third World Approaches to International Law (TWAIL)

∴

The Centenary of the League of Nations: Colonial India and the Making of International Law

*Amritha V. Shenoy**

1 Introduction

The wave called "turn to history" in international law narrates various historical aspects of international law. This turn introduced a sub-discipline namely, the "History of International Law. However, narrating the history of international law is not a new phenomenon. History has been indispensable to the Third World Approaches to International Law (TWAIL). In the words of R.P. Anand, "the present cannot be properly assessed, nor future projected, without an understanding of the past".[1] The second generation of TWAIL scholars connects history to the present.[2] Comparing the writings of TWAIL scholars on historical aspects of international law to the present writers on the discipline, one can see that Eurocentric histories are reiterated. The Eurocentric turn to history needs to be challenged by the narration of alternative histories. The alternative histories need to point out the principles of international law that existed in different civilisations so that modern international law can truly become a universal law.

There are rules that governed war, treaty-making, diplomacy, and trade in many civilisations of the world. However, the existence of an international organisation in pre-nineteenth century cannot be found in other civilisations of the world.[3] International organisations were formed in the nineteenth century. The craving for co-existence and the catastrophes of the World Wars gave an impetus to the formation of international organisations in the twentieth century.[4] Thus, the consciousness of a State to move

* Assistant Professor, Kathmandu School of Law, Bhaktapur, Nepal.
I would like to express my gratitude to Sakshi Shree, Doctoral Candidate, Centre for Japanese Studies, Jawaharlal Nehru University for providing valuable suggestions.

1 R.P. Anand, New States and International Law 5 (2nd ed. 2008).

2 Antony Anghie, Imperialism, Sovereignty and the Making of International Law 139 (2004).

3 Clive Archer, International Organizations 5 (James Crawford & John S. Bell eds., 3rd ed. 2001).

4 Inis L. Claude, Jr., Swords into Plowshares 17 (4th ed. 1964).

 | doi:10.1163/9789004437784_002

beyond national interests, i.e., internationalism, led to the creation of international organisations.[5]

The pioneer international organisations were for postal services, technology, humanitarian aid and other matters.[6] The League of Nations was the first international organisation that dealt with pervasive topics affecting human life. It had an inextricable link to the International Labour Organisation, international health organisations, and interntional economic and financial organisations.

Remembering the organisation on its centenary, the League of Nations, despite its demise, was a breakthrough idea not only for international relations but also for challenging various concepts of international law itself. It posed a challenge to the positivist idea that State was the only subject of international law. It gradually widened the ambit of international law.[7] The formation of an international organisation was clearly piercing through the sovereignty of the States. Many internal matters were discussed directly or indirectly in the League. Therefore, in theoretical terms, international law was moving from positivism to liberalism.

However, only European states became members of the international organisations established before the League. For instance, the Central Commission for the Navigation of the Rhine was formed as a result of the Congress of Vienna in 1815. It was a creation of Europe with European members. Eurocentrism was challenged by the formation of alternative organisations. The Soviet Union and the colonised nations together formed the Comintern or Communist International in 1919, challenging imperialism.

Apart from Eurocentrism, patriarchy was challenged also by the formation of women's organisations. There were three prominent international women's organisations in the post-First World War era, viz., the International Alliance of Women, the International Council of Women, and the Women's International League for Peace and Freedom. The Women's International League for Peace and Freedom organised a meeting of women during the First World War when most of the other inter-governmental organisations were not functional.

---

5 Akira Iriye, Global Community: The Role of International Organizations in the Making of the Contemporary World 9–10 (2002).

6 Commerce was the triggering point for the proliferation of international organisations. Health was another concern. The international organisations included the International Telegraphic Bureau (1868), the General Postal Union (1874), the International Bureau of Weights and Measures (1875), the International Union for the Publication of Customs Tariffs (1890), the Metric Union, and International Health offices in Vienna, Paris, and Havana.

7 This challenge was manifest after the creation of the United Nations. However, the League of Nations was one of the first steps.

Colonial India was a member of some of the international organisations. In 1874, a representative for India signed the Berne Convention, by virtue of which India became a member of the Universal Postal Union in 1876. In 1890, India[8] was represented by a delegate at the Conference of the International Union for the Publication of Customs Tariffs. British India signed the International Wireless Telegraph Convention in 1912. India had a separate vote at the International Radiotelegraph Conference in 1912. Colonial India was party to 150 multilateral treaties[9] and 44 bilateral treaties.[10] Certain international agreements were also signed separately by colonial India.[11] With regard to the alternative organisations, M.N. Roy, an Indian, was a member of the executive committee of the Comintern. Colonial India acceded to the International Alliance of Women to promote universal suffrage.[12]

Colonial India was a founding member of the League of Nations. 2019 was the centennial year of the formation of the League of Nations. Its contributions as one of the first international organisations are remarkable in the history of international law. Nevertheless, in the narrations of the League's history, a substantial part is neglected; it is the contribution of the colonies. Their contributions remain a part of alternative histories. The struggles of the people of colonial India, internal as well as external struggles, remain neglected. The period when colonial India was a member of the League reflects the way the Empire operated.[13] Therefore, the present article is an attempt to narrate an alternative history to highlight the contributions as well as struggles of colonial India in the international arena.

The article describes the political entity called colonial India by examining its position in international organisations despite being a colony. It discusses the ground for Indian membership in the League. Membership in an international organisation gives rise to financial responsibilities to contribute to the sustenance of the organisation. Hence, the article elucidates financial contribution and disproportionate representation with regard to colonial India. It highlights the problems faced by the Indian delegation due to the dominance of Europe in the League. It points out the issues discussed in the League on India. The history narrated herein also looks at the positive

8 India hereafter means colonial India.

9 *See* generally 124 L.N.T.S., 26 U.N.T.S.

10 *See* generally 32 L.N.T.S., 12 U.N.T.S.

11 Oliver J. Lissitzyn, *Territorial Entities other than Independent States in the Law of Treaties*, 125 Recueil Des Cours 1, 72 (1968).

12 Iriye, *supra* note 5, at 29–30.

13 B.S. Chimni, *India*, *in* The Oxford Handbook of International Law in Asia and the Pacific 551 (Simon Chesterman, Hisashi Owada & Ben Saul eds., 1st ed. 2019).

aspects of colonial Indian membership in the League. The article views history not only against Eurocentrism but also the role the different forms of hierarchy, i.e., of class, caste, and gender, played in the participation of India in international fora.

2 Colonial India – an Anomalous Political Entity and IOs

Colonial India was a complicated political entity. As mentioned in the Paris Peace Conferences, India was of a composite character.[14] Colonial India had broadly two components, viz. the territories governed by the British administration and the 562 Princely States.[15] The Governor-General dealt with the relationship between these two components. The Princely States had autonomy over internal matters whereas external affairs were controlled by the British. The Princely States did not have the power to enter into foreign relations with the external powers. The Princely States of India were like vassal states under the control of Britain.[16]

With regard to the territories governed by the British Administration, the British had control over internal as well as external affairs.[17] The right to declare war lay with the British Crown. Diplomatic relations were maintained on behalf of colonial India by the India office in London. The Government of India was comprised of a Foreign Department. The department did not deal with matters of external relations with other States or international organisations (such as the League of Nations). Thus, the Government of India was confined to territorial disputes and internal matters.[18]

Due to the power exercised by the British, India was not a self-governing territory, neither internally nor externally.[19] However, India's international personality was maintained as separate from that of Britain because the Interpretation Act of 1889 did not mention India as a colony. Primarily based

14 R.P. Anand, *The Formation of International Organizations and India: A Historical Study*, 23 Leiden Journal of International Law 5, 9 (2010).

15 India meant British India according to Section 18(5) of the Interpretation Act, 1889. Section 18(5) of the Interpretation Act of 1889 defines India as follows:

"British India, together with any territories of any native prince or chief under the suzerainty of His Majesty".

16 Anand, *supra* note 14, at 11.

17 *Id.*

18 D.N. Verma, India and the League of Nations 83 (1968).

19 Lissitzyn, *supra* note 11, at 66.

on the Act, India was accommodated by the British as a member of international organisations.[20]

There were two reasons for granting membership to India in international organisations, specifically the League of Nations. The primary reason was that the British had a vested interest to increase Britain's "voting strength" in international fora.[21] Therefore, Britain included other Dominions also as members. Thus, the total vote on behalf of the British counted to six (Great Britain, India, Australia, New Zealand, Canada, and South Africa). Six votes were good enough to increase the strength of the British Empire.[22]

Prominent personalities like Govind Ballabh Pant, Bhagwan Das, and others criticised India's membership in the League as beneficial to the British. The British denied this allegation by pointing out Article 5 of the Covenant which mentions the voting procedure of the League and demands unanimous votes, with few exceptions, in the Assembly and the Council.[23] The British reply was not satisfactory in the appointment of committees and the matters of procedure. The British wielded much power by the voting strength it had in the Assembly. It also had an impact on the membership in the Council.[24]

Another reason for including colonial India in the League was that it was a major political entity which lent a helping hand to the British and its allies during the First World War. The admission of members to the League was the discretion of the States that met at the Paris Peace Conference. It is pertinent to note that while India was given membership in the League, India's participation in the First World War itself was a result of British rule in India.[25]

---

20 R. Kemal, *The Evolution of British Sovereignty in India*, *in* 8 Harbans S. Bhatia, Political, Legal and Military History of India 119, 122 (1986).

21 Till 1919, India was represented by the officials appointed by the British. Anand, *supra* note 14, at 7–8.

22 V. Shiva Ram & Brij Mohan sharma, India and the League of Nations 142 (1932).

23 Article 5 of the Covenant of the League of Nations states:

> Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.
>
> All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.
>
> The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

24 Verma, *supra* note 18, at 24–25.

25 *Id.* at 29.

Due to the composite character of India, one Prince from the Princely States was part of the Indian delegation to the League Assembly's Annual Sessions. The Princely States supported the British during the First World War. Furthermore, their inclusion in the delegation meant that they would convey international obligations to the Chamber of Princes, and the Government of India did not have to persuade them separately. An Indian Prince was appointed as a cultural diplomat in the League. Hence, the cooperation of the Princely States and the British was manifest with the signature of the Maharaja of Bikaner in the Treaty of Versailles. This step brought both political entities (British India and the Princely States) closer.[26]

Be that as it may, membership in the League did not grant any autonomy to the Indians. The representatives of colonial India to international fora were selected by the British.[27] The question of authority in selecting Indian delegates to international organisations was a tough one. The issue revolved around the superiority of the Secretary of State or the Government of India. The appointments were to be made, as decided in 1920, in "prior consultation and agreement" between the Government of India and the Secretary of State.[28] The India Office despatched the appointment letter. The name of the authority was not mentioned so that an impression that superiority of the Secretary of State existed. The instructions were issued by the India Office on the information given by the Government of India. When necessary, they were given by the Secretary of State in consultation with the Government of India.

After the conference, delegates submitted reports to the Secretary of State, and a copy was despatched to the Government of India. This decision was made in 1920. Thus, control was attempted to be imposed on India's representation in international fora during the colonial era. The treaties signed by India were ratified by "an instrument of ratification signed by the King on the advice of the British Cabinet".[29] In matters of less gravity, the Secretary of State for India did the ratification.

Sometimes, the arguments formulated by the British were reformulated according to the opinion of Indians.[30] The freedom of expression for India was not untrammelled. It was under British control. However, it is laudable that whatever autonomy the Indian delegates obtained, they utilised it for the benefit of India and her interests. Emulating the Latin American countries that

26 *Id.* at 310.

27 Anand, *supra* note 14, at 12.

28 Lanka Sundaram, *The International Status of India*, 9(4) Journal of the Royal Institute of International Affairs 452, 462 (1930).

29 Verma, *supra* note 18, at 30.

30 Sundaram, *supra* note 28, at 459.

took a joint stand in many instances, the British made joint decisions for the Empire as a whole.[31] Nevertheless, the important political matters "affecting the Empire as a whole" were left to the British Government.[32]

With regard to the Princely States, the Prince could not express on behalf of his fraternity and he was sent as a part of British India.[33] Whenever the Government of India accepted some international obligations, it had to appease the Indian Princely States to follow similar obligations. Since problems would arise with negotiations, the Covenant of the League of Nations and other conferences had provisions to exclude territories from its purview.[34] When the British realised that some obligations can never be expected to be followed by the Princely States, they excluded those territories.

Complications arose in the case of Princely States because they had seceded their external autonomy but did not give up internal autonomy. There were instances when the Princes signed the conventions and later, after the discussions in the Chamber of Princes, they refused to fulfil international obligations. They claimed autonomy in internal administration. The Government of India issued a circular on January 21, 1926, asking the Princely States to follow international obligations under the League of Nations as deem fit in their internal administration.[35] The Princely States maintained the position that the Government of India should not interfere in their administration. The assertion of the Princely States led the Government of India to exclude them from the application of many important treaties like the Hague International Opium Convention, the Slavery Convention, and the International Convention for the Suppression of the Traffic in Women and Children, etc.

Gradually, some autonomy was granted to India. J. C. Coyajee explains the situation as India being granted "quasi-independence in her external relations".[36] One of the reasons for autonomy is because of the freedom struggle against the colonial rule in India. As far as international obligations were concerned, the matters concerning bilateral relations with a foreign power were dealt with by the British government. In the matters that affected India only, discretion was given to India. Treaties like the Locarno treaty had provisions that the issues affecting India and other Dominions were to be decided on their consent. The Imperial Conferences of 1923 and 1926 made it obligatory on the Empire to let the dominions and India decide whether to sign treaties or not.

---

31 Verma, *supra* note 18, at 115–16.

32 Sundaram, *supra* note 28, at 461.

33 *Id.* at 464.

34 *Id.* at 465.

35 Verma, *supra* note 18, at 251.

36 J.C. Coyajee, India and the League of Nations 23 (1932).

The inclusion of Indian Princes projected India as one political unit,[37] and the Indian nationalists utilised this to propose a federal structure of independent India.[38] Later, the Government of India Act of 1935 altered the relations between the Government of India and the Princely States. The Rulers of the Princely States had to sign an instrument of accession. They could specify in the instruments as to the matters on which the Government of India could enter into international treaties on behalf of the Princely States. They were also empowered to opt out of international labour conventions. The Princely States were termed as "international orphans" because they did not have obligations under many international treaties due to such reservations.[39]

From the above account of the political structure of colonial India and its subsequent participation in international organisations, many scholars termed the situation as anomalous in nature. D. H. Miller termed India's membership in the League as "an anomaly among anomalies".[40] V. Shiva Ram and Brij Mohan Sharma opined that "India is a political curiosity inside the League".[41] India's situation in the period between 1919 and 1947 is described as an "anomalous situation" again by T.T. Poulose.[42] The Princely States were in a more complicated position. The Covenant of the League of Nations did not have a provision for the representation of different political entities. Despite such absence of provision, the Indian Princes represented the Princely States in the League. Therefore, such representation was termed as an anomaly by D.N. Verma.[43] Thus, the political entity called colonial India had an anomalous position in international organisations.

3 Colonial India and Membership in the League of Nations

Two Imperial Conferences, or Colonial Conferences, were convened in 1887 and 1897. India did not participate in both conferences. In 1902, the Third Colonial Conference was held wherein preferential tariff in the jurisdiction of the Empire was discussed. The representation of India was inevitable, and therefore, an invitation was sent to the Government of India. A representative

37 Ram & Sharma, *supra* note 22, at 143.
38 Verma, *supra* note 18, at 246.
39 Int'l Labour Org., *Record of Proceedings for its Twenty-Sixth Session*, at 228 (1944).
40 As quoted in verma, *supra* note 18, at 20. *See* Coyajee, *supra* note 36, at 26.
41 Ram & Sharma, *supra* note 22, at 139.
42 T.T. Poulose, *India as an Anomalous International Person (1919–1947)*, 44 British Yearbook of International Law 201, 206 (1970).
43 Verma, *supra* note 18, at 244.

of the India Office attended the conference. It was an "ad-hoc representation at the imperial conference".[44] In the Fourth Colonial Conference conducted in 1907, the representative of the Secretary of State for India attended. The Fifth Colonial Conference was held in 1911. Lord Crewe, the Secretary of State for India, participated in one of its meetings and discussed the issue of Indian immigrants to the Dominion. Issues related to India were discussed in the conferences through the participation of the India Office.

India's demand for participation in the Imperial Conferences was given impetus by the support provided by India to Britain in the First World War.[45] The support changed the attitude of the British public and the Dominions towards India. On 22 September 1915, Mian Muhammad Shafi put forth a resolution in the Legislative Council demanding an invitation to India for participation in the Imperial Conferences in the future. The Governor-General of India, Lord Hardinge, assured consideration. The War Cabinet decided in January 1917 to include India in the forthcoming conference.[46] In March 1917, the War Cabinet began its meetings. India was represented by James Meston, S.P. Sinha, and the Maharaja of Bikaner. A permanent participation of India in the conferences was decided. A resolution was passed for the Dominions and India conferring "a right to an adequate voice in foreign policy and foreign relations".[47] India was not mentioned in the original text, but S.P. Sinha insisted on an amendment to include India. India's claim on enemies of the First World War amounted to 80,000,00 Rupees. This claim made the representation of India inevitable in the Paris Peace Conference. India was represented at the Paris Peace Conference by E.S. Montagu, the Secretary of State for India, the Maharaja of Bikaner, and S.P. Sinha, the Parliamentary Under-Secretary of State for India.

India participated in the Paris Peace Conference, 1919. In 1919, India signed the Treaty of Versailles and other accompanying peace treaties. India's membership in the League was dependent on the signing of the Treaty of Versailles. Thereby, India became an original member of the League of Nations.[48]

---

44 *Id.* at 2.

45 *Id.* at 3.

46 The Imperial War Conference of 1917 "passed a resolution which defined the self-governing Dominions 'as autonomous nations of an Imperial Commonwealth', and India 'as an important portion of the same', and claimed for the Dominions and India an adequate voice in the regulation of the foreign policy and foreign relations of the Empire". *See* Sundaram, *supra* note 28, at 454.

47 VERMA, *supra* note 18, at 6.

48 India was a participant in the Paris Conference wherein the Covenant of the League was drafted. It was listed as one of the original members. Original members were included

As a prelude to membership in the League, India struggled to be a participant in the Imperial Conferences. The struggle for membership in the League continued due to the opposition from the French and others, whereas the USA supported and debated in its Senate on India's membership in the UN. President Woodrow Wilson was the mastermind behind the creation of the League as highlighted in his Fourteen Points Agenda Speech. The US supported decolonisation for the creation of markets in the new states thus formed. In this context, the US supported "colonies enjoying full powers of self-government".[49] However, the US Senate did not approve the League Covenant. In the context of Indian membership in the League, British hypocrisy was debated in the US Senate. Senator Norris pointed out the atrocities committed by the British in the Jallianwala Bagh Massacre.[50] Despite such inhuman acts, the British showed the participants of the Paris Conference that India was governed democratically. However, by virtue of Article 1 of the League Covenant, India became a member of the League.[51]

4 Eurocentrism in the League

Due to prominent European representation in the League, European interests were discussed vastly. It was known as a "European organisation".[52] Due to European dominance, D.N. Verma opines that "oriental conditions and interests were in this way accorded a condescending and somewhat contemptuous tolerance, and then forgotten, while attention was concentrated on Western problems".[53]

Indians opposed Eurocentrism in the League. The League of Nations aimed at maintaining the status quo. The status quo was not acceptable to the

---

according to Article 1, paragraph 1 of the Covenant that states, "the original members of the League shall be those of Signatories which are named in the Annex to the Covenant".

49 Verma, *supra* note 18, at 15.

50 The negotiations at Versailles were conducted as an epilogue to Jallianwala Bagh Massacre and the *Satyagraha* of Mahatma Gandhi. *See* Anghie, *supra* note 2, at 139.

51 Article 1 of the The Covenant of the League of Nations provides:

"Any fully self-governing State, Dominion or Colony not named in the Annex may become a member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere attention to observe its international obligations".

52 Ram & Sharma, *supra* note 22, at 93; Stephen Legg, *An International Anomaly? Sovereignty, the League of Nations and India's Princely Geographies*, 43 Journal of Historical Geography 96, 98 (2014).

53 Verma, *supra* note 18, at 84.

Indians who were struggling for freedom.[54] For them, the League was a manifestation of imperialism. They wanted to get rid of the clutches of imperialism and colonialism.

The Council of the League of Nations was an arena of the great powers. It did not have representation from Africa, Australia, North America, and South America. Ram and Sharma[55] staunchly criticise the composition of the League Council by stating that "Although the chief aim of the League is to inspire confidence in all the nations of the world and to treat them as equals, still in the composition of its organisations there is clearly inequality prevailing". They opined that India and China deserved to be permanent members of the Council due to their large population.[56] India's seat in the Council was further bleak due to the British rule.

In the League Secretariat, there were very few employees from India (about half a dozen).[57] A representation was sent to the League of Nations in 1926 on the appointment of Indians in the League of Nations. One of the earliest appointments of Indians made to the League of Nations Secretariat was that of P.P. Pillai. The representation in the Secretariat was again disproportionate to the heavy financial contribution given by colonial India.[58]

The election of an Indian as the Judge of the Permanent Court of International Justice (PCIJ) was also a difficult task. Candidates like Amir Ali and Sultan Ahmad contested for elections of the judicature in vain. Even though the Court intended to represent all the principal legal systems and civilisations of the world, it was not fulfilled due to European dominance.

The British accepted the optional clause[59] of the Statute of the PCIJ in 1929 after a long contemplation. The exceptions given by India to the optional

---

54 *Id.* at 273.

55 RAM & SHARMA, *supra* note 22, at 193.

56 *Id.* at 166; Ram and Sharma proposed "reshuffling" of the council. In their words, "Some of the seats on the Council should be assigned on a territorial basis. For example, Europe and Asia should each get three seats, America two, Africa two and Australia one. After that, some seats should be distributed on population basis, and India and China, being the countries with the largest populations in the world, should each get a permanent seat. Seats may be assigned on the basis of the principal forms of civilisation, such as Anglo-Saxon, Teutonic, Slev, Latin, Chinese, Japanese, Hindu and Mohammedan etc. There should be a number of non-permanent seats open to election as at present". *Id.* at 208.

57 *Id.* at 167.

58 *League of Nations Notes*, 5(7) BULLETIN OF INTERNATIONAL NEWS 17, 21 (1928).

59 The Indian delegation led by Mr Habibullah signed the optional clause on 19 September 1929. He made the following statement (United States Department of State, *Treaty Information: Permanent Court of International Justice – India*, 2 THE DEPARTMENT OF STATE BULLETIN 451, 452 (1940)).

clause in effect nullified compliance with it.[60] Due to such exceptions, India could not settle disputes (for instance, with the problem of Indian emigrants in South Africa) with the other imperial dominions and left them to the Privy Council.

The Eurocentric nature of the League was reflected in the Mandate System which kept all members of the League under the control of the great powers. The Mandate System was formulated to promote self-government among the colonies and to make them a part of the "international system as sovereign, independent nation-States".[61] It changed the language "civilised and uncivilised" to that of "backward and advanced".[62] This reflects the Eurocentric idea of waiting for the "backward" nations to become "advanced" with the help of the "civilised" nations.[63]

Indian public opinion was against the Mandate System because of the delay in granting self-determination by the establishment of the System in the League. The discontent amongst Indians was also due to the issue of Tanganyika. It was a mandate territory under the British. Indians residing in the area faced discrimination because of British policies. The mobilisation of Indian public opinion against it led the Government of India to take the issue before the Permanent Mandates Commission. India could not move the PCIJ

"On behalf of the Government of India and subject to ratification, I accept as compulsory *ipso facto* and without special Convention, on condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, para 2, of the Statute of the Court, for a period of 10 years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situation or facts subsequent to the said ratification, other than – disputes in regard to which the parties to dispute have agreed or shall agree to have recourse to some other methods of peaceful settlement; and disputes with the Government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree; and disputes with regard to questions which by international law fall exclusively within the jurisdiction of India. And subject to the condition that the Government of India reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given within 10 days of the notification of the initiation of the proceedings in the Court and provided also that such suspension shall be limited to a period of 12 months or such longer period as may be agreed to by the parties to the dispute or determined by decision of all the Members of the Council other than the parties to the dispute".

60 Verma, *supra* note 18, at 95.

61 Anghie, *supra* note 2, at 116.

62 Anghie, *supra* note 2, at 189.

63 Dipesh Chakrabarty, Provincializing Europe: Postcolonial Thought and Historical Difference (Reissue ed., 2008).

because of the exceptions made in the optional clause.[64] All these issues arose due to the Eurocentric nature of the League. It ended up as politics of the great powers. This affected the Indian delegates to the League directly.

5 Problems Faced by the Indian Delegation

The Indian delegation, as previously mentioned, was comprised of the British, Indian Princes, and Indians. The British, who were part of the Indian delegation to the League, largely made decisions on behalf of India. At times, the British expressed Indian interests. For instance, William Meyer strongly supported the reduction of India's expenses in the League of Nations. However, when the interests of Britain and India clashed, the British served the former.

The Indian delegates faced many problems. Due to the lack of instructions and delays in instructions from the India Office, the Indian delegates had to face difficulties in the conferences they represented.[65] Moreover, the delegates sent on behalf of India were less in number in comparison to any other member of the League. The Indian delegates maintained professional contact, unlike other members with more delegates who entered into unofficial diplomacy. The constant demand of the delegates added three substitute delegates to represent India in the Seventh Assembly of the League of Nations.

India did not have a permanent representative in Geneva. Many nations had permanent representatives, but the Government of India was reluctant to incur expenditure. The absence of a permanent representative in Geneva led to a setback to Indian interests in many issues.[66] The members of the Indian legislature demanded the appointment of an Indian head in the delegations sent on behalf of India. The British rejected it in the pretext that an Indian could not "appreciate the guiding principles of His majesty's Government".[67] Indian legislators demanded an Indian head to get rid of the allegation against Indians that they are reiterating the British views in international fora. The British possessed the feeling of racial superiority. It never justified their conscience that the head of the delegation could be an Indian leader.[68] Due to the untiring efforts of the Indian legislators like P. C. Sethna, the demand was met by the British when Mohammad Habibullah was appointed as the head

64 Verma, *supra* note 18, at 98.
65 *Id.* at 52.
66 *Id.* at 56.
67 *Id.* at 68.
68 *Id.* at 70.

of the Indian delegation to the Tenth Assembly of the League of Nations. The uniqueness of the report submitted by this delegation was that it made some recommendations to elevate the position of India in the League. One of the recommendations was on India's candidature in the Council elections. The recommendations were not materialised due to the disagreement of the government. After that, an Indian headed the delegation.

Another problem faced by the delegates was inexperience because, every time, new representatives were appointed for representation. They were never part of committees of the League due to their lack of experience. Demand was raised for continuity in the appointments, which was met in 1930. With the help of such reappointments, Aga Khan was elected as Vice-President of the Assembly, Denys Bray became a part of many sub-committees, and H. Mehta was appointed as General Rapporteur of the Fourth Committee. The Indian legislators, through debates and negotiations with the British, struggled to solve the abovementioned issues through debates and constant demands to the British. However, the representation was British dominated, and even if it included a few Indians, it avoided women and Dalits. In present times, the representation of women and Dalits remains less.

6 Issues Discussed in the League on India

The League of Nations analysed a plethora of problems. Some discussions concerned India and her interests. For example, a special report submitted in the Assembly was on the claim of India to be represented in the Governing Body of the International Labour Office. The representation in the Governing Body was emphasised in one of the sessions of the Assembly in July–August 1920.

Another issue that touched upon colonial India was that of disarmament. The representatives of India in the League did not support disarmament because of the general notion that it would mean putting India's security at stake. The British opinion was that the tribes of Afghanistan were dangerous in the frontiers and were waiting to attack without following any principles of international humanitarian law. The British exaggerated the power of these tribes, and the actual threat was assessed from Russia.[69] Moreover, under British rule, Indian opinion in the League reflected that of the British.

69 *Id.* at 103.

The British could not pull out the army deployed in India also because of the ongoing freedom struggle against them.[70]

The clamour caused by the issue of opium trade caught the attention of the League. Opium became a menace in many parts of the world. Opium wars were fought between India and China. An action against opium trade became imperative. In this regard, the US government organised two conferences on opium traffic in Shanghai (1909) and Hague (1912). India ratified the Hague Convention in 1920 but did not comply with it. Indian opium was sold even after the ratification.

Indian delegates to the League in 1921 and 1922 cited the medical and scientific use of opium in India and hence, could not support the ban of opium totally. The Geneva Conferences, under the aegis of the League, in 1924 and 1925 also dealt with opium issue. The US and China opposed the Government of India's policy as the sale of opium was rampant in these States. They blamed India for the production of opium. India opined that an agreement should be reached between the opium-producing countries.

Opium was vastly used in India. The use of opium in India was severely criticised by medical experts. The use of opium in India was to such an extent that women who worked in industries drugged their babies with opium to prevent them from crying. The Government of India's policies on opium were criticised as inadequate. Since the Government earned a lot of revenue from opium trade (national as well as international), it did not want to restrict its use.[71] It appointed the Royal Commission on Opium. The Commission submitted a report in 1895. It was known to be a farce because it stated that Indians used opium for medicinal purposes and that the Government's policy was based on it.[72]

The Government of India's opium policy was criticised by Mahatma Gandhi and the Indian National Congress. Due to pressures from international and national spheres, the consumption of opium in India was reduced drastically despite the fact that it was a blow to India's revenue.[73] In March 1926, a resolution was passed by the Indian legislature to stop the export of opium for any other purpose except medicinal and scientific reasons. The Government of India tried to control domestic consumption with the enactment of the Opium Act.

---

70 *Id.* at 105.

71 Ram & Sharma, *supra* note 22, at 150.

72 Verma, *supra* note 18, at 216.

73 Ram & Sharma, *supra* note 22, at 153.

Further conventions on opium and other narcotic drugs entered in the League era were "the Geneva Convention of 1925, the Geneva Agreement on Opium Smoking of 1925, the Drugs Limitation Convention of 1931, the Bangkok Agreement on Opium Smoking of 1931, and the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs of 1936".[74] India also participated in these conventions.

These conventions were a result of deliberations in the League on the use of other narcotic drugs. Smuggling of narcotic drugs like cocaine in India led the Indian delegates to request the League in 1926 to check the widespread problem of narcotic drugs. Due to the pressing need for a solution, a conference (the Conference on Limitation on the Manufacture of Narcotic Drugs) was convened under the League through a resolution passed in 1930 by the Assembly. The outcome of the conference was a convention in 1931 based on the Geneva International Opium Convention of 1925. India signed the Convention. The Convention was an unprecedented step towards the regulation of an industry under "international co-operation" and "that manufacture in its economic aspect has been wholly subordinated to higher humanitarian and moral aims".[75]

The League also discussed issues concerning women and children. One of the important conventions on women and children signed by India under the aegis of the League is the Convention for the Suppression of the Traffic in Women and Children of 1922. The Indian Penal Code declared trafficking as an offence and prescribed punishment for the same. The laws were inadequate, and the penal code was amended to provide more protection to women below 18 years of age. The provincial governments also passed legislations to curb trafficking like the Madras Suppression of Immoral Traffic Act of 1930. These steps were taken to bring national laws in consonance with international laws.

Child health, infant mortality, and child welfare caught the attention of the League. The Government of India cited that the conditions in India were not amicable to introduce legislations for child welfare. In 1928, a report was submitted to the Fifth Committee stating that the age of marriage was gradually rising and that child marriages were decreasing in number.[76] Some legislations on children were passed like the Madras Juvenile Offenders Act (amended 1930). Laws were passed in provinces raising the age of marriage. The International Convention for the Suppression of the Circulation of and

74 Anique H.M. Van Ginneken, Historical Dictionary of the League of Nations 142 (2006).

75 Ram & Sharma, *supra* note 22, at 121.

76 Verma, *supra* note 18, at 187.

Traffic in Obscene Publications was signed in 1923. In India, obscene literature and advertisements were prevalent at that time. India ratified this convention in 1924. To implement this international convention, India made amendments to the Indian Penal Code and the Criminal Procedure Code.

In one of the sessions of the Assembly in 1922, the issue of slavery was discussed. After that, the Secretariat formed a Temporary Committee on Slavery. The Slavery Convention was signed under the auspices of the League in 1926. India was ready to sign the treaty provided that she could make some reservations with the exclusion of territories practising some forms of slavery and those on which the Government of India did not have direct control. Another motive behind such a reservation was that the Government wanted to maintain good relations with the Princely States. In pursuance of signing the treaty, the Government released all slaves from the Hukawng Valley in Burma.

With regard to the issue of statelessness, a Special Protocol Concerning Statelessness was formulated under the aegis of the League. On 28 September 1932, India signed the Special Protocol as a separate member of the League of Nations. Article 1 of the Protocol provided the following international obligation on the signatories:

> If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:
> (i) If he is permanently indigent either as a result of an incurable disease or for any other reason; or
> (ii) If he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof.
> In the first case, the State whose nationality such person last possessed may refuse to receive him if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case, the cost of sending him back shall be borne by the country making the request.

From the above highlights of issues on disarmament, opium, slavery, or others, the British Empire's interests were predominant while talking on behalf of India. However, the opinions of the Indians helped change some of the aspects like restrictions on the opium trade and using the positive aspects of international law for the benefit of the Indians. This was a result of constant struggle against the British rule in colonial India.

7 An Assessment of India's Membership in the League

India's membership in the League had both positive and negative aspects. The negative aspects of European dominance, the manifestation of Empire in the League in the name of India, have already been elucidated in the previous sections of this article. However, in the words of scholars, the League was a significant step. In this regard, quoting Stephen Legg, "The League can be considered an apparatus, through the way in which it attempted to re-territorialise the imperial world into an international order, but this also involved deterritorialising and de-scaling imperial sovereignty".[77] In the words of J.G. Starke,[78] the League of Nations was a significant step in the evolution of international law.

> The League of Nations Covenant, that is to say, Part I of the Treaty of Versailles, 1919, reflected a new theory of the scope and purpose of the international organisation. This was the conception of an international institution, with universal or almost universal membership of the states of the world and devoted to the fulfilment of most general aims in the interests of the international community, namely the promotion of international cooperation, the preservation of international peace and security, the fostering of open, just, and honourable relations between nations, the firm establishment of International Law as the actual rules of conduct between States, and the maintenance of justice and a scrupulous respect for all treaty obligations.

The greatest flaw of the League was that it could not prevent the Second World War. Despite the drawbacks, the League was not a failure as it laid foundations for the United Nations. Kewal Singh states the importance of the League in institutionalising international relations, "By its commitment to the principles of justice to all peoples and nationalities and their right to live on equal terms of liberty and safety with one another whether they be strong or weak, the League marked the first effort to democratize the international relations".[79]

---

77 Stephen Legg, *Of Scales, Networks and Assemblages: The League of Nations Apparatus and the Scalar Sovereignty of the Government of India*, 34 Transactions of the Institute of British Geographers 234, 243 (2009).

78 J.G. Starke, *The Contribution of the League of Nations to the Evolution of International Law*, Indian Yearbook of International Affairs 207, 209 (1964).

79 Kewal Singh, *UN's Efforts at Pacific Settlement of International Disputes*, *in* United Nations and India 52 (S.C. Parasher ed., 1985).

With regard to India, some positive aspects of membership in the League cannot be avoided. The first aspect was that India could better develop an international personality and could be recognised as a political entity in the world. It helped her "for the creation of a special international status".[80] Indian diplomacy got in shape after membership in the League.[81] The representatives to the League and inter-related organisations imbued diplomatic skills like negotiations that was carried forward by next generation of diplomats. Indian Political Department members were sent as British Ministers to Afghanistan and Nepal. Consular Officers from India were despatched to many parts of the world like Kashgar, Persia, Muscat, Jeddah, etc. In 1927, India was empowered to enter into commercial treaties directly without the backing of the British government.

"The debate over Indian rights at the League was but one indication of how newly defined international political space in the 1920s threatened domestic governments' ability to control their domestic political governance and discourse".[82] The membership also appeased the national leaders who were demanding independence in an unprecedented manner.[83] They understood that the British wanted to show the outside world that Britain was supporting India. The membership gave an impetus for the "constitutional development" of India.[84] Montagu, by providing the rationale that India was a member of the League, put forth the Government of India Bill before the House of Commons. The British also tried to disprove the allegations that strengthening her voting power was the motive behind including India in the League. Therefore, granting some autonomy to India to govern herself was imperative.[85] The Government of India Act of 1919 kept out of the Indian legislature's purview to discuss matters on the League.[86] The first resolution on an international treaty was put forward by Sir Atul Chatterjee in the Legislative Council and by Thomas Holland in the Legislative Assembly to frame laws in consonance with the Washington Conference, 1919, which fixed the hours of work. Thus,

80 Sundaram, *supra* note 28, at 452.

81 Verma, *supra* note 18, at 35.

82 Daniel Gorman, The Emergence of International Society in the 1920s 140 (2012).

83 Verma, *supra* note 18, at 25.

84 *Id.* at 35–36.

85 *Id.* at 41.

86 Article 8(i) of the rules under the 1919 Act states that "no question shall be asked regarding any matter affecting the relations of His Majesty's Government or the Governor-General in Council with any foreign power".

the Indian legislature attained the status of "competent authority" to decide on such matters.[87]

One of the advantages of membership of the League was that the Indian legislature moved beyond national issues and discussed international issues.[88] Some of the inter-imperial problems were raised in the League of Nations by India. For instance, the issue of Indians residing in the mandated territories was raised by Maharaja of Nawanagar. Srinivas Sastri criticised the treatment of Indians in the mandated territories in strong words before the League Assembly.[89] These issues were discussed in international fora by the Indian delegates until a decision was made to restrict such speeches in the Imperial Conference of 1923. In the 1930s, there was a debate in the League of Nations to decide a scale wherein national and international matters would be demarcated. This issue came up during the discussions on trafficking in women and children. The British said that the League could deal only with international matters whereas the League denied such bifurcation.[90] The Government of India was more "contemptuous" of the League of Nations and did not want to share intricacies of the Empire.[91]

Membership in the League led to India's presence in the non-League conferences like the Washington Conference on Naval Armaments of 1921, the Genoa Economic Conference of 1922, etc. India's membership in the League of Nations made her a part of the Permanent Court of International Justice, the International Labour Organisation, the International Committee of Intellectual Cooperation,[92] the Advisory Committee on Traffic in Opium and Other Dangerous Drugs, the International Institute of Agriculture, the Health Organisation, etc.

The interaction with other States led to further civilisational exchanges and brought India's culture to the front through her delegates. The delegates upheld the values like non-violence that the Indian civilisation stands for and spread them in international fora.

87 Verma, *supra* note 18, at 43.

88 *Id.* at 78.

89 Gorman, *supra* note 82, at 126.

90 Legg, *supra* note 77, at 234.

91 *Id.* at 244.

92 Jagdish Chandra Bose and Radha Krishnan were the members of the International Committee of Intellectual Cooperation. The aims of the committee were to develop "the interchange of knowledge and ideas among peoples and improving the conditions of intellectual work". Ram & Sharma, *supra* note 22, at 130.

8 Conclusion

The present article aims at narrating an alternative history of the struggle of the Indians when colonial India became a member of the League of Nations. Its membership is lauded as a British boon. However, the narration behind the inclusion and the finance, and human resources India provided to the British gets receded to the background. There are many aspects that have changed in the post-colonial era. India is considered economically strong. However, history needs reiteration for self-introspection and for taking ideas of the past to create a better future. Colonial India's membership is a reminiscence of how the Empire shaped the international organisations for its own benefits. At the same time, it hides behind various struggles of Indians at the national, regional, and international levels.

Breaking Bad Customs: Involving the Idea of *Opinio Juris Communis* in Asian State Practice

*Thamil Venthan Ananthavinayagan**

1 Introduction: The Formation of Customary International Law

Customary International Law (CIL) is one of the sources of Article 38.1 of the International Court of Justice (ICJ) Statute, consisting of two elements, namely state practice as its objective element, and the belief in such state practice as its subjective element.[1] An action forms custom only if it can formulate the articulation of the legality of the action.[2] *Opinio juris* is considered to be statements of belief, but not actual beliefs. Against this background, treaties and declarations that represent *opinio juris* are considered to be statements about the legality of action, rather than examples of that action.[3] However, Posner and Goldsmith claim that:

> It lacks a centralized law-maker, a centralized executive enforcer, and a centralized, authoritative decisionmaker. The content of CIL seems to track the interests of powerful nations. The origins of CIL rules are not understood. We do not know why nations comply with CIL, or even what it means for a nation to comply with CIL. And we lack an explanation for the many changes in CIL rules over time.[4]

Surely, CIL can be considered a last resort in disputes over international law. When there is no applicable legally-binding treaty, it is always possible to

* Lecturer in International Law at Griffith College, Dublin, Ireland.

1 Zhang Yue, *Customary International Law and the Rule Against Taking Cultural Property as Spoils of War*, 17 Chinese Journal of International Law 943, 947 (2018).

2 Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 The American Journal of International Law 757, 758 (2001).

3 Anthony D'Amato, *The Concept of Special Custom in International Law*, 63 American Journal of International Law 211, 214 n. 14 (1969) (citing Francois Francois Geny, Methode D'interpretation et Sources en Droit Prive Positif (2nd ed. 1919)).

4 Eric A. Posner & Jack L. Goldsmith, *A Theory of Customary International Law*, 66 University of Chicago Law Review 1113, 1114 (1999).

 | doi:10.1163/9789004437784_003

argue that a certain rule has crystallised within CIL. However, it is a rather complicated task to prove the existence of a customary rule because to do so requires strong evidence of the existence of two fundamental elements. When this source of law was formed, the vast majority of the states that exist today were inexistent due to economic conditions and the structure of social relations.[5] In consequence, these newly formed states criticise or reject the norms under CIL, while not refuting public international law in general.[6] And yet, despite the acceleration of actors under international law, "Western developed countries have continued to construct and reconstruct the norms of international law in their favour to the detriment of the third-world countries".[7] The Third World Approaches to International Law (TWAIL) wishes, to this end, to dismantle the prevailing norms that benefit the powerful few. B.S. Chimni suggests that TWAIL gives meaning to international law, as it transforms it into international law of emancipation and reshapes international law as international legal norms that offer a life of dignity for the poor, deprived, oppressed and subjugated in the Third World.[8] The argument in this article is not that CIL is useless or solely a Western product, but it wishes to advance the idea that CIL needs to include and proliferate the subaltern voices to a greater extent.

To this end, the widespread and consistent practice is followed by the belief in it. Another aspect of this practice is its general practice. Regardless of localities and regional practices, a large share of affected states must be engaged in the practice. The density of practice required, however, is difficult to determine with precision.[9] Moreover, there are genuine questions about the legitimacy of CIL. While treaties express promises in written forms, they foresee dispute resolution mechanisms engineered into the treaties for the signatories who are bound by them. In opposition to this, CIL is unwritten arising from decentralised practices of nations, while the criteria for its identification are unclear.[10] Arteem Negev holds the view that:

---

5 *See* S. Prakash Sinha, *New Nations and the International Custom*, 9 William & Mary Law Review 788, 792 (1968).

6 *Id.*

7 Brian-Vincent Ikejiaku, *International Law is Western Made Global Law: The Perception of Third-World Category*, 6 African Journal of Legal Studies 337, 338 (2013).

8 B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 Melbourne Journal of International Law 499, 499–500 (2007).

9 Andrew T. Guzman, *Saving Customary International Law*, 27 Michigan Journal of International Law 115, 150 (2005).

10 Posner & Goldsmith, *supra* note 4, at 1116.

> CIL may not be legally legitimate because it can be too ambiguous, bypasses the requirement of tacit consent, and breaches the principle of sovereign equality of states. However, CIL is morally legitimate due to the benefits it provides for international law. The moral value of CIL lies in its ability to be widespread, avoid withdrawal from obligations, and fill in gaps in international law. Lastly, CIL is socially legitimate because it is *de facto* accepted by the international community.[11]

Anthony D'Amato and others have pointed out that CIL creates law based on which it requires action in conscious accordance with law preexisting the action. This practice requirement of CIL needs more scrutiny, as more efforts need to be put into the investigation of the creation of custom and its consistency.[12] What does, however, consistency mean? In the North Sea Continental Shelf Sea case, Judge Lachs from the ICJ postulated:

> What can be required is that the party relying on an alleged general rule must prove that the rule invoked is part of a general practice accepted as law by the States in question. No further or more rigid form of evidence could or should be required.
>
> In sum, the general practice of States should be recognized as prima facie evidence that it is accepted as law. Such evidence may, of course, be controverted – even on the test of practice itself, if it shows "much uncertainty and contradiction" … It may also be controverted on the test of *opinio juris* with regard to "the States in question" or the parties to the case.[13]

A prominent theory explains the legitimacy as one which is understood as a rule with its institutional penumbra to have a high degree of legitimacy. Here, legitimacy is rooted in the rule-making institution and exertion of compliance on those addressed normatively. Those who are addressed believe in the rule or institution and operate in accordance with generally accepted principles of legitimate process.[14]

---

11 Artem Sergeev, *The Legitimacy of Customary International Law: Legal, Moral, and Social Perspectives*, 8 International Review of Law 13 (2017).

12 D'Amato, *supra* note 3, at 4.

13 North Sea Continental Shelf (Ger. v. Den.), 1969 I.C.J. 232 (Feb. 20) (dissenting opinion of Judge Lachs).

14 Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 The American Journal of International Law 88, 93 (1990).

CIL's doctrine is, in the end, "contradictory, inconsistent, indeterminate and informal".[15] To this end:

> These characteristics are in some respects problematic, but they also create enough space to empower anyone invoking custom, whether in the First World or elsewhere, to pursue their own vision of the international rule of law. In other words, the fluidity and malleability of the doctrine allows the identification of custom to operate both as a *tool of oppression* by the First World and as empowerment of the periphery.[16]

2 The Role of Customary Law in Asian State Practice

However, can a custom born and developed in the Western Hemisphere extend to and dictate state practice of the states that were restricted in their governance? How can cultures, long neglected and disregarded in cultural evolutions, see themselves represented in the development of CIL? Shall these cultural and legal practices, instead, languish? B.S. Chimni, in his groundbreaking piece, explains that CIL reflects "the dominance or hegemony of certain [Western] ideas and beliefs" for which a Third World scout tries to assist in its promotion.[17] He further argues that CIL "safeguards the interests of the advanced capitalist nations even as it at times addresses the concerns of the entire international community",[18] while also "naturaliz[ing] and validat[ing]" certain Western assumptions and preferences.[19] Ultimately, Chimni argues in favour of a postmodern doctrine that would overcome these shortcomings. The ICJ had taken into account the existence of regional customary law in the Asylum case[20] and particularly in the Rights of Passage over Indian Territory case.[21] Indigenous Asian laws continue to play an important role *vis-à-vis* Western law. Having postulated this, the article will examine the structural legal discussions in relation to the Preah Vihear case and the South China case.

---

15 Jean d'Aspremont, *A Postmodernization of Customary International Law for the First World?*, 112 AJIL UNBOUND 293, 295 (2018).

16 *Id.*

17 B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 28 (2018).

18 *Id.* at 9.

19 *Id.* at 28.

20 Asylum Case (Colom. v. Peru), Judgement, 1950 I.C.J. Rep. 266 (Nov. 20).

21 Case concerning Right of Passage over Indian Territory (Port. v. India), Judgement, 1960 I.C.J. Rep. 6 (Apr. 12).

2.1 *Case Studies from the Asian Region*

In the following two sections it is worthwhile to draw experiences on the development of CIL in the Asian region. To this end, the Preah Vihear case and the South China Sea dispute are relevant for consideration.

2.1.1 *Preah Vihear Case*

In 1904, a treaty between Cambodia and Thailand created a joint commission to demarcate their border according to a watershed, which placed the ancient Hindu temple of Preah Vihear in Thai territory. However, a 1907 map drawn by French authorities relocated the boundary without explanation, placing the temple squarely in Cambodian territory. The ICJ determined that both parties accepted the French map in 1908 as an "interpretation" of the treaty text: "the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty".[22] Even though the first judgment rendered in 1962 proved that Cambodia had sovereignty over the Temple of Preah-Vihear and its vicinity, due to heated situations along the borders that were threatening peace in that region and unsuccessful bilateral consensus, the ICJ was solicited again by both countries, in order to clear the misunderstandings that cropped up by interpreting the initial judgment again in 2013. Whilst the ICJ reached a decision in unanimity with its previous judgment, it can be noted that it relied greatly on the legal basis that the treaty claim asserted.[23] Moreover, there are strong arguments for why, although Thailand never contested the French map's placement of the temple, it was inappropriate to describe its silence as an acceptance.[24] While this issue might be addressed in the bilateral context by requiring a high threshold showing that a state's silence was knowing and intentional over an extended period of time, as is required for desuetude, it will be nearly impossible to be demonstrated in a multilateral treaty regime. As one commentator notes:

> [T]he *Temple of Preah Vihear* case exhibits, international law in Asia seems to undermine its legitimacy by a wilful abdication of non-Western knowledge systems and practices, particularly those from the margins. Arguably, periphery and not centre should then construct the modern

22 Case concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgement, 1962 I.C.J. Rep. 6, 34 (June 15).

23 Solida Svay, *Analysis of the Preah-Vihear Temple Case, Cambodia v/s Thailand at the International Court of Justice under Common Territorial Claims Involving Land Disputes*, 36 Journal of Law, Policy And Globalization 12, 12 (2015).

24 Cambodia v. Thai., 1962 I.C.J. at 4.

> state. Such an untangling, even if politically brave, would prioritize the Siamese alternate-modern polity over colonial territorial conceptions of state. The conception of political spaces that Siam harboured does not only have an Asian application. Any revision of the international law of territory by conceptually displacing territory and planting people at its core in a world blinded by sovereignty-induced boundaries and territory is a knowledge production of universal application.[25]

Is it fair to assert that majority rulings by the Court are a general rule of CIL? Does this bind the rest of arbitrators involved?[26] Moreover, can peoples from the Global South accept that their Third World elite, complicit in the extension of Western knowledge production within CIL, deprives them of their understanding of belonging, demarcations, culture and localities? In reality, it becomes evident that international law's potency is limited and disregards indigenous geographies, knowledge and customs at large.[27]

2.1.2 *South China Sea Dispute*

Being one of the most contested areas on our planet's surface due to fishing, shipping and presumed oil and gas resources, many incidents between China and the Philippines after 2011 led to unsuccessful bilateral consultations.[28] Two options were at hand to settle the dispute: first, proceedings before the ICJ; second, compulsory jurisdiction under the United Nations Convention on the Law of the Sea (UNCLOS). The former option was not feasible, considering that China never accepted the compulsory jurisdiction of the Court, and the Philippines excluded the Court's jurisdiction for these kinds of disputes under Article 36.2 of the ICJ Statute.[29]

---

25 *Life of Imperialism: Thailand, Territory and State Transformation*, INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, https://www.iilj.org/wp-content/uploads/2017/10/SemiSiamSINGH.pdf (last visited Oct. 20, 2019).

26 Kaiyan Homi Kaikobad, *Nullity and Validity: Challenges to Territorial and Boundary Judgements and Awards*, *in* ASIAN APPROACHES TO INTERNATIONAL LAW AND THE LEGACY OF COLONIALISM 45, 49 (Jin-Hyun Paik et al. eds., 2014).

27 *See* Prabhakar Singh, *Of International Law, Semi-colonial Thailand, and Imperial Ghosts*, 9 ASIAN JOURNAL OF INTERNATIONAL LAW 46, 68 (2019).

28 Andreas Zimmermann & Jelena Bäumler, *Navigating Through Narrow Jurisdictional Straits: The Philippines – PRC South China Sea Dispute and UNCLOS*, *in* 12 *THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 431, 432 (2013).

29 *See* Secretary of Foreign Affairs of Republic of the Philippines, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE (Jan. 18, 1972), http://www.icj-cij.org/en/declarations/ph. Also, it would have been unlikely that

Hence, the only resort was the UNCLOS. As of now, all countries bordering the South China Sea are states parties to the UNCLOS, including China and the Philippines.[30] Being states parties to the UNCLOS, they are subject to the dispute resolution provisions under part XV. The Philippines argued there were several disputes between the Philippines and China concerning the interpretation or application of the UNCLOS.[31]

China would have accepted an invitation of the Philippines to agree on the ICJ's jurisdiction under the concept of *forum prorogatum*, ICJ Statue Article 38.5.

30 U.N. Division for Ocean Affairs and the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Oct. 20, 2019). The dates of ratification of the fiver concerned states are as follows: Brunei Darussalam, November 5, 1996; China, June 7, 1996; Malaysia, October 14, 1996; the Philippines, May 8, 1984; and Vietnam, July 25, 1994.

31 *In the Matter of the South China Sea Arbitration* (Phil. v. China), Case No. 2013–19, ¶ 112 (Perm. Ct. Arb. 2016), https://www.pcacases.com/pcadocs/PH-CN%20-%20160712%20-%20Award.pdf [hereinafter *South China Sea Arbitration*]; *Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs*, 2017 Law of the Sea Bulletin 91, https://doi.org/10.18356/66155955-en. These dispute submissions were:

(1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea;

(2) China's claims to sovereign rights jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS;

(3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;

(4) Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;

(5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;

(6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;

(7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;

(8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;

After initiation by the Philippines on the 22nd of January 2013,[32] a tribunal was constituted under Annex VII to the UNCLOS and delivered its award on the 12th of July 2016. This award followed an earlier Award on Jurisdiction and Admissibility dating from the 29th of October 2015. In the award of the 12th of July 2016, the Arbitral Tribunal decided as follows:

---

(9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;

(10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

(11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;

(12) China's occupation of and construction activities on Mischief Reef
   (a) violate the provisions of the Convention concerning artificial islands, installations and structures;
   (b) violate China's duties to protect and preserve the marine environment under the Convention; and
   (c) constitute unlawful acts of attempted appropriation in violation of the Convention;

(13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner, causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;

(14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
   (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
   (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;
   (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
   (d) conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef; and

(15) China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention.

32 DEP'T OF FOREIGN AFFAIRS OF THE REPUBLIC OF THE PHIL., NOTIFICATION AND STATEMENT OF CLAIMS (2013), https://www.dfa.gov.ph/images/UNCLOS/Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf; Memorial of the Philippines, Arbitration under Annex VII of the UNCLOS (Phil. v. China), Vol. III, Annex 1 (Mar. 30. 2014), http://www.pcacases.com/pcadocs/The%20Philippines%27%20Memorial%20-%20Volume%20III%20%28Annexes%201-60%29.pdf.

1. China does not have historic maritime rights in the South China Sea (nine dash line).[33]
2. None of the disputed features in the South China Sea are islands (within the meaning of Article 121 of the UNCLOS) and thus do not trigger any rights in consistency with the UNCLOS.[34]
3. Chinese activities in the South China Sea violated Philippines' rights within their Exclusive Economic Zone.[35]
4. Chinese construction activities have caused damage to the natural environment.[36]

China, unsurprisingly, rejected the findings and refused to abide by them. Noteworthy is that China had submitted a declaration under Article 298 of the UNCLOS, excluding itself from compulsory jurisdiction.[37] Most notably,

---

33 The nine-dash line is a cartographic denotation that was developed, first by the Republic of China in the 1940s, and then by the People's Republic of China (PRC) in the 1950s, and subsequent years to affirm Chinese sovereignty over the islands and maritime areas of the South China Sea.

34 Under Part VII UNCLOS, Article 121 distinguishes between islands and rocks as follows:
1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

35 The Exclusive Economic Zone (EEZ) is one of the major innovations in the law of the sea, Its legal regime are characterized as follows:
1. The EEZ is an area beyond and adjacent to the territorial sea: it can extend to a maximum 200 nautical miles from the baselines.
2. Within the EEZ, a coastal State enjoys sovereign rights over its natural resources. It can exercise its jurisdiction over certain activities for the purpose, among others, of protecting the environment. But it is also obliged to respect the rights of other States (thanks to the maintenance of certain freedoms laid down by the law of the high seas, such as freedom of navigation), to be found under Article 55 UNCLOS.

36 *South China Sea Arbitration*, *supra* note 31, ¶ 983.

37 *See* U.N. Division for Ocean Affairs and the Law of the Sea, Declarations and Statements, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm; *see also* MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, POSITION PAPER OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE MATTER OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES, ¶ 58 (2014), https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm (Declaration of China in pursuant to Article 298: "The Government of the People's Republic of China does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a), (b) and (c) of Article 298 of the Convention").

China not only rejected the claims of the Philippines, but also rejected jurisdiction of the Tribunal with its position paper.[38] Schoenbaum writes that "[t]he result of China's refusal to participate was a lawyer's dream – litigating a case before a court that will hear only one side of the case – his own".[39] China has submitted a declaration under Article 298.1(a)(i) of the UNCLOS, excluding itself from compulsory dispute settlement under Article 287 and 288 of the UNCLOS. However, the existence of Article 9 Annex VII and Rule 25 of the Rules of Procedure is designed to prevent any adverse consequences imposed on a non-appearing party in proceedings. As noted, the non-appearing party is still a party to the case and is still bound by the decision of the tribunal whether it agrees with it or not – the famous Nicaragua-USA case before the ICJ is exemplary.[40]

---

38 *Id.* ¶ 86. Here, China provides that:

> It is the view of China that the Arbitral Tribunal manifestly has no jurisdiction over this arbitration, unilaterally initiated by the Philippines, with regard to disputes between China and the Philippines in the South China Sea.
>
> Firstly, the essence of the subject-matter of the arbitration is the territorial sovereignty over the relevant maritime features in the South China Sea, which is beyond the scope of the Convention and is consequently not concerned with the interpretation or application of the Convention.
>
> Secondly, there is an agreement between China and the Philippines to settle their disputes in the South China Sea by negotiations, as embodied in bilateral instruments and the DOC. Thus the unilateral initiation of the present arbitration by the Philippines has clearly violated international law.
>
> Thirdly, even assuming that the subject-matter of the arbitration did concern the interpretation or application of the Convention, it has been excluded by the 2006 declaration filed by China under Article 298 of the Convention, due to its being an integral part of the dispute of maritime delimitation between the two States.
>
> Fourthly, China has never accepted any compulsory procedures of the Convention with regard to the Philippines' claims for arbitration. The Arbitral Tribunal shall fully respect the right of the States Parties to the Convention to choose the means of dispute settlement of their own accord, and exercise its competence to decide on its jurisdiction within the confines of the Convention. The initiation of the present arbitration by the Philippines is an abuse of the compulsory dispute settlement procedures under the Convention. There is a solid basis in international law for China's rejection of and non-participation in the present arbitration.

39 Thomas J. Schoenbaum, *The South China Sea Arbitration Decision and a Plan for Peaceful Resolution of the Disputes*, 47 JOURNAL OF MARITIME LAW & COMMERCE 451, 453 (2016).

40 *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, ¶ 30 (June 27). Here the Court held: "[T]he Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts. It would furthermore be an over-simplification to conclude that the only detrimental consequence of the absence of a party is the lack of opportunity to

China's argument was that the question of territorial sovereignty over certain islands and reefs did not fall within the ambit of the UNCLOS.[41] When coming to the aspect of the nine-dash line, the Tribunal had to overcome this jurisdictional obstacle, and declared that the nine-dash line was "[I]n brief, a dispute over the source and existence of maritime entitlements does not 'concern' sea boundary delimitation merely because the existence of overlapping entitlements is a necessary condition for delimitation".[42] The Tribunal reasoned that since this was a dispute over the maritime entitlements generated by the various dispute features in the South China Sea, the dispute did not concern maritime delimitation. In relation to historic titles, the most crucial issue to determine jurisdiction under Article 298.1 of the UNCLOS, China claimed that the South China Sea belonged to it for a prolonged period.[43] The Tribunal stated that this depended on the nature of historic claims and the scope of the Article 298 UNCLOS exception. However, the Tribunal stated that "[i]n the absence of a more specific indication from China itself, it necessarily falls to the Tribunal to ascertain, on the basis of conduct, whether China's claim amounts to 'historic title'".[44] The Tribunal determined that the Chinese claim did not involve title and following this did not fall under the scope of the exception under Article 298(1)(a)(i).[45] Finally, the Tribunal declared that any rights China stipulated on the basis of historic title were "superseded … by the limits of the maritime zones provided for by the [UNCLOS]".[46]

Problematic is that China propounds its international legal weight depending on its circumstances – whereas B.S. Chimni correctly observed that the UNCLOS was largely CIL and developed by the Western powers in their quest

---

submit argument and evidence in support of its own case. Proceedings before the Court call for vigilance by all". Very interestingly, one of the counsels in that case for Nicaragua was also the counsel of the Philippines, Mr. Paul S. Reichler.

41 *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes Between China and the Philippines in the South China Sea,* MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 26, 2013), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1035577.shtml.

42 *South China Sea Arbitration*, *supra* note 31, ¶ 204.

43 *See* Masahiro Miyoshi, *China's "U-Shaped Line" Claim in the South China Sea: Any Validity Under International Law?*, 43 OCEAN DEVELOPMENT & INTERNATIONAL LAW 1 (2012); Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 98 (2013).

44 *South China Sea Arbitration*, *supra* note 31, ¶ 206.

45 *See id.* ¶ 229.

46 *Id.* ¶ 262.

for colonial expansion, exploitation and pillage,[47] China picks and chooses the customs of the West to suit its own power aspirations.[48] Indeed it is true that European landlocked states had little to nothing to contribute to the development of the laws of the sea. However, isn't it also true that on the flip side a few Western states had dominated the creation and further development of the law of the sea that morphed into the UNCLOS?[49] The UNCLOS is another evidence that law based on Western knowledge leads to the entrenching of the power paradigm for the global power in Asia, namely China. To this end, it needs to be reconsidered that development of a customary law of the community is the way for a true custom of the peoples. It is accepted at the same time that Asian state practice under the UNCLOS has evolved and taken ownership – Asian states are invoking dispute settlement mechanisms and are trying to reinterpret parts of the UNCLOS to give effect to their regional aspirations. To this end, Shunji Yanai held that:

> It could be understood that Asian States, which were considered to be reluctant to use judicial or arbitral dispute settlement procedures, are slowly changing their attitude toward accepting third party adjudication for the settlement of disputes, thus contributing more actively to the development of international law.[50]

And yet, there is no uniform Asian state practice, and it is rather the opposite: CIL is used under different interpretations and narratives by Asian states to pursue their sovereign goals in the region – dispute mechanisms are there to propound those ambitions. Judge Xue Hanqin writes:

> Asia's attitude to international law, if deemed ambivalent, is deeply rooted in its history. As is rightly pointed out, that only offers a partial explanation. More relevant is the contemporary practice of international law, particularly of the Western world. Asian States are more sensitive of delegating sovereignty, not because they are ambivalent of international

47 *See* Chimni, *supra* note 17.

48 *See* Mark J. Valencia, *US 'Picking and Choosing' from the Law of the Sea*, EAST ASIA FORUM (Aug. 17, 2018), https://www.eastasiaforum.org/2018/08/17/us-picking-and-choosing-from-the-law-of-the-sea.

49 *See* Alan Boyle, *EU Unilateralism and the Law of the Sea*, 21 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 15 (2006).

50 Judge Shunji Yanai, Keynote Speech at the International Symposium on the Law of the Sea, The Rule of Law in the Seas of Asia: Navigational Chart for the Peace and Stability (Feb. 12–13, 2015) (transcript available at https://www.mofa.go.jp/files/000074503.pdf).

> law, but because they do not believe that international law as thus advocated and practiced would protect their fundamental rights and interests. In many a case, their under-participation is not a matter of willingness, but capacity to influence. To be a meaningful rule-maker, Asia still has a long way to go.[51]

This begs the question: how can a law based on *opinio juris communis* overcome such divergent interpretations, serve the goal of a common Asian practice and enable the view of the community to proliferate?

3 What is *Opinio Juris Communis*?

3.1 *Generating the Law of the Community*

The law of the community can be deduced from the United Nations General Assembly's (UNGA) growing importance as a centre for the concerns of the Global South, as it represents the vast majority of the members of the UNGA. To this end, resolutions of the UNGA have morphed into customary international law, as it represents the voices of the world community.[52] Is there perhaps room for the perception of instant customary law?[53] Can the UNGA turn into a law-making entity within the United Nations, a forum of global conscience? Is there something to be referred to as *opinio juris communis*? The UNGA is a body from which a sense of global consciousness has to evolve.

However, while Article 2.1 of the United Nations Charter stresses the sovereign equality of states in international law, it can be questioned if there is such. Formal equality must be complemented by substantive equality, as it needs to meet the requirements of justice or fairness.[54] Substantive equality necessarily implies that existing inequalities in inter-state relations must be taken into account in all decision-making processes at the international level. Consequently, in such situations the realization of substantive equality brings about the need to treat unequal states unequally. Thus, differential treatment

---

51 Xue Hanqin, *An Asian Perspective*, Opinio Juris (Jan. 18, 2017), http://opiniojuris.org/2017/01/18/an-asian-perspective.

52 M.C.W. Pinto, *Responsibility to Protect ('R2P')*, *in* Asian Approaches to International Law and the Legacy of Colonialism: The Law of the Sea, Territorial Disputes and International Dispute Settlement 146 (Jin-Hyun Paik et al. eds., 2014).

53 Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 The Indian Journal For International Law 23, 36 (1965).

54 *See* Ulrich Beyerlin, *Bridging the North-South Divide in International Environmental Law*, 66 Zaörv 259, 272 (2006).

can prove to be the only means of ensuring substantive equality that is part of international justice.

3.2 *Fostering a Law of Community*

The right to self-determination, a right that was invoked by the Global South as a floating international legal device to accelerate the decolonisation process, was recently declared by the ICJ as customary international law. To this end Muttucumaraswamy Sornarajah writes that:

> Unlike existing norms of international law which were ascribed to the conduct of states and as constituting customary principles, most of the new norms were articulated by Third World states on behalf of peoples and were asserted on the basis of justice. A core sense of justice animated the norms that were proposed. The equality of people and the ending of domination of one people by another was the basis of the principle of self-determination.[55]

The ICJ had held in the Chagos Advisory Opinion that:

> [T]he nature and scope of the right to self-determination of peoples, including respect for the national unity and territorial integrity of a State or country, were reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[56]

This Declaration was annexed to General Assembly resolution 2625 (XXV) which was adopted by consensus in 1970. "By recognizing the right to self-determination as one of the "basic principles of international law", the Declaration confirmed its normative character under customary international law".[57] The idea of the *opinio juris communis*, in this vein, is based on the premise that individuals, indigenous groups, civil society actors and non-governmental organisations are taking on a greater role in the formation of the views and opinions on international legal relations and matters. B.S. Chimni writes in his widely considered and discussed article that:

---

55 *See* Muttucumaraswamy Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SYBIL 19, 20 (2006).

56 Press Release, International Court of Justice (ICJ), Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1945, at 4, ICJ Press Release No. 2019/9, (Feb. 25, 2019).

57 *Id.*

> A postmodern doctrine would therefore go further and look at the weight of resolutions through the prism of the global common good. Those resolutions that reflect opinio juris communis and further the goals of international human rights law and associated jurisprudence would be considered to have binding effect. In operative terms this would mean that in instances where a qualifying resolution is adopted by an overwhelming majority of votes, undue weight will not be attached to opposing votes if it furthers the cause of global justice.[58]

The development of the persistent objector doctrine is one which evolved in the 1970s to deal with the independence of Third World states and its effects on the international legal order, when "Western States feared losing control over the development of customary law".[59]

> In this sense, the doctrine would be a sort of "counter-reformation" by the West against the attempts of Third World countries to use their majority in multilateral organizations to reshape international law, or, in other words, an exhaust valve, so that traditional states would not be bound by the norms put forward by the Third World.[60]

To this end, the Republic of Korea remarked that the role of persistent objector was one that needed more clarification and elaboration after the ILC's identification of customary international law in its 67th session of the International Law Commission in 2015.[61]

4 Conclusion: Towards a New Custom

For some, international law is best created exclusively through treaties, as to which states can opt out by non-action, simply by declining to ratify the instrument. So long as customary norms take many decades to ripen into

58 Chimni, *supra* note 17, at 42.

59 Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 The International and Comparative Law Quarterly 779, 783 (2010).

60 George Rodrigo Bandeira Galindo & César Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 Chinese Journal Of International Law 251, 267 (2017).

61 Comments by the Republic of Korea, 70th session of the International Law Commission (2018), https://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/icil_republic_of_korea.pdf&lang=E (last visited May 5, 2020).

law, customary international law does not seem threatening. But it is another matter, if customary law can be formed within just a few years and is deemed binding on the states that have not affirmatively manifested their persistent objection. In such cases, they may fear the concept of law formation that appears more revolutionary than evolutionary. At the same time, the case studies of Grotian Moments demonstrate international recognition that customary international law must have the capacity in unique circumstances to respond to rapidly evolving developments by producing rules in a timely and adequate manner. They also demonstrate that not every momentous technological, geo-political or societal change results in accelerated formation of customary international law. There are complaints about overarching positivism. They argue for the creation of regional international courts and the prioritisation of legal certainty. It could be thought of as invoking and considering regional customary laws and regional general principles, seen in their common cultural tradition.[62] But most importantly, it is about democratising CIL, given all its nuances, narratives and visions of the world, to make CIL a reflection of the law of the peoples. There is the assumption by those scholars of international law, mostly representing the Eurocentric vision of international law, that customary international law exists also for the newly independent states, as a gift from state practice of Western states. It is argued that these states, civilised in their history, were caretakers for the development of an international legal infrastructure. This needs and has to be refuted. Anghie and Ghatii write that:

> Customary international law (CIL) is in many respects the foundation of international law. It comprises the principles that govern international relations even in the absence of a treaty, and is one of the means by which states register changes in the international system and represent them as law. It is understandable, then, that CIL has been the subject of intense and extensive theorizing, and that the most distinguished international lawyers, members of the International Law Commission, and the International Law Association have devoted so much time to its study and systematization. While CIL has traditionally been dominated by the West, scholars from the former Soviet Union and the non-European world have emerged to formulate their own distinctive views on CIL, seeing it as a Western invention designed to further Western interests.[63]

62 Andreas Buss, *The Preah Vihear Case and Regional Customary Law*, 9 Chinese Journal Of International Law 111, 126 (2010).

63 Antony Anghie & James Gathii, *Introduction to the Symposium on B.S. Chimni, "Customary International Law: A Third World Perspective"*, 112 AJIL Unbound 290, 290 (2018).

The social order of property, propriety and power has to be radically revised. That is without question. The issue is what must be the strategy, the tactics and the way forward to a place that is not what we have now. The Global South is a place of great struggle and of various tactics and strategies experimented with on the streets and in the halls of government. Individual state consent cannot be regarded as the sole source of law creation and obligation, as it was stated in the Lotus case.[64] Rather there needs to be the shift towards a type of international democratisation of international law, in which a greater reflection of the international community is necessary.[65]

64 *The Case of the S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

65 Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, 95 The American Journal of International Law 459 (2001).

Understanding Human Rights from an Eastern Perspective: A Discourse

Ravi Prakash Vyas and Rachit Murarka***

1 Introduction

Human rights, though assumed as a Western concept, is not an exclusive construct of the Western world. As a matter of fact, if one analyses the rich debate around human rights and the obstacles which Human Rights Commission have overcome to establish certain universal values as rights,[1] one would not fall into the trap of engaging in an East versus West debate on human rights. There is an overwhelming influence of the West on the discourse around human rights, owing to the World Wars. However, it would be a travesty to conclude that Asian views were not considered while drafting the Universal Declaration of Human Rights. In fact, the drafting committee of Human Rights had two prominent Asian scholars, Charles Malik from Lebanon and P.C. Chang from China. Later, Charles Malik served as a president of the Human Rights Commission.

Despite having a long history of practices which can be equated with the principles of human rights in the Asian region, it is established globally that human rights is largely a Western concept. The misconception lies in the interpretation of Asian texts. Most of the ancient Asian texts are analysed from the lens of religion. Another misconception is that the Judeo-Christian religion is a Western religion, and that Hinduism, Islam and Buddhism are oriental religions. However, the fact of the matter is that all major religions have their roots in Asia. Christianity, though claimed as a Western religion, is rooted in Asia and, from there, spread to the West. Therefore, juxtaposing Christianity as a Western religion against Eastern religions like Hinduism, Buddhism and Islam is a factual error. But it is also true that the West is more influenced by Christianity than any other religions.

* Assistant Professor of Public International Law and Human Rights, Kathmandu School of Law, Nepal.

** Assistant Professor of International Relations and Legal Research, Kathmandu School of Law, Nepal.

1 Micheline R. Ishay, The History of Human Rights (2008).

 | doi:10.1163/9789004437784_004

Religion is an integral part of daily life in Eastern societies, and it dictates many facets of lives. Religion provides guidelines for day to day behaviour, and these guidelines are in the form of directives that can be equated with duties. These duties, many scholars claim, are the predecessors of the grammar of human rights. Some scholars also mention that the teachings of Eastern religions could be said to be proto-human rights.[2] The main emphasis of religion is on the obedience of duties, rather than the realisation of rights. And this is a common thread in all the religions. That is why Subedi claims human rights are universal and found in all great civilisations and religions of the world.[3] The claims of human rights being the product of Western Christian civilisation have sought to project the selective nineteenth century values during the epitome of colonial domination.[4] However, we cannot undermine the atrocities experienced in deprivation of such human rights in such phases of time period.[5] This does not mean that Western civilisation has been reluctant to practice human rights values, but this is to understand that the ideal concept of peaceful coexistence has never existed, and therefore, Asian societies also have had their uncertain period of practice in human rights.

Human rights practice can be found in different parts of Asia since ancient times, if not explicitly using the term 'human rights' itself, then through different customs, norms and practices. The practice delves into the very way of life that people possess. It is closely associated with religious and social conditions and specific history, culture and values of a particular country. However, it is also to understand that we should not compare the human rights concept of such Asian societies with the existing liberal framework. Societies existed in their sphere of autonomy and harmony and coexisted irrespective of their religious differences.[6] They considered emperor and king as guardian of their nations therefore, it was people's willingness to correspond to an important role and responsibility in the society, and not merely entitlement was forced due to the social hierarchy. Countries at different development stages or with different historical traditions and cultural backgrounds also have a different understanding and practice of human rights.[7]

---

2 *Id.*

3 Surya P. Subedi, *Are the Principles of Human Rights 'Western' Ideas? An Analysis of the Claim of the 'Asian' Concept of Human Rights from the Perspective of Hinduism*, 30 California Western International Law Journal 45 (1999).

4 *Id.*

5 *Id.*

6 *Id.*

7 Pieter van Dijk, *A Common Standard of Achievement: About Universal Validity and Uniform Interpretation of International Human Rights Norms*, 13 Netherlands Quarterly of Human Rights 105, 105 (1995) (quoting a speech by Liu Huaqui, the head of the Chinese delegation at the World Conference on Human Rights, Vienna, June 15, 1993).

The Western civilisation has significantly contributed in formulating human rights notions, and countries around the world have acknowledged the contribution of their effort especially after the Second World War. However, this does not mean that the traditional framework of governing the society and respect of every human being never existed before. The relation of modern and the West has severely disintegrated such values. The division of economy and labour was seen as discrimination even where people seek the highest amount of welfare. In other words, it is unfortunate to correspond that the colonial mission of making societies into consumer market means that values and customs of human rights in societies have disappeared.[8] This makes us understand that the denial to accept that the concept of human rights existed in Asian societies would be a mindless proposition.[9]

Looking at all the major ancient civilisations, it is found that every one of them had a separate way to protect the safety and dignity of people both in times of war and peace. After outlining a brief survey of human rights history in State practice, Shelton rightly concludes that "[d]ifferent cultures and different legal systems vary in the priorities and emphases given to particular rights, and vary according to traditions and perceived threats. Yet there exist today commonly shared legal norms accepted and recognized by all states".[10]

2 Significance of Human Rights in Eastern Societies

Expressing the entire custom and human rights norm inclusive in Asian communities is difficult. Due to the existence of wide and unique systems of governance and societal practice, Asian communities highlight the very existence of diversity. Oriental perspective in such a situation tries to express the custom of Asian societies especially in relation to 'cultural enterprises'. It should be clear; this connotation of orientalism in no way should correspond to the discriminatory nature or inferior classification of the orient or orientalism.[11] The Eastern understanding of human rights differs from the democratic

8 John H. Bodley, Victims of Progress (3rd ed. 1990).

9 Surya P. Subedi, land and Maritime Zones of Peace in International Law 67–69 (1996).

10 Dinah Shelton, Universal Recognition of Human Rights (1987) (unpublished paper presented at the 18th Study Session of the International Institute of Human Rights in Strasbourg) (on file with author).

11 According to Edward Said, the relationship between the west and the Orient is a relationship of power, of domination, and of varying degrees of a complex hegemony. Hence, the concept of the Orient being inferior in civilizational or value-based terms was created by the West. *See* Edward W. Said, Orientalism 5–6 (1978).

institution and liberal framework. The perspective is more centred on coexistence, and rationality lies on sustainability which is much aligned with the reciprocity rule (i.e., except the treatment from another person on the basis of your treatment of another person). In this concept, the institutions created in the earlier period without having democratic values were suitable in local government in the particular areas. The anarchical rule from some rulers does not overrule the entire cohesion maintained in the historical time frame as suggested from various writings and scriptures from ancient periods.[12]

Another important matter of investigation is that the values related to human rights existed in Asian societies much before the Universal Declaration of Human Rights, but the principles were not seen from the lens of modern human rights. In fact, modern human rights was not conceived out of a vacuum. Modern human rights is like an organism which is evolved out of various set of ideas prevailing at different times. It is influenced by ideas from the Renaissance and the age of enlightenment; at the same time, it also takes into account various religious guidelines. Human rights, like an organism, is still evolving. An interesting point here is that the language of duties in religious texts took the form of rights in the modern world. In fact, the idea of human rights in Asia itself is a product of historical developments that started taking place over hundreds of years ago. For instance, Rene Cassin recognised the natural law and religious foundation of the Universal Declaration of Human Rights. The first article of the Declaration talks about the equality and spirit of brotherhood. This article can be said to have been influenced by the Bible: 'Love thy neighbour as thyself' and 'love the stranger as you love yourself'.[13] Cassin maintained that one should not lose the values of fundamentals, according to him:

> [T]he concept of human rights comes from the Bible, from the Old Testament, from the Ten Commandments. Whether these principles were centred on the church, the mosque or the *poils*, they were often phrased in terms of duties, which now presume rights. For instance, Thou shall not murder is the right to life. Thou shall not steal is the right to own property, and so on and so forth. We must not forget that Judaism gave the world the concept of human rights.[14]

12 Yubaraj Sangroula, Concepts and Evolution of Human Rights: Nepalese Perspective (2005).

13 Ishay, *supra* note 1.

14 *Id.*

It could be a coincidence that Cassin was a Jew and that he emphasised Judaism, but at the same time, he maintained that Christianity and Islam are also the significant fundamentals.

Ironically, some scholarly writings show that the sanctimonious oriental values were understood and even transplanted into the Western world. C.H. Alexandrowicz, an acclaimed historian of the law of nations, explained the significant contribution of the Asian countries in the early sixteenth, seventeenth and eighteenth centuries by stating, '[t]he European agencies in the East learned the lesson of coexistence of Hinduism, Islam, and Christianity in India (particularly on the west coast) and transplanted their experience to the West, which had been so long incapable of extricating itself from the obsession of religious wars'.[15]

3 Brief History of Human Rights in Asian Societies

This article looks to understand the significance of custom and proposition of Eastern values generally from the religious institution which shaped the way of life of people. As clarified, religious preaching is not a supernatural understanding but tries to understand the very nature of human action and considers the action appropriate and acceptable for a common good. In this view, it is important to analyse philosophy and human rights within such distinct understandings.

Scholars like Matthew A. Ritter has justified Judeo-Christian heritage as a predecessor of modern human rights. However, he has conveniently equated Judeo-Christianity with the West and forgot to mention the Eastern origin of Judeo-Christian heritage. He has analysed meticulously the tenets of Judeo-Christian heritage and convincingly showed that the Judeo-Christian religion comes closer to modern human rights.[16] This article will discuss three major religions: Buddhism, Islam and Hinduism. This article will not discuss Judeo-Christian heritage despite the fact that Judaism and Christianity are Eastern religions because many scholarly works justify the tenets of Judaism

15 C.H. Alexandrowicz, The Law of Nations in Global History 45 (David Armitage & Jennifer Pitts eds., 2017); Reynaldo Galindo Pohl (Special Representative on the Human Rights Situation in the Islamic Republic of Iran), *Rep. on the Human Rights Situation in the Islamic Republic of Iran*, U.N. Doc. E/CN.4/1987/23 (Jan. 28, 1987).

16 Matthew A. Ritter, *Human Rights: The Universalist Controversy. A Response to Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism, by Dr. Surya P. Subedi.*, 30 California Western International Law Journal 71 (1999).

and Christianity as a predecessor of modern human rights, but all these works are done keeping in mind that they are Western religions. This article at the outset has mentioned that the Judeo-Christian religion is as Eastern as other major religions. Therefore, any justification with regards to the Judeo-Christian religion is an advancement of Eastern discourse.

4 Buddhism

Buddhism was introduced in a caste-stratified society which contradicted its basic tenet of being equal in an absolute sense. Hence, Buddhist moral teachings substantially contained many precepts of duties and rights. The doctrine of '*ahimsa*' in Buddhism elucidates the view that every individual respects the inherent dignity of their own life, furthering love and protection to others in a selfless manner, and does not deserve the suffering which is extended to others.

In Buddhist philosophy, the cycle of rebirth that serves as a justification for the basis of the individual's existence indicates that everyone is related and connected in a universal manner and cannot exist independent of each other. Hence, the actions of a single individual affect the rest. The Dalai Lama, considered to be the reincarnation of Bodhisattva of Compassion and the spiritual leader of the 'Gelug School' of Tibetan Buddhism, has stated that there exists a universal responsibility to promote human survival. He has reiterated the inseparable link that exists between the human heart and the environment that needs to be fostered through love and understanding. He delivered an address to a Conference on Human Rights organised by the UN in Vienna, where he highlighted the Buddhist approach to human rights.[17]

It is argued that there are non-Western ethical traditions that can espouse human rights, such as Theravāda Buddhism. Human rights can be deduced from Buddhist moral teachings by assessing the association between the Buddhist precepts and social justice as seen in the Theravāda tradition. Concerns regarding 'self-fulfilment, respect for others and the quest to contribute to others' have been found in Confucian, Hindu and Buddhist traditions, hence implying correlative duties for a just and peaceful society. Hesanmi expounded the reasonability of affirming the mutual entailment of rights and duties rather than erecting a false dichotomy between the two.[18]

17 Daisaku Ikedia, A Forum for Peace: Daisaku Ikeda's Proposals to the U.N. (Olivier Urbain ed., 2014).

18 Andrew Clapham, Human Rights: A Very Short Introduction 5 (2nd ed. 2015).

Ananda Gurugé notes that "Professor Perera demonstrates that every single Article of the Universal Declaration of Human Rights, even the labour rights to fair wages, leisure and welfare has been adumbrated, cogently upheld and meaningfully incorporated in an overall view of life and society by the Buddha".[19]

Kenneth Inada has suggested a definitive foundation for human rights in Buddhist metaphysics. In a discussion of 'The Buddhist Perspective on Human Rights', Inada refers to 'an intimate and vital relationship of the Buddhist norm or *Dhamma* with that of human rights'.[20]

The Buddhist virtue of compassion emboldens us to develop the human capacity for empathy to the extent as to relate completely with the suffering of others. Several texts elucidate the process of exchanging self and other and suggest a meditative ritual where we imagine ourselves in the other's position. This is referred to as sentimentalism in the West, which emphasises the role of the emotions in moral judgments. According to this perspective, the ascription of human rights is 'an expression of a deep human ability to recognize the other as like oneself; to experience empathy for the other's needs and sufferings; to consent to, support, and rejoice in the fulfilment of the other's human capacities and well-being'.[21]

It's stated in orthodox Buddhist teachings that torture or killing that is classified as abuses of human rights will induce negative karmic consequences. Karma, which is the law of causation, has an ontological foundation in natural law resembling physical laws that dictate biological growth or heat. It has been suggested that the concept of human dignity can be derived from doctrines of a Buddhist nature. While the contemporary idea of human rights has a distinguished cultural origin, its basic preoccupation with human good is experienced by Buddhism.

The followers of Buddhism in the contemporary age have founded the Soka Gakkai International (SGI), a community-based Buddhist organization that promotes peace, culture and education based on the inherent dignity of life by upholding and propagating Nichiren Daishonin's Buddhism.

---

19 L.P.N. Perera, Buddhism and Human Rights: A Buddhist Commentary on the Universal Declaration of Human Rights xi (1991).

20 Kenneth K. Inada, *The Buddhist Perspective on Human Rights*, *in* Human Rights in Religious Traditions 71 (Arlene Swindler ed., 1982).

21 L.S. Cahill, *Rights as Religious or Secular: Why Not Both?*, 14 Journal of Law and Religion 45 (1999); Yoichi Kawada, *The Buddhist Perspective of Life and the Idea of Human Rights*, 21 Journal of Oriental Studies 123, http://www.iop.or.jp/Documents/1121/Journal21_Y.Kawada2.pdf.

> The Lotus Sutra, which expounds the essence of Buddhist teachings was founded 80 years ago was initially dismissed as a congregation of sick and poor in Japan. However, the members took this as a badge of the highest honour and resonating with a burning conviction undertook the work of engaging in dialogue with people in order to encourage and nurture hope.[22]

It believes that 'the inherent role of religion can be defined as taking human hearts that are divided and connecting them through a universal human spirit. It is the religion that supports, inspires and provides an impetus for people searching for the good and the valuable in their lives'.[23]

The Universal Declaration of Human Rights claims that human rights addresses the relationship between society and individuals, safeguarding the latter from exploitation and persecution, with its aim being legal in nature. It is expected by Western ideologists that clauses which refer to equal treatment and dignity of life should be universally applicable. There is a valid consensus among the scholars that these universal rights are congenial with Buddhist morality.[24]

5 Islam

Islam originated in Mecca and Medina of Saudi Arabia in the early seventh century and since then gradually spread all over central and southeast Asia as well as Africa via trade and commerce. Since the time of Mohammad when it first originated, Islam had championed for human rights such as the right to life, right to freedom of expression, right to equality before the law, rights of women and as such. One might even argue that Islam has not only advocated for the human rights that are contained in the present-day human rights instruments such as the Universal Declaration of Human Rights but went beyond that and ensured more human rights such as the rights of parents as well as children, rights of neighbours, inheritance and other rights which are not mentioned in modern human rights documents and all these developments took place in Asia through Islam, centuries before the West came up with the modern notion of human rights.

---

22 IKEDA, *supra* note 17.

23 *Id.* at 259.

24 Andrew May, *Buddhism and Human Rights: A Book Review*, ANDREW-MAY.COM (2001), http://www.andrewmay.com/bhr.htm.

Islam preaches the right to life of every human being.[25] With regard to when taking of a life is justified, it is mandated that even when someone is guilty of murder or spreading corruption on the earth, such can only be decided only by a proper and competent court of law. Even when there is any war with any country, only by the decision of a properly established government can a life be taken away. In fact, no human being has the right by himself to take a human life without any reason, and even when such retaliation is justified, due process must be followed. If anyone, however, murders a human being, it would be as if he has slain the entire human race.

In another place, the Holy Qur'an also distinguished homicide from that of destruction of life for justified reasons by ordering the Muslims not to kill any human being (herein referred as soul) without following due process of law, because Allah has made all human life sacred (6:151). Prophet Mohammad has also referred to murder as the greatest sin besides associating something with God. All these instances strengthen the fact of how strongly Islam strives to respect the right to life of every human being.

Immediately after mentioning the right to life, the Holy Qur'an addresses the right to the safety of life of human beings.[26] The Holy Qur'an lays down that whenever someone saves the life of another human being, it would be deemed as if she had saved the entire humankind. This saving can be interpreted to mean diverse situations. If someone is ill or wounded and in need of help, it is the duty of everyone to help that man irrespective of his race, gender, skin colour, nationality or belief. If someone is dying of starvation, every Muslim is obligated to feed him.[27] Therefore, Islam strives to ensure the safety of the life of every human being on earth without any discrimination.

Islam does not solely depend on voluntary help and charity. Rather, Islam had made charity compulsory to the rich through a practice known as zakat to help poor people obtain the basic necessities of life.[28] In fact, according to Al-Bukhari, the Prophet has clearly stated that this portion of the wealth over which the poor and needy have claim will be taken from the wealth of the rich and then be given to those in need. Islam has forbidden the primitive practice of capturing a free man and making him a slave or selling him into slavery. In this regard, the Prophet Mohammad clearly stated that he shall stand as a plaintiff against three categories of people, slavers being one of them. Moreover, this injunction is general in nature and applies to every human being regardless

25 Syed Abul A'la Maudoodi, Human Rights in Islam (2nd ed. 1981).
26 *Id.* at 1.
27 *Id.*
28 *Id.*

of their nationality, race or belief. Islam also gives protection against arbitral arrest. According to Caliph Umar, "no one can be imprisoned for any other purpose except for the pursuance of justice in Islam".[29] Therefore, in Islam, every human being is considered to be innocent until proven guilty, and even when justice is served, it must be in accordance with due process of law.

In Islam, all human beings are equal before God regardless of where they were born, their social position, their race, colour or gender. The Holy Qur'an mandates, 'O mankind! We have created you from a male and a female'.[30] Therefore, in Islam, all men are considered to be brothers as they are the descendants from one father and mother.[31]

There are other rights prescribed by Islam which can be found mandated in the Holy Qur'an and in the recording of the words and conduct of the Prophet, as well as his 'Sahabi', also known as Hadith. Some other rights as incorporated and practiced in Asia through Islam are the right to freedom of association, the right to religion, the right to take part in the affairs of the State, the right to freedom of conscience and conviction and as such.

6 Hinduism

The present notion of human rights is based on universal values found in all major civilisations of the world: In Asia, Africa and of course, in Europe. One such instance is the reflection of human rights in Hinduism which was practiced in ancient Asia. Secularism in the conduct of the domestic and international affairs of the state, equality of all human beings and adherence to the principle of peaceful co-existence, regardless of faith and beliefs were some of the core elements that can be found deeply-rooted in ancient Hinduism. Though the Hindu approach towards human rights has changed drastically since the Dark Age, the ancient Hindu scriptures from which the religion originated from only contain the principles of universal fraternity, peaceful co-existence and the equality of all human souls.

A significant reflection of modern constitutional monarchy can be deemed in the writings of Kautilya which stated that '[i]n the happiness of his subjects lies [the king's] happiness; in their welfare his welfare. He shall not consider as good only that which pleases him but treat as beneficial to him whatever

29 Farhad Malekian, Principles of Islamic International Criminal Law: A Comparative Search 375 n. 1 (2011).

30 *Qu'ran* 49:13 (Mohsin Khan).

31 Maudoodi, *supra* note 25.

pleases his subjects'.[32] Here, Kautilya was stating a king's obligation to follow an order based on *dharma*. Furthermore, the scripture also attaches some qualification on the king himself such as: The king must be a *dharmic* person (one who follows *dharma*), always be responsive to what the wishes of his people are and lastly, he must be guided by the sound advice of the elder statesmen of society when making decisions about the affairs of the State.

With regards to how a dispute should be resolved, Kautilya mandates that such disputes are to be judged in accordance with four bases of justice, namely-*Dharma* (based on truth), evidence (based on witness), custom (based on the tradition accepted by the people) and lastly, royal edicts (based on law as promulgated).[33] The concept of right and wrong in Hinduism is contained in a collection of sacred scriptures and divine revelations such as the four *Vedas*[34] and *Dharma sastras*. These scriptures include the 108 *Upanishads*,[35] the 18 *Puranas*,[36] the 100 *Up-Puranas* and a number of *Smritis*.[37] The *Vedic* texts reflect how peaceful and orderly people engaged in the fulfilment of their lives in accordance with *Rita* are.[38] These scriptures are evidence that peace, justice, rights and wrong were concepts introduced through Hinduism long before they were in the West.

The very notion of *dharma* alone contains many facets of the modern principles of human rights. The word *dharma* originated from the verbal root *dhr*, which means to uphold or to maintain the law and order or eternal order of the world.[39] All the *dharmas*, though articulated in different senses, refer to obligations that must be fulfilled to maintain and support the individual, the family, social class and the whole society.[40] In fact, the various *dharmas* are simply different rules of action one must apply to different stages of life, different social class, to being a king or a human being and so on.

On the other hand, *dharma* used in a legal sense 'refers to the laws and traditions governing society, informing every citizen of the rules governing

32 Kautilya, The Arthashastra 125 (L.N. Rangarajan trans., 1992) (1987).

33 *Id.* at 351.

34 Advaita Ashrama, The Brhadaranyaka Upanisad: With the Commentary of Sankaracarya (Swami Madhavananda trans., 3rd ed. 1950).

35 Hindu Scriptures (Robert Charles Zaehner trans., 1966).

36 Upendra Nath Ghoshal, A History of Indian Political Ideas: The Ancient Period and the Period of Transition to the Middle Ages 580 (1959).

37 *Id.* at 8.

38 Pratima Bowes, The Hindu Religious Tradition: A Philosophical Approach (1976).

39 Subedi, *supra* note 3.

40 John M. Koller, The Indian Way 62 (1982).

social life'.[41]According to Kollar, '*dharma* is usually classified according to the requirements of one's position in society and stage in life, for these represent the main factors of time, place and circumstance that determine one's own specific *dharma*'.[42]Ariel Glucklich similarly stated that '*Dharma* is not a what, it is how: there is the dharma of conduct, of course, and this we usually understand as law and morality'.[43] *Dharma* is the concept of righteousness which is used to regulate the relationship between individual, family, community and the State.

In its original sense, *dharma* implies the maintenance of peace and security through the rule of law and order within a larger cosmic framework. Therefore, perceived this way, the concept of *dharma* seems to be secular and universal in nature and has little to no connection with the various Hindu gods and goddesses. In fact, Eyffinger rightly states that 'indeed a quite unique characteristic of ancient Indian thinking with respect to international relations was its insistence on universalism. This notion had religious as well as political connotations, as is illustrated by the postulated universality of the individual soul. In political theory, this concept was exemplified by a view of world government based on non-violence towards all creation and the indiscriminate quality of mankind. With regard to inter-state conduct, no distinction was recognized between believers and non-believers'.[44]

Since the advent of Hindu philosophy, the religion has championed the idea of harmony and fraternity among all individuals and the quality of human beings, regardless of any factors such as belief, gender, race or colour which are the main cause of discrimination even in the twenty-first century. Indeed, it was this non-discriminatory, universalist culture of ancient India and Southeast Asia which made it possible for the European traders to establish trade with this region of the world on equal terms with that of the natives. These traders entered into various treaty relations with these Asian States as equal partners and received the benefits of the region's rich system of trade and commerce. During those earlier periods, there existed no issues of inferior or superior civilization, and commercial relations between European States and Asian States were free from religious bias.

With regard to secularism and peaceful co-existence, *Arthasastra* contains several mandates which only strengthen the fact that secularism in the

41 *Id.* at 12.

42 *Id.*

43 Ariel Glucklich, The Sense of Adharama 7–8 (1994).

44 Arthur Eyffinger, The International Court of Justice 1946–1996, 204–205 (1996).

governance of State affairs, universalism with regard to human approaches to the outside world and the principle of peaceful co-existence when dealing with foreign powers of different faiths and beliefs, were some key elements which were embedded in ancient Hinduism. Alexandrowicz opined that:

> *Arthasastra* constitutes a divorce of politics (internal and external) from moral philosophy and creates a dichotomy typical of Brahmin learning which contrasted sharply with the Buddhist concept of the supremacy of moral law over and above politics. In terms of European philosophy, it might be comparable with the efforts of those theologians and lawyers who tried to extricate the *jusgentium* from the grip of theology.[45]

This gives a genuine outlook to the statement that the concept of human rights was well entrenched in the all major beliefs of oriental philosophy. The means to suggest to the people their obligation to perform obedience for human rights is governed from general stories and, if observed, serves a general utilitarian purpose so that people can understand and adapt to practices without having to deal with complex ideas. This is largely significant when addressing a large portion of society rather than only understanding it as mythical beliefs. The concept of human rights is incorporated in every sector and walks of life. It is more important that the understanding of such concept is based on acknowledging the capacity of each person to perform such acts.

7 Asian Countries in Development and Origin of Human Rights

We have had a distinct observation on various understanding of oriental perspective. The theoretical clarity remained, however, ineffective in the implementation and practice of such customs, even more when economic development could not serve the people's needs. In the current situation, a homogeneous view of Asian society reflects that particular groups which are the governing elites that receive global recognition. To this effect, Asian societies have also been willing to accept democracy more openly than the past. From the mid-twentieth century, political systems lacked the openness and democratic nature which justified authoritarianism and incidental suppression. States understood necessities of democratic institutions and therefore,

45 Charles Henry Alexandrowicz, An Introduction to the History of the Law of Nations in the Nations in the East Indies: (16th, 17th and 18th Centuries) (1967).

prioritised their effort on establishing such norms. The Bangkok Declaration, which was ratified by all the Asian governments at the 1993 Asian regional preparatory meeting for the Vienna World Conference on Human Rights, remains a relevant example and many of these Asian governments have solid engagements with regard to human rights. Their commitment is admirable. One illustration is India who, along with other States, is pledged to human rights through its constitutional apparatus with an independent and robust judiciary and in spite of several disputes and complications, has tried to sustain the struggle for human rights.[46]

Asia has had a long humanist culture whose progression is associated with the formation of norms of behaviour based on consideration and appreciation for human decency and morality throughout the world. Philosophical discourses found in religious mythologies such as Mahabharata or rules and customs that maintain rights for the most defenceless groups or individuals were included in the Hammurabi Code, the Laws of Manu, the conventions of Empress Jingu and the writings of Sima Qian and Confucius.[47]

In India, there have been instances of jurisprudence principles since around 4000 B.C. that included descriptions of rules and procedures for civil and criminal cases, specifically concentrating on punishment. The Vedic Rishis always urged for the protection of everyone in society, and this was considered as the duty of the State or king. Hence, the premise of the rights of individuals is not entirely a Western concept.[48]

The Rig Veda also alludes to three types of civil rights: *Tana* (body), *Skridhi* (dwelling place) and *Jibhasi* (life). In the book 'Hindu Narratives and Human Rights', the author explicates that the Hindu texts include a comprehensive and intricate analysis of 'the particular and universal dimension' on human rights. It involves an examination of the questions that Draupadi asked in the Mahabharata after she was coerced to attend the assembly of Kauravas. The author also claims that the conflict between Kauravas and the Pandavas, with the issue being ownership of land, is also one of, 'the contested rights'. The prevalence of Indian literature which includes both short and long narratives like *Mahabharata*, *Ramayana*, *Panchantantra*, *Bhagwad Gita*, etc. presents the debate on human rights in the manner of folk tales and stories. These anecdotes have been investigated by the author who assert that Indian thinkers

46 Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 Australian Year Book of International Law 1 (1994).

47 Int'l Fed'n for Human Rights, Demystifying Human Rights Protection in Asia (2015), https://www.burmalibrary.org/docs21/FIDH-2015-Demystifying_Human_Rights_Protection_in_Asia-red.pdf.

48 Giriraj Shah & K.N. Gupta, Human Rights: Free and Equal (2001).

not only championed for human rights but also exhibited that the violation of such rights may have ramifications that 'extend beyond the individual'.[49]

The Mahabharata is customarily classified as an archaic oral Indian epic which incorporates many significant systems of codes, values and narratives for Indians to contemplate on human destinies, births and deaths, the futility of war, the nature of divinities, the ambiguous nature of human action and unavoidable consequences of individual actions.[50]

Hinduism itself had some core values which protected and promoted human rights. Those rights never came from the West. Hinduism originated from and was developed in the Indian sub-continent, which proves that human rights existed in this region from the very beginning. In fact, the concept of non-discrimination between believers and non-believers originated in India 2000 years ago.[51] Moreover, King Ashoka, after the Kalinga War (261 B.C.), proclaimed universal peace and respect for the rights of others in the following words: 'His Sacred Majesty Ashoka desires that all living beings should have security of existence for which men should exercise self-control and not to take by force what others possess. All should enjoy peace of mind by co-existence and not by mutual interference and recrimination'.[52]

Even before the Universal Declaration of Human Rights, during the colonial period, Raja Ram Mohan Roy, the father of Indian Renaissance, fought against the age-old system of Sati (burning of widows in her dead husband's funeral pyre). With his active persuasion, Lord William Bentick, the then-Governor General of British India, passed the famous Regulation XVII in 1829 that declared Sati as illegal and punishable by courts.[53] Even though the British claim it as a Western contribution, as the Act was passed by Lord Bentick, it was Raja Ram Mohan Roy who actively raised his voice against it and brought it to the attention of the authorities. Despite many challenges, he made it possible and abolished the Sati system because it was a huge violation of right to life. He also condemned polygamy, denounced the caste system, advocated for the right of Hindu widows to remarry, etc.

---

49 Ashok Vohra, *Discourse on Human Rights*, THE TRIBUNE (May 16, 2010), https://www.tribuneindia.com/2010/20100516/spectrum/book1.htm (reviewing ARVIND SHARMA, HINDU NARRATIVES ON HUMAN RIGHTS (2009)).

50 M.D. MUTHUKUMARASWAMY, MAHABHARATA: TEXTS AND PERFORMANCES (2017).

51 Nagendra Singh, *History of the Law of Nations Regional Developments: South and South-East Asia*, *in* RUDOLF BERNHARDT, ENCYCLOPAEDIA OF INTERNATIONAL LAW 237, 239 (1984).

52 *Id.* at 241.

53 Priya Soman, *Role of Raja Ram Mohan Roy and the Abolition of Sati System in India – A Study*, 7 INTERNATIONAL JOURNAL OF DEVELOPMENT RESEARCH 14465, 14466 (2017).

Carrying this legacy, it was Ishwar Chandra Vidyasagar, a great academician, scholar and social reformer during the colonial period, who championed for women's rights and was the first to marry his son with a widow, which was strictly condemned in Indian society. After the abolition of Sati, widows were treated in the society like inferior human beings and were looked down upon by the entire society. Ishwar Chandra was the first to point out their equal rights as human beings and raised the issue of widow remarriage. It was an unimaginable proposal back then. However, because of his contribution towards such issues, the Widow Remarriage Act was passed in 1856, making the marriage of widows legal.[54] Therefore, it not only became a practice in the Indian society, but it also turned into a complete law which strengthened the basis of the practice through the formal legal system.

Another ancient source of human rights is Babylonian Law, also known as Hammurabi's Code, which was a set of laws and rules formulated by King Hammurabi. It encompassed the concept of fair wages, extended protection of property and prescribed charges to be heard and proved at trial.[55]

The Hammurabi Code was written in systematic categories of columns and paragraphs which consisted of nearly 300 separate provisions of commercial, criminal and civil law covering contracts, judicial procedures, penalties or punishments, including nature of crimes, family relationships, inheritance and specific aspects of human rights. The Code contains original examples of the right to freedom of speech, presumption of innocence, the right to present evidence and the right to a fair trial by judges. It also postulated protections for different classes of Babylonian society, including women, widows, orphans, the poor and even the slaves. The most important contribution of the Code is the enactment of a vital principle of the rule of law which stated that few laws are so crucial that they apply to every individual, including the king (State). This has cultivated an essential issue for human rights which is reflected in the association between duties and rights. There are duties that exist which everyone is beholden to, but, if they remain unperformed, others would have a right to claim them.[56]

The precepts of Islam which were made clear 500 years later and were acknowledged in the writings of the prophet Muhammad also emphasize the

54 Ramandeep Kaur, *Ishwar Chandra Vidyasagar – A Great Reformer*, My India (Sept. 25, 2019), https://www.mapsofindia.com/my-india/history/ishwar-chandra-vidyasagar-a-great-reformer.

55 Pravin H. Parekh, Human Rights Year Book 2010 (2010).

56 Paul G. Lauren, *The Foundations of Justice and Human Rights in Early Legal Texts and Thought*, *in* The Oxford Handbook of International Human Rights Law 163 (2013).

responsibility or duty (*jard*) to protect the well-being of others. It underscores a command to safeguard the weakest members of society and to perform charity. The Holy Qur'an covers topics ranging from social justice, the sanctity of life, personal safety, mercy, compassion to respect for every individual. Islam also realized an affiliation between religious beliefs and the law of a political community. The Constitution of Medina, which was written to administer the first Islamic State, approached matters of freedom and injustices resulting from additional privileges due to a hierarchical tyrannical distinction and provided a buffer for individuals by including provisions concerning religious tolerance.[57]

Muhammad Ali Zinnah stated in his speech to the first constituent Assembly of Pakistan on September 11, 1947 that:

> You are free to go to your temples; you are free to go to your mosques or to any other place of worship in this state of Pakistan. You may belong to any religion or caste or creed-that has nothing to do with the business of the state. We are starting with this fundamental principle that we are all citizens and equal citizens of one State.[58]

In China, there were several philosophers who advanced their ideas regarding justice and human rights. Mo Tzu (c. 470–391 B.C.) established the Mohist school of moral philosophy. During his time, there was constant warfare, violence and widespread abuse; he denounced acts that were harmful to others such as hierarchies and divisions in society that prescribed varying treatment and any instance where the powerful suppressed the weak.

He set, as guiding principles, the notion of self-sacrifice, the institution of uniform moral standards and the discharge of responsibilities for others' security. MengZi (372–289 B.C.), also known as Mencius, stated that every individual inherently shares a common humanity, moral worth, dignity and goodness and is able to empathize. He believed that it is the duty of governments to foster these qualities. He insisted that rulers or kings who indulged in oppression and persecution lost the 'Mandate of Heaven', relinquishing the authority to rule.[59]

There are several notable leaders who have expounded Buddhism and expressed concerns about socio-political issues in the context of human rights like Aung San Suu Kyi, A.T. Ariyaratne, Maha Ghosananda and Sulak Sivaraksa.

---

57 Ann E. Mayer, Islam and Human Rights (5th ed. 2012).

58 Subedi, *supra* note 3.

59 Wm. T. deBary & Weiming Tu, Confucianism and Human Rights (1998).

There have also been institutions established by Buddhists to promote human rights including the Cambodian Institute of Human Rights, the Tibetan Centre for Human Rights and Democracy and the Thai National Human Rights Commission. Several Asian countries with large Buddhist populations (Thailand, Myanmar, Laos, Cambodia and Vietnam) are also members of the ASEAN Intergovernmental Commission on Human Rights (AICHR) founded in 2009.[60]

8 Conclusion

Hence, the concept of human rights, mainly a post-World War II concept, developed largely during the formative years of the United Nations (UN) by Western countries. Even though there is no other option other than to agreeing that the East does not have sufficient evidence or literature to establish that human rights existed in this region prior to the establishment of the UN, merely accepting human rights as a Western concept for the sole reason stated above is to ignore the practices of other great ancient civilizations of the world. This clearly undermines the existence and practice of human rights in the Asian region. Due to the denial of scholars and academicians of the West, who mostly dominated the legal literature, that this notion that human rights is a Western concept has now been wrongly established, whereas the trend of human rights practice and development was in existence in Asia much before it was even thought of by the West.

It is true that human rights norms have not been guaranteed to the people in large sections of Asian societies. However, certain generations of poverty cannot wipe out the positive aspect a society possesses. Eastern philosophy, in its distinct and very similar connotation as highlighted, has brought appropriate, generalized and existing concepts of welfare and security. It is true that there is not much clarity regarding the democratic foundation of the State practice. However, States are realizing the importance of such institution to ensure that people's human rights are upheld and to avoid anarchy. It can be observed that isolated communities forced into a consumer market requires time to adapt and manifest its values and tradition. Therefore, not merely taking it as a hostile situation, Western States should avoid the tendency to compare the nature and concept of human rights in binary opposites.

60 Damien V. Keown, *Are There "Human Rights" in Buddhism?*, 2 JOURNAL OF BUDDHIST ETHICS 3 (1995).

The tendency of the colonial power to wrongfully undertake communities, other than Western communities, as uncivilized should not be practiced. Therefore, the concept of Asian societies and Eastern philosophy should be recognised. The development of human rights and the inclusion of the concept of human rights should not be under the veil of mythical or primitive perspective. Rather than analyses of concepts such as mutual cohesion and equality which was effectively practiced, the concept of human rights should be extensively reviewed and included to maintain a better framework of human rights for all.

Subcontinental Defiance to the Global Refugee Regime: Global Leadership or Regional Exceptionalism?

*Jay Ramasubramanyam**

1 Introduction

This article emerges from, among other factors, my identity and my lived experiences and understanding of South Asian history. Those who had firsthand experiences of the malaises of the Partition of India in 1947 are long gone, and the current generation of people have effectively become "custodians of such collective memory" that have been deeply etched in the identity and ethos of a subcontinental being.[1] The memories of the Partition of India, though not mainstream, serve to signify the development of modern-day South Asia and also "humanize and pluralize Partition stories" – characteristics that escaped British imagination and colonial historiographies which projected distorted tropes that served to demonize the subaltern and further their own political goals.[2] I believe that I too have the responsibility to not only articulate such memories through academic interventions, but also provide some steps towards understanding refugee history that has overlooked the subjective experiences of displacement in the aftermath of the Partition. This article forms a small part of a larger project – to write into international refugee law the alternate modes of international protection that resist and challenge the Eurocentric and hegemonic norms as outlined by the 1951 Convention Relating to the Status of Refugees, which projects a faux universality with respect to its application.

The article's objective is to analyze the marginalization of South Asian experiences of refugeehood and provide some insights into the alternate mechanisms of refugee protection that have been developed in response. The first part of this article will engage in discussions on South Asian states' relationship to the 1951 Convention Relating to the Status of Refugees. While many scholars have

* Doctoral Candidate (2015–2020), Department of Law and Legal Studies, Carleton University, Canada.

1 Yasmin Khan, The Great Partition: The Making of India and Pakistan xxv (2017).

2 *Id.*

called for South Asian nations to sign and ratify the 1951 Convention, this article will rationalize the regional disillusionment to the Convention's approach. The second part of the article will attempt to engage with discussions on Third World Approaches to International Law (TWAIL) and its role in understanding South Asian approach to the global refugee regime, in an attempt to decenter the narrative to bring postcolonial states within the purview of such discussions. The third part of the article will articulate moments of defiance with the help of case law and archival records. The article will conclude with a short analysis on the significance of alternate locations of practice to enable a more holistic understanding of the global refugee regime.

A rich body of literature has analyzed the Partition and its repercussions on the subcontinent's reconstruction after the formal end to colonialism. However, a regional myopia is noticeable in its understanding.[3] The Partition of India should be understood as a global event akin to post-WWII reconstruction of Western Europe that also resulted in mass displacement across newly formed nation-states. As Vazira Zamindar outlines the mechanics of the Partition, similarities of such dispossession and disenfranchisement can be drawn from the European experience. She explains: "[A] Partition Council began exacting the task of counting and dividing the vast machinery of colonial statecraft into two – everything from tables and chairs, weather instruments and military hardware, to railway engineers and office clerks."[4] Millions were dispossessed by both India and Pakistan as a result of this violent end to formal colonialism. Stories of the Partition invoke and capture the quintessential nature of "all the aporias of belonging in a cartography of nation-states. Where … is India? Where is Pakistan? Who is Indian? Who is Pakistani?"[5]

The international community's response to the displacement in Western Europe post-WWII was accompanied by institutionalization of refugee protection mechanisms. However, contemporaneous displacement during and after the Partition of India did not capture as much attention at an international level. This article argues that displacement was as much a defining feature of the Partition of India as it was during post-WWII reconstruction of Europe. Despite forced displacement being a defining feature across the globe during this time, much of the literature has extensively focused on the latter. This article will attempt to demonstrate the gaps that persist with respect to conceptualizing forced displacement in South Asia. Given the lack of deeper examination of

3 *Id.* at xxi.

4 Vazira Fazila-Yacoobali Zamindar, The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories 1 (1st ed. 2010).

5 *Id.* at 2.

refugee protection in the region, this article will establish how resistance to the global refugee regime has been articulated with the establishment and implementation of ad-hoc alternatives to hegemonic refugee protection.

1.1 *1951 Convention Relating to the Status of Refugees*

The international community's efforts in post-WWII repatriation of European refugees and forced migrants were marked by the United Nations proposing the "assimilation of all stateless persons, including refugees, under a new international regime."[6] Despite political antagonism that proved to be obstacles to effectively actualizing a holistic vision of refugee protection, the United Nations High Commissioner for Refugees (UNHCR) was established and an effective international refugee protection instrument was proposed, i.e., the 1951 Convention Relating to the Status of Refugees.[7] The Convention was viewed as the cornerstone in refugee protection norms. It was also an attempt to codify legally binding international refugee protection mechanisms. Given that the Convention was built on the heels of post-WWII disenfranchisement in Europe, the definition of a refugee was constrained temporally and geographically.[8] This meant that the Convention applied only to those who were fleeing specific circumstances, during specific periods in history, in Europe.[9] The 1967 Protocol Relating to the Status of Refugees abolished the temporal and geographical restrictions so as to allow for a more universal application of the 1951 Convention's norms.[10] Despite the 1967 Protocol removing the temporal and spatial constraints, South Asian States remained disillusioned with the Refugee Convention's core objectives. Perhaps for this

6 James C. Hathaway, The Rights of Refugees Under International Law 91 (2005).

7 *Id.*

8 *See id.* at 96.

9 Article 1(A)(2) of the *Refugee Convention* (For the purposes of the present Convention, the term "refugee" shall apply to any person who: As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it); Convention relating to the Status of Refugees art. 1(A)(2), *opened for signature* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

10 Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 606 U.N.T.S. 8791 (entered into force Oct. 4, 1967).

reason, States in the region have instead chosen to regard refugee protection as matters between States and have reasserted their position that the Convention and Protocol fail to capture the experiences of displacement in the region by not ratifying these instruments.

1.2 *Imprecision of the Global Refugee Regime*

Over the years, a growing body of academic literature and judicial interventions have interrogated normative characterizations of forced displacement, which has led to problematizing pre-existing narratives on this issue. McAdam and Goodwin-Gill argue that the current refugee regime "imperfectly [covers] what ought to be a situation of exception" and continues to be an incomplete legal framework.[11] The refugee framework was established in light of conflicts and upheavals faced by the international community, which caused mass migration and disenfranchisement. Hathaway points out that the system of protection for refugees was imprecise and did not clearly set up specific responsibilities for states. The initial perception of the refugee protection, as a temporary mechanism, also added to the imprecision.[12] The current system of refugee protection "rejects the goal of comprehensive protection for all involuntary migrants."[13] The responsibility of states to step in to protect those involuntary migrants is limited. Additionally, Hathaway argues that the assistance provided to refugees is done so without taking into account their subjective experiences, due to the standardized characterization of a refugee.[14] Existing refugee protection mechanisms only take into account the asylum states' well-being and are the result of an uneasy "compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk."[15] This compromise results in a weak framework and a "narrow scope of legal protection," as it fails to meet the needs of forced migrants.[16]

Gil Loescher in his work also points to the shortcomings and limitations of the current refugee protection framework. By problematizing the current characterization of refugees, Loescher argues that a majority of forced or

11 Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 1 (3rd ed. 2007).

12 *Id.* at 86.

13 James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harvard International Law Journal 129, 132 (1990).

14 *See id.*

15 *Id.* at 133.

16 *Id.*

involuntary migrants today are fleeing circumstances other than those outlined in the 1951 Convention.[17] State incompetence and failure are more prominent circumstances as opposed to state persecution. By pointing to the example of the decade long economic and political disarray in Zimbabwe in the early 2000s, Loescher argues that only small minority of those who fled the country were doing so due to individualized persecution.[18] He points to normative gaps in the current framework of refugee protection by arguing that widespread human rights deprivations, state fragility and environmental distresses have also caused displacement in recent years. Loescher calls for a better understanding of human mobility to better afford protection for those facing such crises.[19]

2 Regional Disillusionment to the Refugee Regime

2.1 *From the League of Nations to the United Nations*

India's experience with refugee protection predated post-Partition displacement. A founding member of the League of Nations,[20] India had provided assistance, sanctuary, and identity certificates to Russian refugees[21] and refugees from the Saar.[22] As part of efforts to settle Jewish refugees in India, a Jewish colony was created in the suburbs of Delhi to aid those expelled from Germany.[23]

---

17 Gil Loescher, *Human Rights and Forced Migration*, *in* Human Rights: Politics and Practice 311 (Michael Goodhart ed., 3rd ed. 2016).

18 *Id.*

19 *Id.*

20 Lanka Sundaram, *The International Status of India*, 9(4) Journal of the Royal Institute of International Affairs 452, 455 (1930).

21 File No.: C1435/331/Rr.401/001/9/33, Distribution of Nansen Stamp – India (30 May 1928). [League of Nations Archives, Geneva]. This file contains a series of memoranda, and correspondence that took place between representatives of the Economic and Overseas Department of the India Office and the Nansen International Office for Refugees, on Russian Refugees in India.

22 Dossier No 20A/22493/19255, Feb. 20, 1936 (League of Nations Archives, Geneva). At the Imperial War Conference of 1917, India was granted special representation on an equal footing with the self-governing dominions and played an important role in various international conferences. *See* Sundaram, *supra* note 20, at 454 n. 20.

23 Letter from Indian civil servant Badri Prasad Mital to The Right Honourable Edward Fredrick Lindley Wood, Baron Irwin of Kirby Underdale on the 'Proposed Settlement of Jewish Refugees in India' (Jan. 16, 1939), in Settlement of Jewish Refugees in India, FO 371/24098/1737, Registry No W 1737/1737/48 (National Archives, London). The request was forwarded by A. Dibdin, Esq, India Office to AWG Randall, Esq, Foreign Office (Document No P & J 671/39 in the same file, dated 17 February 1939). The request was

Despite India's engagement in these processes, it was with mixed sentiments. Some Indian nationalist leaders declared that "the League of Nations was a fraud and was meant for the perpetuation of imperialism",[24] while a member of India's Council of State, Phiroz Sethna, argued that "India cannot take her rightful place in international affairs unless she has her right place as a nation".[25] India subsequently became a full member of the United Nations while it was still under British rule.[26]

2.2 *Partition of India and Drafting of the Convention*

The Partition of India, which divided British India into India and Pakistan, constituted a violent end to formal colonialism in South Asia and resulted in mass displacement across newly created international borders – Hindus and Sikhs to India, and Muslims to Pakistan.[27] Both States faced tremendous challenges in responding to the protection needs of the displaced, which led to "extraordinary interventions"[28] and the groups being pitted against one another.[29] This coincided with the early deliberations for a post-war international refugee treaty. Reflecting on these deliberations during a visit to Europe in 1946, India's Defence Minister, V.K. Krishna Menon, stated that "[the] outstanding and overall impression left on my mind are very limited reference to our internal problems and difficulties",[30] a matter that coloured both India and Pakistan's engagement with the formal drafting process of the Refugee Convention.

After the Partition, India and Pakistan attempted to engage constructively with the formal drafting process of what was to become the Refugee Convention.[31] A UN General Assembly resolution adopted in January 1946 stated that the "main task concerning displaced persons [was] to encourage and assist in every way possible their early return to their countries of origin".[32]

---

subsequently approved by the latter without objection on 23 February 1939, as per a handwritten note in the same document.

24 R.P. Anand, *The Formation of International Organizations and India: A Historical Study*, 23 Leiden Journal of International Law 5, 12 (2010).

25 *Id*. at 13.

26 *Id.* at 17.

27 ZAMINDAR, *supra* note 4, at 1.

28 KHAN, *supra* note 1, at xxiii.

29 ZAMINDAR, *supra* note 4, at 1.

30 Government of India, External Affairs Department, *Report by V.K. Krishna Menon on Visits to Various European Capitals*, at 41 (Government of India Press 1946) (cited in Oberoi 18 n. 1).

31 Pia Oberoi, *South Asia and the Creation of the International Refugee Regime*, 19(5) Refuge 36, 38 (2001).

32 'The Question of Refugees, UNGA res. 8(I) (Jan. 29, 1946). See also Constitution of the International Refugee Organization (adopted Dec. 15, 1946, entered into force Aug. 20, 1948) 18 UNTS 3.

At the 77th meeting of the Third Committee on Social, Humanitarian and Cultural Questions, the representative from Pakistan drew attention to that resolution and stated that "[to] avoid disturbing friendly relations between nations, refugees should not be settled in a region in which the majority of the inhabitants were opposed to such resettlement".[33] The representative noted that the resolution provided that States should be willing to encourage and assist in every possible way the early return of persons of concern to their country of nationality or habitual residence. However, given the unique circumstances of the Partition of India, which created new borders along ethno-religious lines, the idea of returning people to their place of habitual residence or country of nationality could not be considered. At a subsequent Economic and Social Council (ECOSOC) meeting in 1949, India sought to recognize its efforts in assisting refugees during the Second World War. However, from 1947 onwards it had been faced with its own refugee problem, post-Partition, and 'had been unable to give anything more than moral support to the International Refugee Organization'.[34] The Indian representative pointed out that this 'was not from lack of sympathy with its aims, but from lack of resources'.[35] Despite their initial reluctance, India and Pakistan continued to engage with the formal drafting process of the Refugee Convention. However, both States expressed concerns on various issues, most importantly the definition of a refugee. Noting the option contained in article 1B of the Convention to limit the definition to people displaced on account of 'events occurring in Europe before 1 January 1951', the representative from Pakistan 'was of the opinion that the definition … should not be limited by any territorial boundaries', and furthermore expressed the hope 'that the scope of the definition would be extended by the General Assembly so as to cover unfortunate people both inside and outside the boundaries of Europe'.[36] In separate meetings of the Third Committee, India and Pakistan's permanent representatives to the United Nations requested that the Convention address racial and religious discrimination directed towards some refugees.[37] They also expressly requested

33 Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Seventh Meeting held at Lake Success, New York (Nov. 6, 1947), U.N. Doc. AC.3/SR.77, 189 (statement of Mrs. Hussain).

34 Economic and Social Council, Summary Record of the Ninth Session, Three Hundred and Twenty-Sixth Meeting (Aug. 6, 1949) U.N. Doc. E/SR.326, 628 (statement of Mr. Desai).

35 *Id.*

36 Economic and Social Council, Summary Record of the Eleventh Session, Four Hundred and Sixth Meeting (Aug. 11, 1950) U.N. Doc. E/SR.406, 278 (statement of Mr. Amin).

37 Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Ninth Meeting, held at Lake Success, New York (Nov. 7, 1947) U.N. Doc.

that displacement resulting from the Partition be addressed. However, they were met with resistance, resulting in their disillusionment with both the Convention and UNHCR's mandate.[38] India stated that the 'objections raised confirmed [their] belief that fundamental differences existed'.[39]

Despite efforts to draw attention to post-Partition displacement the international community failed to see this as a situation of mass displacement. The complex history of the Partition of India captures the depth of dispossession and disenfranchisement of South Asians amidst incomprehensible bureaucratic and physical violence that was the result of cartographic divisions mapped on to people. States in the region were left to find solutions in their own terms given the international community's disregard. Pakistan, for instance, included *muhajir* or refugee as a category in its 1951 census. *Muhajirs* were those who had moved to Pakistan as 'a result of Partition or fear of disturbances connected therewith.'[40] The newly formed government of Pakistan provided them settlement in urban areas in the province of Sindh. Similarly, India and Pakistan signed the 1950 Nehru-Liaquat Pact whereby the two governments agreed to protect people who had been displaced as a result of violence along religious lines.[41] The pact also guaranteed minorities throughout 'complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality'.[42] South Asian States' responses to mass exodus since the Partition of India show that, in essence, they have adhered to the core principle of *non-refoulement* in article 33 of the Convention.[43] A number of ad hoc mechanisms have developed to provide sanctuary, material assistance, and protection to refugees. Tibetan, Sri Lankan, and Bangladeshi refugees in India, Afghan refugees in Pakistan, Bhutanese refugees in Nepal,

---

AC.3/SR.79, 200 (statement of Mr. Sen). *See also* Third Committee 189 n 9 (statement of Mrs. Hussain).

38 Oberoi, *supra* note 31, at 42.

39 Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Eightieth Meeting held at Lake Success, New York (Nov. 7, 1947) U.N. Doc. AC.3/SR.80, 211 (statement of Mr. Sen).

40 *Id.*

41 Agreement between the Governments of India and Pakistan regarding Security and Rights of Minorities (adopted Apr. 8, 1950) 1 India Bilateral Treaties and Agreements 243 (Nehru-Liaquat Agreement) https://mea.gov.in/Portal/LegalTreatiesDoc/PA50B1228.pdf [last visited Apr. 30, 2020].

42 *Id.* para. A.

43 Veerabhadran Vijayakumar, *A Critical Analysis of Refugee Protection in South Asia*, 19(2) REFUGE 10 (2001).

and Rohingya refugees in Bangladesh have all been provided either temporary sanctuary or long-term protection.[44]

2.3 *A Myth of Difference: Racialization of the Refugee Regime*

B.S. Chimni's work suggests another reason for regional disillusionment from a more contemporary sense. He argues that a new approach that challenged the established notions of refugee law "created the myth of difference (the idea that great dissimilarities characterized refugee flows in Europe and the Third World)."[45] The myth of difference contributed to an understanding that "the nature and character of refugee flows in the Third World were represented as being radically different from refugee flows in Europe since the end of the First World War."[46] This approach created "an image of a 'normal' refugee" who could be identified as "white, male and anti-communist – which clashed sharply with individuals fleeing the Third World."[47] This approach, as Chimni argues, not only created an inherent difference in the way forced migration was perceived in the Third World, but also laid the blame of disproportionate refugee flows on postcolonial states. This underestimated the role that colonialism played in creating such instabilities and postcolonial anxieties of individuals.

Such a disparate perception of groups of refugees originating from the Global South is not new, given the exclusion of such narratives during the establishment stage of the Convention. The subcontinent's disillusionment with the global refugee regime could also be attributed to the racialized and colonial origins of the idea of 'human,'[48] which resulted in a widespread dispossession and disenfranchisement in the region. As Mayblin argues, the myth of difference, in addition to historically constrained notions of persecution, was foundational in conceptualizing specific practices of international protection; this points to the "hegemonic epistemology of colonial modernity … as the most adequate framework within which one might begin to understand the exclusionary politics of asylum today."[49] The inadequacy of integrating postcolonial anxieties, theories of race and racism within the historical development of the global refugee regime is essential to understanding South Asia's disillusionment.

---

44 *Id.* at 9.

45 B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 Journal of Refugee Studies 350, 350 (1998).

46 *Id.* at 351.

47 *Id.*

48 Lucy Mayblin, Asylum After Empire: Colonial Legacies in the Politics of Asylum Seeking 30 (2017).

49 *Id.*

The effects of the Partition of India are far-reaching and have continued to define the experiences of modern-day South Asia. However, as Khan points out, the Partition risks being viewed as an exceptional circumstance that induced massive mobility across such borders. Such understandings further place the history of displacement that foregrounded the founding of modern-day South Asia, beyond the means of comparative accounts. This has resulted in the systematic silencing of post-Partition woes of many who continue to feel its effects.[50]

While the objective is not to subsume the subcontinent's colonial and postcolonial refugee history into European or Western history, it is significant to note that this narrative of exclusivity has largely left out questions on what constitutes forced displacement or who can be identified as a refugee in South Asia, which could serve as a rationale for regional disillusionment. Despite the Partition of India resulting in one of the largest displacements in the 20th century that were comparable to the events of post-WWII Europe, they failed to make an impact on the establishment of the international protection framework that characterized refugeehood based on strict characteristics that were uniquely European and excluded the experiences of the subcontinent.[51] A narrow definition of what constituted persecution or its well-founded nature, under the auspices of the 1951 Convention, failed to capture the subjective experiences of colonial violence within its purview. As Zamindar argues, the subcontinent's experience of colonial and postcolonial displacements "has largely gone unexamined … because of its peripheral location to postwar international order."[52]

3 TWAIL and Its Impact on Understanding South Asian Perspectives on the Refugee Regime

It is evident that refugee frameworks that pre-existed the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol have mandated states to operate under the terms as set out by Eurocentric norms. States contravening such terms have been viewed as transgressors. This legacy of Eurocentricity has continued to be the basis for the current refugee framework as well. The narratives on India's relationship to an international legal framework like that of the global refugee regime have often been viewed as a form of 'subcontinental

50 KHAN, *supra* note 1, at xxiii.

51 ZAMINDAR, *supra* note 4, at 6.

52 *Id.* at 6–7.

defiance.' This then begs the question on whether 'Indian exceptionalism' with respect to the global refugee regime could be viewed as a defiant or deviant position.

At the heart of TWAIL is the idea that Western states have always enjoyed a sense of dominance through presumed superiority, enabling them to suggest other nations are like-minded when it comes to the international legal order.[53] They have not only been successful in maintaining the status quo of imbalance inherent in international law but have also been instrumental in establishing the rules governing that legal order. This perpetuates the West's practice and tendency to use global legal institutions to continuously persecute and demonize the Global South.[54] At the heart of this lies international law's deep connections to structures of power and inequality. However, international legal order remains a contested space in which some states continue to challenge this sense of hegemony through their acts of defiance and resistance by developing ad-hoc and parallel mechanisms towards international protection of refugees. Jan Hendrik Willem Verzijl in his 1957 article wrote:

> Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of [European] beliefs, and in both of these aspects it is mainly of Western European origin.[55]

This quote is reinforced in the work of Antony Anghie, who argues that "international law regards colonialism … and … non-European societies and their practices … as peripheral to the discipline … because international law was a creation of Europe."[56] This sense is reflected clearly in several frameworks of international law, more specifically the global refugee regime. As mentioned earlier, South Asia's sidelining during the initial discussions around the 1951 Convention Relating to the Status of Refugees is a clear example. This goes to the heart of what Anghie describes: "[c]olonialism … [is] far from

53 *See* GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 6 (2004).

54 *Id.*

55 J.H.W. Verzijl, *Western European Influence on the Foundation of International Law*, 1 DAVID DAVIES MEMORIAL INSTITUTE OF INTERNATIONAL STUDIES ANNUAL MEMORIAL LECTURE 137 (1957).

56 Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, *in* 27 THIRD WORLD QUARTERLY 739, 739 (2006).

being peripheral to the discipline of international law [as it] is central to its formation."[57] The false sense of universalism projected by international law frameworks is the result of colonialism.[58] As a result of the process by which positivist jurists devised doctrines founded on "explicitly racial and cultural criteria to decree certain states [and peoples as] civilized,"[59] non-European societies were sidelined and expelled from the realm of international law since they were considered devoid of any cognizable legal personality. Such societies, in the eyes of the Europeans, were incapable of raising any objections to dispossession and disenfranchisement which were integral parts of conquest and exploitation.[60] Therefore, it is easy to recognize the systematic process by which colonialism managed to define and subsume personhood and identity of colonial subjects within the bounds of European experience, which then enabled the entrenchment of a deeply flawed system of international legal order that continued to advance the interests of hegemonic states in the Global North.[61]

Finally, international law frameworks like the 1951 Convention can be viewed as exclusionary from TWAIL lens. As Anghie points out, with the emergence of colonial territories into sovereign states, their involvement in and challenges to the predominant system were viewed as a disruption to the pre-existing global legal order.[62] International law, which was undoubtedly European in nature, began to view newly independent states as outsiders who had to be accommodated within the system. The lack of reflexivity is clear from the establishment of the Convention as European solution to a European problem. While the Convention deemed those disenfranchised post-WWII in Europe as worthy of protection, postcolonial anxieties that led to mass displacement across newly created international borders in the subcontinent failed to feature within this framework. This clearly captures the notion that non-European states and their issues were viewed as "peripheral to … international law."[63] Larger European states continue to find ways to exclude and marginalize states in the Global South with the help of the international law that the former created.

57 *Id.* at 742.
58 *Id.*
59 *Id.* at 745.
60 *Id.*
61 *Id.*
62 *Id.* at 740.
63 *Id.* at 739.

4 Deviance v. Defiance: How is Resistance to Hegemony Expressed by South Asia?

Having established that the existing global refugee regime constitutes an imperfect and incomplete framework in providing protection to people of concern, it is critical to confront the historical imbalances that have defined the development of the regime. TWAIL has certainly proven to be a convenient crucible for theoretical musings to identify structures that are inherently disadvantageous to the welfare of Third World states and peoples. This emerges from B.S Chimni's criticisms of TWAIL, the very discipline and scholarship he helped propel; he argues that "[u]nfortunately, TWAIL … has [never] been able to effectively critique neo-liberal international law or project an alternative vision of international law."[64] However, this argument questions the efficacy of TWAIL and "bemoans [the] collective failure [of Third World] to articulate an alternative to the mainstream international legal regime."[65] As Al Attar and Miller argue, despite decades of TWAIL scholarship "redress[ing] the historical biases that … undermine Third World well-being[,]" power imbalances continue to persist.[66] For instance, this is evident from the lacunae that exists in contextualizing forced migration in South Asia. The newly independent states in the region were compelled to establish reactionary or ad-hoc measures to protect forced migrants. This echoes Al Attar and Miller's counter argument to Chimni's prevailing view of Third World states' inability to articulate a cohesive counter-vision to structural imbalances. Al Attar and Miller argue that the clarity in this vision is not for the states' lack of trying but the "result of … forceful counter-challenges waged by First World actors, unmoved by the Third World plight."[67]

However, India's role in developing ad-hoc protection mechanisms continues to be met with reproach. For instance, a March 2008 article titled *India Needs a Refugee Law* in the Economic and Political Weekly by Saurabh Bhattacharjee quite articulately presents a case for India's need to develop a comprehensive domestic refugee law, while simultaneously adhering to its

64 B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, *in* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 47, 48 (Antony Anghie, B.S. Chimni, Karin Mickelson & Obiora Okafor eds., 2003).

65 Mohsen Al Attar & Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian Reconstruction*, 31 THIRD WORLD QUARTERLY 347, 348 (2010).

66 *Id.* at 347.

67 *Id.*

commitments and obligations to customary international law.[68] The arguments are based on the Constitution of India that presents a directive principle that India shall envisage to respect international law and treaty obligations.[69] While the article acknowledges that India's disillusionment with the 1951 Convention Relating to the Status of Refugees was based on the framework's Eurocentrism, it criticizes India for seeking assistance from the UNHCR during the arrival of Iranian and Afghan refugees in the 1980s. Bhattacharjee also makes the assumption that India has absolved itself of its responsibilities towards the principles of non-refoulement and other refugee protection standards by not acceding to the Convention.[70] He concludes by arguing that "Indian law and practice provides a distorted and incomplete protection to refugees [and] … fails to recognize them as a distinct category of persons."[71] Bhattacharjee goes on to say that India has failed in its commitments to human rights standards and has denied basic protection to a large number of refugees.

Bhattacharjee's characterization of India as divergent with respect to its commitments to refugee protection is not uncommon given the predominant narrative expressed by the international community to characterize non-signatory states. The ongoing policies and legislative interventions of the Indian government, namely the Citizenship Amendment Act of 2019, certainly point to such indifference. However, a more pragmatic approach to India's disillusionment with the international frameworks like the Convention and the Protocol provides a more comprehensive view of some of the regional or national developments on refugee protection. Historically, India has shown resistance to the global refugee regime, which moderately embodies the vision of TWAIL scholarship and provides an opportunity to actualize some of the visions to temper the pre-existing structural imbalances in the global refugee regime.

4.1 *Examples of Resistance*

For instance, in the 1960s, when Tibetan Refugees arrived in India, then Prime Minister of India Jawaharlal Nehru declined the assistance of the Office of the UNHCR on the basis that India's treatment of Tibetan refugees would be internationally inspected and scrutinized. Non-cooperation was demonstrable from India's rejection of a proposal to have a UNHCR representative

68 Saurabh Bhattacharjee, *India Needs a Refugee Law*, 43 ECONOMIC AND POLITICAL WEEKLY 71 (2008).

69 *Id.* at 72.

70 *Id.*

71 *Id.* at 74.

present in the country to oversee the operations of resettling Tibetan refugees. A deep sense of paternalism and colonial characterization of the conditions of refugees in India is also obvious from another Interoffice Memorandum between the UNHCR Representative from London and the UNHCR Geneva dated January 8, 1963.[72] This particular memorandum refers to the visit of Lady Alexandra Metcalfe (daughter of the former Viceroy of India, Lord Curzon) to India to inspect the status of Tibetan refugees. References were being made not only to the "deplorable conditions of Indian citizens" but also to India's "apathy towards Tibetan refugees."[73]

The archives also show an Interoffice Memorandum dated November 6, 1961 from Gilbert Jaeger, then Deputy Director of the Office of the UNHCR in Geneva, during the peak of the Tibetan refugee influx in India. The memo referred to the visit of a representative Mr. P.N. Sharma from an Indian-based NGO Lok Kalyan Samiti.[74] The memorandum indicated that Mr. Sharma had asserted that the UNHCR "could not and should not impose its assistance upon the Indian government and could not start collecting aid for Tibetan refugees in India in the present circumstances."[75]

One final moment of resistance can also be noticed with the rejection of international institutions to be established and accredited in India with respect to resettling Tibetan refugees in India. A letter dated January 25, 1962 from the Central Relief Committee's General Secretary Mr. Kalyan Singh Gupta to Mr. Gilbert Jaeger shows that the Government of India was welcoming aid from voluntary organizations, be they foreign or Indian. However, Mr. Gupta made it abundantly clear that the Central Relief Committee was the agency "responsible for receiving and coordinating such aid."[76] Mr. Gupta asserted that such circumstances mandated that aid would be acceptable "provided these are made direct to the Central Relief Committee India, which is the operative agency."[77]

---

72 Memorandum from the UNHCR Rep. London on Tibetan Refugees to the High Comm'r for Refugees, G.XV.1.15/46 – 4/11 (Jan. 8, 1963).

73 *Id.*

74 Interoffice Memorandum from Gilbert Jaeger, Deputy Dir. of the High Comm'r, on Tibetan Refugees in India – Visit of Shri PN Sharma, File No. 11/1-15/0/IND/TIB (Nov. 6, 1961) (UNHCR Archives, Geneva).

75 *Id.*

76 Letter from Kalyan Singh Gupta, Gen. Secretary of the Central Relief Committee (India) to Gilbert Jaeger, Deputy Dir. Off. of the High Comm'r for Refugees, File No. 11/1-15/0/IND/TIB, Ref. No. 16(62)-9030 (Jan. 25, 1962) (UNHCR Archives, Geneva).

77 *Id.*

The archival documents demonstrate India's resistance to the global refugee regime and international assistance. The assertion of an independent oversight body to extend protection to refugees also demonstrates the rejection of normativity with which refugees were being characterized under the refugee regime. This was one of the many moments of the subcontinent's defiance and iconoclasm to an assumed universality of a Eurocentric global refugee regime. This also provides a glimpse into an alternate location of practice of refugee protection that has been in existence in the global sphere for several decades.

Despite non-accession to international refugee law instruments, states in the region have continued to provide protection in a way that is different from Western notions. For instance, from a contemporary sense, South Asian states are not new to widespread involuntary migration. The Partition of India in 1947, the Tibetan influx of the 1960s, the Bangladesh Liberation War of 1971 and the Sri Lankan Civil War that ravaged the island nation for close to three decades from the 1980s have all led to massive human mobility within the region. South Asian states are also experiencing an influx of Rohingya refugees from Myanmar in the recent years. However, the relegation of South Asia's contextual specificities by a hegemonic refugee framework has resulted in the establishment of domestic ad-hoc solutions to respond to periods of human mobility in the region. In addition to the constraints and imprecisions inherent in the international refugee regime, nuancing refugeehood in countries that do not possess a national asylum law is more complex.

4.2 *Case Law and Jurisprudence*

An examination of such ad-hoc solutions also points to the fact that countries like India have developed policies, complex case laws and jurisprudence to tackle issues of refugee protection despite not being signatories to the 1951 Convention. For instance, the case of *Khudiram Chakma v. State of Arunachal Pradesh*[78] emerged from a writ petition filed by Chakmas, a group that sought refuge in India from Bangladesh in 1964. Under a resettlement scheme drawn up in 1996, the Chakmas were resettled to the North East Frontier Agency, which later became the Indian state of Arunachal Pradesh. However, a few years later, local villagers lodged complaints against the Chakmas alleged that they were encroaching on their lands and dealing with arms and ammunition.[79] An enquiry into the matter led to the Chakmas being vacated and moved back. The Supreme Court of India looked into Article 14 of the Universal Declaration

78 State of Arunachal Pradesh v. Chakma, (1994) 1 SCC 615 (India).

79 *Id.*

of Human Rights[80] to uphold the obligation of refugee protection. Though the principle of non-refoulement marks the foundation of the 1951 Convention Relating to the Status of Refugees, the Supreme Court of India in its own defiant sense held that Chakma refugees who had escaped persecution in Bangladesh could not be forcibly sent back due to the threats they may have faced. The Court further held that this could in turn result in the deprivation of their right to life under Article 21 of the Constitution of India.[81]

This approach was further reinforced in the case of *National Human Rights Commission v. State of Arunachal Pradesh*.[82] This emerged from a public interest petition, filed by the National Human Rights Commission and sought to enforce the rights, under Article 21 of the Indian Constitution.[83] The Court in the National Human Rights Commission case held that "[the] Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws."[84] The Court in this case also held that the "[s]tate is bound to protect the life and personal liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons … to threaten the Chakmas to leave the State," and included state institutions must take steps to "carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the state without being inhibited by local politics."[85] A brief analysis of case law and archival analysis provides an indication that an alternative regime of protection is noticeable in refugee protection in the region. The larger research agenda is to present findings on whether there is coherence in the way the refugee definition has been applied in alternate locations of practice like the subcontinent.

The case of *Ktaer Abbas Habib Al Qutaifi v Union of India* originated from a special civil application to the High Court of Gujarat, which sought direction to release two Iraqi asylum seekers from detention in the western Indian state of Gujarat.[86] The petitioners sought a stay of deportation, based on the principle of *non-refoulement*, and release from detention. The court noted the Supreme Court's ruling in *NHRC* that the Constitution guarantees certain

80 *Id.*

81 *Id.*

82 National Human Rights Commission v. State of Arunachal Pradesh and Another, (1996) 1 SCC 742 (India).

83 Article 21 of the Constitution of India states that *"No person shall be deprived of his life or personal liberty except according to procedure established by law."* INDIA CONST. art. 21.

84 *Id.*

85 *Id.*

86 Ktaer Abbas Habib Al Qutaifi v. Union of India, (1999) CRI LJ 919 (India).

fundamental human rights to non-citizens,[87] and held that '[the principle of non-refoulement] prevents expulsion [sic] of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[88] The court further stated that this aligned with 'Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India. All member nations of the United Nation [sic] including our country are expected to respect for international treaties and conventions concerning Humanitarian law'.[89]

4.3 *Alternate Locations of Practice as Moments of Resistance to Hegemony*

The colonial ethos that institutionalized international law is highlighted by Falk and others. They question the role of international law by highlighting the notion that mainstream scholarship on the subject has failed to include perspectives from the Global South.[90] They argue that many within the South and the rest of the world have viewed the Third World as an object of regulation and repression, that have continued to ignore traditional legal norms. International law has been instrumental in homogenizing all legal traditions which tend to subsume identities of those in the Global South.[91] They also point out that the role of resistance in shaping international law doctrines and institutions and the need to recognize its role are equally critical while discussing TWAIL.[92] This notion is reinforced by Upendra Baxi in his account of TWAIL. He argues that the "Third World emerges through practices of resistance and struggle" by those under the yoke of coloniality. He further argues that such practices "offer the best possible readings of the critique" of the faux universalization of international law practices.[93]

This article has set out to analyze the defiant role the subcontinent has played in developing alternate locations and mechanisms of practice by ignoring the hegemonic prescriptions that mandate specific standards for refugee

87 *Id.* at para. 10.

88 *Id.* at para. 18.

89 *Id.*

90 *See* Richard Falk et al., *Introduction*, *in* INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 1, 1 (Richard Falk et al. eds., 2008).

91 *See id.*

92 *See id.*

93 Upendra Baxi, *What may the 'Third World' expect from International Law?*, *in* INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 9, 10 (Richard Falk et al. eds., 2008).

protection. The standards outlined by the global refugee regime have not been representative of the South Asian experience; hence resistance to such mechanisms is significant in this discussion. Therefore, as Falk and others argue, "normative implications of taking the resistance of the 'Other', 'subaltern' seriously, are significant" in discussions on TWAIL.[94] Baxi argues that "Third Worldism as offers histories of mentalities of self-determination and self-governance, based on the insistence of the recognition of radical cultural and civilizational plurality and diversity."[95] Though a critical reading of the international refugee regime has been quite prevalent, incorporating Baxi's stance on civilizational plurality is not only a work in progress, but significant in the South Asian case. A holistic understanding of the role of the global refugee regime is possible with the help of writing into refugee history the postcolonial anxieties that continue to define South Asian identity and personhood. As Baxi argues Third Worldism offers some critical modes of reading the historical practices of resistance, "complicate … [the] reading[s] [of] … the normative" international law principles and "pose some profound challenges to the ['] legalised hegemony['] of the 'Great Powers' in relation to their [o]ther" or outlaw states.[96]

5 Conclusion

The contemporary foundation of refugeehood in South Asia was built on the origins of the Partition of India. The subsequent instability that led to involuntary migration across newly created international borders marks a significant aspect in history to map conceptualizations of refugeehood in the region. This enables an analysis on what the alternate conception is. But most importantly, articulating moments of defiance to the global refugee regime and exploring alternate locations of practice with respect to how forced migration is conceptualized and responded to could prove to be steps in the right direction in overcoming hegemonic approaches to how significant gaps in historical narratives and discourses on forced migration could be mitigated. The nature of international institutions in charge of refugee protection is intrinsically Eurocentric, a quality that is deeply entrenched in mechanisms and procedures adopted in their approach to their mandate. This demonstrates a need

94 Falk et al., *supra* note 90, at 4.
95 Baxi, *supra* note 93, at 10.
96 *Id.* at 11.

to project a sense of plurality in perspective with respect to what constitutes response to mobility as opposed to an assumed universality of the global refugee regime. The regime's grandiose aspirations of universalism present an illusory picture of accessible protection and humanitarianism, which makes all other forms of alternate histories, conceptions, locations of practice and discourses optional and relevant only as critiques to this larger hegemonic framework. Therefore, a few thoughts, as expressed in this article, on South Asia's place within forced migration studies are steps to initiate discussions on defiance to the global refugee regime.

Harmonizing UNCITRAL Model Law: A TWAIL Analysis of Cross Border Insolvency Law

Dwayne Leonardo Fernandes and Devahuti Pathak***

1 Introduction

Globalization has had a twofold effect on the world of commerce. On one hand, it has resulted in dramatic increases in the exchange of goods, services, factors of production, and the revenues that such forms of exchange generate.[1] This, advocates of neoliberalism have argued, has resulted in higher GDP, higher GDP Per Capita, and better standards of living the world over.[2] Sceptics remain unconvinced by these arguments due to the lack of concern for the distributional consequences of this newly created wealth.[3]

However, on the other hand, this increase in the volume of exchange across borders has led to an increase in the number of practical issues concerning juridical boundaries in the regulation of transnational commercial activity. In a global context characterized by the interplay between multilateral institutions[4] and sovereign nations, the former have devised global norms, authored by the Global North and premised on a normative belief in the efficacy of the market mechanism, to coordinate legislative and policy-making processes across the world.[5] Through the mechanism of conditionalities that, when imposed, permit or restrict access to financial resources, these multilateral agencies can pressurize nations into adopting these global norms.

* Independent Researcher.

** Advocate, High Court of Delhi and Supreme Court of India.

1 Esteban Ortiz-Ospina & Diana Beltekian, *Trade and Globalization*, OUR WORLD IN DATA (2018), https://ourworldindata.org/trade-and-globalization (last visited Oct. 20, 2019).

2 Jeffrey A. Frankel & David H. Romer, *Does Trade Cause Growth?*, 89 AMERICAN ECONOMIC REVIEW 379, 379–99 (1999).

3 Federico Cingano, *Trends in Income Inequality and Its Impact on Economic Growth* (OECD Soc., Emp't & Migration Working Paper, Paper No. 163, 2014), https://doi.org/10.1787/1815199X.

4 Dean Coldicott, *The World Trade Organization, Legitimacy and the Development Problematic*, WORLD BANK (2008), http://siteresources.worldbank.org/INTRAD/Resources/DColdicott.pdf.

5 Antony Anghie, *University and the Concept of Governance in International Law*, *in* LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES 20, 21–40 (Edward K. Quashigah & Obiora C. Okafor eds., 1999).

 | DOI:10.1163/9789004437784_006

This imposes exogenously determined constraints on States, particularly in the Third World, and limits their ability to constitute their own institutional contexts and developmental path. Thus, one adverse product of the increased globalization of commerce and the multilateral institutions' push to impose its neoliberal agenda on the Global South is the intertwined problem of local governance and economic development in the Third World. One domain in which these issues find clear articulation is the case of cross-border insolvency law. In order to examine this case meaningfully, we situate our study in the context of the current debate surrounding India's attempts to reform their insolvency law through the introduction of the Insolvency and Bankruptcy Code, 2016 (hereafter, "the Code").

The attempts to reform this legislation is of particular interest due to the fact that the prevailing idea, emanating from and emphasized by the multilateral institutions, is the adoption of the United Nations Commission on International Trade Law (hereafter, the "UNCITRAL") Model Law on Cross Border Insolvency, 1997 (hereafter, "the Model Law").[6] The logical foundations of this idea rest on the universalist notion that differences between domestic legal systems and their associated modes of governance inhibit the costless movement of capital from one economy to another, and, as such, must be made more legible through the removal of such differences. Differences in modes of governance, in the neoliberal discourse of global governance, provide a disincentive to investors. This is due to the fact that they impose additional transaction costs,[7] the costs of using the domestic systems, on investors. And such increases in costs have an adverse effect on their willingness to invest.

The aim of our study is to examine the trajectories and implications of India's State Practices that began with the Eradi Committee Report, 2000, coursing through the judgement of *Macquarie Bank Limited v. Shilpi Cable Technologies Limited*, now culminated in the form of a draft chapter on cross border insolvency that adopts the Model Law based on the recommendations of the Report of the Insolvency Law Committee, 2018 (hereafter, "the Committee") which was constituted by the Ministry of Corporate Affairs, Government of India, and, most recently, the Cross Border Insolvency Protocol (hereafter, the "CBIP")

6 U.N. Comm'n on Int'l Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency 1997*, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (adopted May 30, 1997).

7 *Transaction Costs*, ENCYCLOPEDIA OF LAW & ECONOMICS (Boudewijn Bouckaert & Gerrit De Geest eds., 1998), https://reference.findlaw.com/lawandeconomics/literature-reviews/0740-transaction-costs.html (last visited Oct. 20, 2019).

that has emerged between the parties involved in the Jet Airways case.[8] A key element to understanding India's motivations in choosing to adopt the Model Law finds articulation in the rationale the Committee employed in arriving at its conclusions. Crucially, the Report also renders visible the gaps in their considerations and spaces where they have deferred to the wisdom of the Central Government in the exercise of its legislative functions.

By drawing on the Third World Approaches to International Law (hereafter, "TWAIL") as our interpretative lens, we seek to push back against the dominant thrust of the literature on cross border insolvency. The concern of this branch of scholarly activity has largely been about developing increasingly refined justifications for the adoption of the Model Law.[9] A glaring gap in the literature that emerges as a consequence of this pursuit is an examination, from the bottom up, of the domestic policy considerations that go into the process of adopting the Model Law.

By situating our study in the context of the political processes of the Indian State that are concerned with enabling the adoption of the Model Law, we provide a tangible ground on which to enter into the theoretical debate – universalism versus territorialism – that characterizes the diversity of experiences in the adoption of the Model Law. Harmonization, posited as a forward march towards the inevitable unification of cross border insolvency law, is challenged through a comparative analysis of the State Practices of countries from the Global North around their experience of adopting the Model Law.

The remainder of this article is divided into three additional sections. Section two lays out the entwined logic of cross border insolvency and harmonization by examining the rationale underlying the UNCITRAL's efforts to promote the adoption of the Model Law, introduces the concept of State Practices, and examines the State Practices that have gone into India's eventual decision to adopt the Model Law. Section three compares India's experiences with the experiences of common law countries from the Global North. Section four stands in lieu of a conclusion and offers a sense in which TWAIL allows interpretation of sections two and three.

8 Jet Airways (India) Ltd. v. State Bank of India, (2019) C.P. (IB)-1968/(MB)/2019 (India).

9 An article by Mohan is a representative example. S. Chandra Mohan, *Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?*, 21 INTERNATIONAL INSOLVENCY REVIEW 199, 211 (2012).

2 The Rationale Underlying the Model Law and India's State Practices

In the wake of the Second World War, nations of the Third World began to cast aside their colonial yoke and won the right to self-government. At the international stage, this resulted in a chorus of articulation of Third World sovereignty that looked for, and eventually, found succour in the internationalism of the United Nations. The United Nations did not remain unmoved to these global changes and responded to them by amending its organizational form. One response, in the domain of international trade and investment, was the development of the UNCITRAL. The UNCITRAL was established as a subsidiary body of the United Nations General Assembly and was tasked with the facilitation of international trade and investment. It is important to note that the official mandate of the UNCITRAL is "*to promote the progressive harmonization and unification of international trade law*."[10] It pursues this goal by organizing itself into Intergovernmental Working Groups that examine various facets of international trade law that develop "*conventions, model laws, and other instruments that address key areas of commerce, from dispute resolution to the procurement and sale of goods*."[11]

It is important for us to distinguish between the two goals of the UNCITRAL – harmonization and unification. The former is considered a short-term goal characterized by greater coordination between States. The latter is a longer-term goal characterized by the removal of substantive differences, the source of variations in cost, in the legal modes of governance. The logic of harmonization, in essence, rests on a foundation of cost efficiency, that is, cost minimization.[12] It espouses a belief that greater international trade can be produced by reducing the disincentives to international trade, namely, high transaction costs. Harmonization, in general, is seen as having "mythical qualities"[13] that is synonymous with harmony. As a result, the absence of harmonization is seen

10 Provisional Agenda of the Sixty-Second Session, U.N. Doc. A/62/100, at 146 (2007).

11 *Frequently Asked Questions – Mandate and History*, UNCITRAL, https://uncitral.un.org/en/about/faq/mandate_composition/history (last visited June 9, 2019).

12 Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AMERICAN JOURNAL OF COMPARATIVE LAW 683 (1992).

13 Martin Boodman, *The Myth of Harmonization of Laws*, 39 THE AMERICAN JOURNAL OF COMPARATIVE LAW 699 (1991).

as disharmony, an undesirable quality whose undesirableness is seen as self-evident. Thus, harmonization is a panacea to the ills of negative externalities and high transaction costs.[14]

In order to coherently understand the implications of the UNCITRAL's commitments to the principles of coordination and the forms that State Practices take in the domain of international trade law, namely, harmonization and unification, we will examine the idea of State Practices in the context of a Third World nation – India. We will do so in relation to India's decision to accept provisions of the Model Law as the operational framework for cross border insolvencies. The objective of this exercise is simple – an examination of State Practices that gives us a sense of the local priorities, including substantive aspects of local law, that are kept aside in order to meet international obligations.

2.1 *The Concept of State Practices*

International law is comprised of generally accepted laws, treaties between nations, and Customary International Law. Within this framework, the concept of State Practices is a constituent element of customary international law. State Practices are characterized by the general practices that States engage in that can be accepted as law. This includes actions of the State, its constituent bodies – executive, judiciary, legislature – and the individuals that occupy positions within them that keep with the international obligations of the State to the global community at large.[15]

2.2 *The Adoption of the Model Law as State Practice*

To understand why the adoption of the Model Law is contingent on State Practices, we may observe a debate on the form in which cross border insolvency law should be harmonized by Member States:

> The Commission recalled the considerations by the Working Group on Insolvency Law on whether the text should be prepared as model legislation or as a treaty or model treaty (NCN.9/422, paras. 14–16, and NCN.9/433, paras. 16–20). The prevailing view was that the text should be completed as model legislation, the form that, because of its flexibility, was best suited to induce in the shortest possible time harmonized

14 Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What, and How?*, 60 ANTITRUST LAW JOURNAL 593 (1991).

15 A. Mark Weisburd, *The International Court of Justice and the Concept of State Practice*, 31 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 295 (2009).

> modernization of national laws in the area of cross-border insolvency, an area of law that hitherto had not been subject to unification.[16]

Owing to the fact that the Commission, as quoted above, decided to structure the Model Law as a Model Treaty, the burden of keeping in line with these obligations rested on how States chose to incorporate them into their local laws. In the context of India, this can be seen by examining three key pieces- the Eradi Committee Report, 2000, the judgement of *Macquarie Bank Limited v. Shilpi Cable Technologies Limited*, and the draft chapter on cross border insolvency that adopted the Model Law[17] based on the recommendations of the Report of the Insolvency Law Committee, 2018 (hereafter, "the Committee") which was constituted by the Ministry of Corporate Affairs, Government of India.

2.3 *India's State Practice*

2.3.1 Eradi Committee Report, 2000

The Central Government constituted a High-Level Committee on Law Relating to Insolvency of Companies to examine and suggest reforms in the existing laws associated with winding up proceedings of companies and in the various stages of insolvency proceedings of companies to make them more efficient in tune with international best practices. This Committee recommended that part VII of the Companies Act, 1956 should be suitably amended to incorporate provisions of the Model Law in regard to issues on cross border insolvency.

2.3.2 Macquarie Bank Limited v. Shilpi Cable Technologies Ltd., AIR 2018 SC 498

In this judgment, the Supreme Court of India interpreted (i) Section 9 (3)(c) of the Code which states that the operational creditor shall, along with the application for initiating insolvency proceedings, furnish a copy of the certificate from the Financial Institutions confirming that there is no payment of an unpaid operational debt by the corporate debtor; and (ii) Section 8(1) under which demand notice of an unpaid operational debt is to be issued in favour of the foreign creditor.

---

16 *Report of the United Nations Commission on International Law on the work of its thirtieth session*, ¶ 26, 13 U.N. Doc. A/52/17 (1997), *reprinted in* [1999] 28 United Nations Commission on International Trade Law: Yearbook 7, U.N. Doc. A/CN.9/SER.A/1997.

17 Ministry of Corp. Affairs, Report of Insolvency Law Committee on Cross Border Insolvency 5 (Oct., 2018) (India), http://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.

The Supreme Court held that the certificate to be issued under Section 9(3)(c) of the Code is a procedural provision, which is directory in nature, and also held that a fair construction of Section 9(3)(c), in the spirit sought to be achieved by the Code, leads to a conclusion that certification by a Financial Institution cannot be construed as a threshold bar or a condition precedent to initiating insolvency proceedings. The Supreme Court further read Section 30 of the Advocates Act with Sections 8 and 9 of the Code, together with the Adjudicatory Authority Rules and Forms, and concluded that a notice sent on behalf of an operational creditor by a lawyer would be valid, proper, and "*in order*." Thereby the Supreme Court enabled greater access to foreign operational creditors not associated with financial institutions under the Code to file applications and pursue insolvency proceedings in India.

2.3.3 Report of the Insolvency Law Committee, October 2018[18]

This report examined the problem of unintended exclusions under Section 29A of the Insolvency and Bankruptcy Code (that disqualify certain persons from submitting resolution plans under the Code), the treatment of homebuyers as financial creditors, promotion of the resolution process through re-calibration of voting thresholds for different decisions of the committee of creditors, etc. The Committee deliberated on cross border insolvency and the insufficiency of Sections 234 and 235 of the Code, dealing with cross border insolvency in a separate chapter, though reserving exhaustive recommendations on the same.[19]

The Committee, in this report, noted that there was a need for a comprehensive examination of the cross border insolvency framework in India in comparison with other international jurisdictions and hence reserved the recommendations vis-à-vis a cross border insolvency to beyond the purview of this present report.[20]

2.3.4 Report of Insolvency Law Committee on Cross Border Insolvency, October 2018

Thus, pursuant to the March 2018 Report, the Insolvency Law Committee took a deep dive into the state of regulation of cross border insolvency in India and examined existing provisions in various statutes relating to cross-border insolvency, in light of adopting the Model Law. The Committee limited "application

18 *Id.* at 1.
19 *Id.* at 5.
20 *Id.* at 13.

of cross-border insolvency provisions to corporate debtors" and considered further extending them to individual companies and enterprise groups.[21]

The October 2018 Report sets out some key "advantages" to adopting the Model Law,[22] like increasing foreign investment by aligning India with global best practices in insolvency resolution and liquidation having a flexible option in light of differences among national insolvency laws, and it is viewed as a mode of resolution that protects public interest, gives priority to domestic insolvency proceedings over foreign proceedings, and enables a mechanism of co-operation among courts that would facilitate faster and effective conduct of concurrent proceedings.[23]

This October 2018 report has broadly inspected various provisions of the UNCITRAL Model Law and categorically commented on the extent to which such provisions may or may not be adopted, including various extents of modification in adoption. A brief examination of the same is as follows:

The Report firstly identifies the four main principles on which the Model Law is based:

1) Access: In order to enable foreign insolvency professionals and foreign creditors access domestic courts, the Committee, *inter alia*, recommends that the Central Government ought to devise a mechanism to enable such access in the current legal framework in India.
2) Recognition: The Committee identifies the system of recognition of foreign proceedings and relevant remedies by domestic courts as provided in the Model Law. The Committee recommends such recognition based on the determination of the debtor's Centre of Main Interests (hereafter, the "COMI"). Relief is recommended to be provided for likewise, on whether the foreign proceeding is a main or a non-main proceeding.
3) Cooperation: The Committee, recognising the still-evolving infrastructure of Adjudicating Authorities under the Insolvency and Bankruptcy Code (hereafter, "the IBC"), has restricted and subjected the cooperation between Adjudicating Authorities and foreign courts to guidelines to be notified by the Central Government in due course, while retaining the Model Law provisions on *inter se* cooperation among Adjudicating Authorities, foreign insolvency professionals, and foreign and domestic insolvency professionals.

21 *Id.* at 6.
22 *Id.* at 5.
23 *Id.* at 5–6.

4) Coordination: The Committee also makes recommendations on how to coordinate insolvency proceedings when they have been initiated domestically and/or when a foreign insolvency proceeding has already commenced.[24]

Through this Report, the Insolvency Committee, having assessed existing jurisprudence related to cross border insolvency as well as existing material "issued by the UNCITRAL for guidance on the Model Law," recommended adoption of the Model Law in the form of a draft cross border insolvency legislation (hereinafter, also referred to as "Draft Legislation" or "Draft Part Z").[25] Additionally, the Committee also recommended how various other amendments may be necessitated in subordinate legislations in light of this Report.

In fact, the Report suggests amendments to the IBC to streamline inclusion of the proposed chapter to it. These include, *inter alia*, amending Sections 234 and 235 to exclude corporate debtors, the inspection powers of the IBBI for adjudication of penalties against foreign representatives, amendment of section 375(3)(b) of the Companies Act, etc.[26]

2.3.5 Cross Border Insolvency Protocol, 2019

On the 17th of April, 2019, Jet Airways (India) Ltd. (hereafter, "Jet Airways") stopped operations after it ran out of cash needed to continue its services and was unable to persuade its lenders to finance further expenditure.[27] Subsequently, its largest lender – the State Bank of India – initiated insolvency proceedings against Jet Airways under the IBC. Concurrently, the Dutch Court Administrator began insolvency proceedings against Jet Airways towards debts owed to lenders operating in Dutch jurisdiction.

The National Company Law Tribunal in India had initially declared all other foreign insolvency proceedings against Jet Airways null and void. However, the National Company Law Appellate Tribunal recognized the Dutch proceedings on the condition that no assets of Jet Airways in Netherlands be sold.[28] The various lenders in Jet Airways proceedings agreed to the adoption of a

24 *Id.* at 14.

25 *Id.*

26 *Id.* at 14–15.

27 Anirban Chowdhury, *Jet Airways Bankrupt, Goyals under Scanner, Scion Floats New Company*, THE ECONOMIC TIMES, Sept. 11, 2019, https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/jet-amid-clouds-naresh-goyals-son-launches-travel-tech-startup/articleshow/71058293.cms.

28 Press Trust of India, *NCLAT Asks Jet Airways IRP to Cooperate with Dutch Court Administrator*, THE ECONOMIC TIMES, Sept. 4, 2019, https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/nclat-asks-jet-airways-irp-to-cooperate-with-dutch-court-administrator/articleshow/70975541.cms?from=mdr.

CBIP,[29] due to the absence of well-defined cross border insolvency norms and delays in the adoption of the recommendations of the report discussed in the earlier Section, so as to ensure the efficient resolution of the proceedings.

Keeping in mind the Model Law, the CBIP acknowledges that Jet Airways, an Indian company, had interests in various jurisdictions around the world. However, the Centre of Main Interest of the Airline was in India and, as such, Indian proceedings would assume priority over all others and the Dutch Court Administrator would defer pronouncement of any judgement until its Indian counterpart did so. Further, parties to the CBIP agreed that they would uphold principles of coordination, communication, information, and data sharing in such a way as to maximize the value of assets of Jet Airways.

Section 13 of the CBIP articulates that the principle of comity will hold for all Courts involved in the proceedings and that the agreement to cooperate will, in no way, undermine the powers each of these Courts have in their respective jurisdictions.[30]

3 Interpretation of the Model Law in Other Common Law Countries

The Model Law is interpreted differently in different countries. Australia enacted the Model Law by annexing the Model Law as Schedule 1 to the Cross-Border Insolvency Act 2008 (Cth) (the Act) and applied it to both corporate and personal insolvency. The Model Law in Australia does not attempt to amend or insert itself into the domestic law relating to insolvency. The Model Law was enacted in Canada by "An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada 2005, which inserted the same into Part IV of the [Companies Creditors Arrangement Act, RSC 1985, c C-36] in respect of large corporate insolvency, and restructuring and by inserting it into Part XIII of the [Bankruptcy and Insolvency Act, RSC 1985, c B-3] in respect of other insolvencies."[31]

New Zealand enacted the Model Law with minor variations as Schedule 1 to the Insolvency (Cross-border) Act 2006 by making specific provisions in relation to the High Court of New Zealand acting in aid of overseas courts by enabling it to refer to "any document that relates to the Model Law on

29 *Supra* note 8, at 2.

30 *Id.* at 17.

31 NEIL HANNAN, CROSS-BORDER INSOLVENCY: THE ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW 16 (2017).

Cross-Border Insolvency that originates from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law on Cross-Border Insolvency."[32] Likewise, the Insolvency Act 2000 in the UK authorized the introduction of the Model Law with or without modification by regulation. The Secretary of State enacted an amended form of the Model Law in the Cross-Border Insolvency Regulations 2006.[33]

Chapter 15 of the United States Bankruptcy Code was introduced in October 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, to govern transnational bankruptcies and is applicable to insolvency of a debtor that conducts its business in more than one country, based on the UNCITRAL Model Law. Section 1501(a) of the United States Bankruptcy Code enumerates the five objectives of Chapter 15: (1) cooperation between United States courts and foreign courts; (2) "greater legal certainty for trade and investment"; (3) "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor"; (4) "protection and maximization of the value of the debtor's assets"; and (5) "facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment." Chapter 15, moreover, requires American courts to "cooperate to the maximum extent possible with a foreign court or a foreign representative." Chapter 15 further defines a foreign main proceeding as one pending in the country where the debtor has their Centre of Main Interests, and contemplates that to be the place of its incorporation, unless the contrary is proved. If the debtor is able to obtain recognition of a foreign main proceeding, then the bankruptcy law of its home country will govern the insolvency proceedings.[34]

Cross border insolvency issues are governed by applying two theories: the universality theory and the territoriality theory. The universality theory states that all assets of the insolvent company are administered by the court in the place of incorporation, and if assets of the company are located in foreign jurisdictions, then the court has the power to apply for assistance from courts in those jurisdictions. The territoriality theory instead recommends separate proceedings to be conducted for each country, and under the theory, no recognition is given to proceedings that have taken place/completed in

32 Insolvency (Cross-border) Act 2006, s 5(1) (N.Z.).

33 HANNAN, *supra* note 31, at 15–20.

34 John J. Chung, *Chapter 15 of the Bankruptcy Code and Its Implicit Assumptions Regarding the Foreign Exchange Market*, 76 TENNESSEE LAW REVIEW 74 (2008).

other jurisdictions. The Model Law adopts the universality approach to cross border insolvency.[35]

Our focus in this section is on two aspects: (i) Recognition of Foreign Proceedings and Relief and (ii) Concurrent Proceedings.

3.1 *Extent of Adoption/ Rejection/ Modification of the Model Law in Chapter Z*

Examination of the nature of recommendations of the Insolvency Committee towards adoption of the Model Law is pivotal for the purpose of this article. Thus, we do not simply summarise the recommendations made in this article but instead examines these suggestions in light of the nature of adoption of the Model Law from a TWAIL perspective. These recommendations, broadly, are as follow:

3.1.1 General Provisions

The Committee recommended that the Draft Legislation be extended to corporate debtors only since Part III of the IBC has not yet been notified, and the Committee felt that extending cross border insolvency provisions of the Model Law to individuals and partnership firms would be premature. However, the Committee suggested extending the definition of a "corporate debtor" to foreign companies as well to enable access to creditors and insolvency professionals registered outside of India to avail remedies in India.[36]

The Committee proposed that with the introduction of cross border insolvency provisions, there arose a need to modify provisions in the Companies Act, 2013 (hereafter, also referred to as the "2013 Act") that deal with insolvency of foreign companies, such as Section 375(3)(b) that provides for winding up of companies (that may include foreign companies) for insolvency. The proposed solution for the existence of such parallel provisions was for the Ministry of Corporate Affairs to analyse the efficacy of retaining these provisions in the 2013 Act. The Committee further suggested transferring proceedings pending under the provisions of the 2013 Act for adjudication under the Code to avoid duplicating judicial efforts.[37] Further, the Committee recommended amending Sections 234 and 235 of the Code to apply only "to individuals and partnership

35 Rachel Morrison, *Avoiding Inherent Uncertainties in Cross-Border Insolvency: Is the UNCITRAL Model Law the Answer?*, 15 QUEENSLAND UNIVERSITY OF TECHNOLOGY LAW REVIEW 103 (1999).

36 MINISTRY OF CORP. AFFAIRS, *supra* note 17, ¶ 1.2.

37 *Id.* ¶ 1.3.

firms" since the proposed insolvency provisions related to corporate debtors are proposed in these recommendations.[38]

The Committee recommended that, initially, the Model Law would be adopted with legislative reciprocity, and thereafter, on a need basis, the reciprocity requirement would be diluted. The Committee further clarified that the reciprocity requirement was only proposed to govern the cross border insolvency provisions and not the rest of the provisions under the IBC, meaning that "foreign creditors will still be able to … participate in … proceedings under the Code regardless of reciprocity."[39] However, the Committee refrained from explaining or even highlighting what it meant when it said that the reciprocity requirement may be diluted "based on the experience in implementation of the Model Law and development of adequate infrastructure in the Indian insolvency system." The meaning of "development of adequate infrastructure in the Indian insolvency system" is vague and difficult to assess. Does it mean a more robust implementation of the Model Law? In which case, the proposal to dilute reciprocity is incongruous.

Likewise, the Committee restricted changes to the definition of "establishment" as provided under Clause 2(c) of Draft Part Z to accommodate the meaning on "establishment" as provided in the Model Law (where limited recognition as a "foreign non-main proceeding" has been given to proceedings in countries where the debtor has an "establishment").[40] Further, in terms of having a three month look back period for determining existence of an establishment, the Committee suggested not building the same into the draft law, as adequate space has been provided to the courts in the Model Law to prevent forum shopping by defining the term *economic activity* with the adjective *non-transitory*. This was also considered in light of the fact that the three month look back period may not be earmarked "from the date of filing insolvency application in the foreign non-main proceeding." This is because it is possible that, even by such time, "no economic activity exists".[41]

As such, in terms of having a threshold for recognition, the Committee suggested that "the definition of non-main proceedings be limited to proceedings in countries where the corporate debtor has an "establishment"" and left out the requirement of a COMI.[42] The Committee suggested retaining "the definitions of "foreign court," "foreign representative," "foreign proceeding,"

38 *Id.* ¶ 1.10.
39 *Id.* ¶ 1.8.
40 *Id.* ¶ 2.3.
41 *Id.* ¶ 2.7.
42 *Id.* ¶ 2.8.

"foreign main proceeding," and "foreign non-main proceeding" as … provided in Article 2 of the Model Law."[43]

Finally, the Committee recommended that, "in line with the spirit of the Model Law, the language used in Article 6 of the Model Law must be retained as it is, including usage of the term "manifestly"" in the context of interpreting public policy exceptions restrictively.[44] The Committee recommended that in a situation where the Adjudicating Authority is of opinion that there is likelihood of public policy violation, a notice ought to be sent to the Central Government. The Committee further recommended that "it may be advisable to include a provision akin to [S]ection 241(2) of the 2013 Act to empower the Central Government" to take cognizance of an action that "would be manifestly contrary to public policy in India" in case notice "has not been issued by the Adjudicating Authority."[45]

3.1.2 Recognition of a Foreign Proceeding and Relief

The Committee recommended that Articles 15 and 16(1) and (2) of the Model Law "may be adopted in the present [D]raft Part Z."[46] The Committee suggested that "adoption of a look-back period of three months while enforcing the COMI presumption would be suitable in the Indian context."[47] This recommendation is in light of "the EU Insolvency Regulation (Recast) that seeks to prevent … forum shopping by" presuming that a corporate debtor's registered office is its COMI "inapplicable in cases where the corporate debtor has relocated its registered office to" a different country within the three-month period prior to requesting for insolvency proceedings.[48]

The Committee for the same reasons adopted the two factors provided in the UNCITRAL Guide to Enactment to identify the COMI, namely, "(a) where the central administration of the debtor takes place; and (b) which is readily ascertainable by creditors," in order to "assist the Adjudicating Authority" to identify "the COMI when it does not coincide with the registered office."[49] The decision of recognition was suggested to be made within a timeline of 30 days by the Adjudicating Authority with a possible extension of another 30 days, in view of Article 17 of the Model Law.[50] In Australia and the UK, it must be

43 *Id.* ¶ 2.9.
44 *Id.* ¶ 3.4–3.7.
45 *Id.* ¶ 3.7.
46 *Id.* ¶ 10.5.
47 *Id.* ¶ 11.4.
48 *Id.*
49 *Id.* ¶ 11.5.
50 *Id.* ¶ 12.3.

shown on readily ascertainable evidence that the COMI is in another State. In the USA and Canada, the court requires evidence to be put before it as to the COMI, and if any of that evidence is inconsistent with the rebuttable presumption, then the court must make its own determination on the evidence presented.[51]

The Federal Court of Australia considers various factors while deciding the COMI, such as the place of residence of the directors, place of incorporation, place of all executive decisions, place of residence of the majority of employees, place of residence of the company's creditors, place where majority of the company's assets are located, etc. On the other hand, Canada does not have a definition or reference to an establishment nor does it state that the debtor having a COMI as a necessary element of a non-main proceeding in their adoption of the Model Law.[52]

New Zealand adopted the meaning of COMI as considered in the definition of the same in the EC Regulation, and "the court referred to the Virgos-Schmidt Report which describes a place of operations as one from which economic activities are exercised on the market (that is externally), whether the said activities are commercial, industrial or professional to give meaning to COMI."[53] The English Court of Appeal, on the other hand, has relied upon the Virgos-Schmidt report to state that it depends on 'whether it has in that other country a "place of operations" where non-transitory "economic activity" is carried on with human means and goods.'[54] The court further stated that the determination of a COMI will require more than simply having a branch office or place where the debtor is located.[55]

Further, the United States Bankruptcy Court found that an establishment ought to constitute a 'seat for local business activity' for the debtor. Terms such as "operations" and "economic activity" require demonstration of a local effect on the marketplace, more than mere incorporation, record-keeping, and simple maintenance of property therein.[56] Both the UK and the USA may have put their domestic interests above the desire to achieve a degree of uniformity in the recognition of foreign insolvency and reconstruction proceedings between States. In doing so, they are evidently working against the universalist principles they espouse and upon which the Model Law is based.[57]

---

51 HANNAN, *supra* note 31, at 113.
52 *Id.* at 49.
53 *Id.*
54 *Id.* at 50.
55 *Id.*
56 *Id.* at 52.
57 *Id.* at 53.

The Model Law provides for two kinds of relief-interim relief and relief on recognition. However, the Code gives no power to the Adjudicating Authority to provide interim relief in CIRP. Hence, "the Committee recommended that power to grant interim relief may not be provided in the [D]raft Part Z."[58] This was done particularly in light of India's experience with the Sick Industrial Companies (Special Provisions) Act, 1985 that "set a precedent for misuse of interim relief."[59]

In terms of mandatory relief, the recommendation was that a moratorium in the nature of what is provided in Article 19 be implemented in the Draft Part Z, applicable in "recognition of a foreign main proceeding," along with "the exceptions and limitations applicable to the moratorium in Section 14 of the Code."[60] This is interesting from a TWAIL perspective, as Article 20 of the Model Law calls for "an automatic moratorium … on recognition of foreign main proceedings" which aligns with the overall approach, as recognized in this Report, of an overarching significance given to "domestic insolvency proceedings of the enacting country over foreign proceedings."[61]

The Committee suggested that "a provision similar to Article 20(3) of the Model Law may be inserted in the [D]raft Part Z to ensure" the subsistence of "the right to commence individual actions or proceedings against the corporate debtor to the extent necessary to preserve claims against the corporate debtor," in the face of automatic moratorium.[62] Likewise, the Committee suggested complete adoption of Article 20(4) of the Model Law which provides that the moratorium as given in Article 20(1) does not impede the right of the creditor to initiate domestic insolvency proceedings.[63]

However, when it comes to discretionary relief and the scope of the adjudicating authority to assess the same, the Committee makes a cautionary case, and suggests that the same ought to be exercised in light of the moratorium provisions under Section 14 of the Code.[64] Similarly, the Committee recommended not adopting Article 21(d) that provides "examination of witnesses and collecting information and evidence regarding the debtor," since such power is already available to the insolvency professional under the Sections 18, 29, and 23 of the Code.[65]

---

58 MINISTRY OF CORP. AFFAIRS, *supra* note 17, ¶ 13.4.
59 *Id.* ¶ 13.4.
60 *Id.* ¶ 14.3.
61 *Id.* ¶ 14.2.
62 *Id.* ¶ 14.6.
63 *Id.* ¶ 14.7.
64 *Id.* ¶ 14.9.
65 *Id.* ¶ 14.10.

While discarding the provisions for discretionary relief (Article 21) and interim relief (Article 19), the Committee sounded a note of caution for them to be exercised sparingly, and recommended full implementation of "Article 22 of the Model Law [that] provides courts with the flexibility to impose conditions on the reliefs" provided under Articles 19 and 21 and/or their modification and termination.[66]

The Model Law proposes prioritizing relief given in terms of insolvency proceedings against the debtor in foreign main proceedings over foreign non-main proceedings. This hierarchy of relief as provided to foreign main and non-main proceedings, as a general principle of the Model Law, has been accepted by the Committee without any deviation.[67]

Article X of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments ("MLREIJ") provides that the relief available under the corresponding legislation in the State enacting Article 21 of the Model Law includes recognition and enforcement of an insolvency judgment includes recognizing and enforcement of such judgment.[68] The Committee agreed with this proposition and suggested including enforcement of judgments as a relief as well, "if deemed fit by the Adjudicating Authority."[69] However, the Committee reserved discussion on the legislative changes pertaining to this for a later stage.[70]

Article 23 of the Model Law describes actions that are detrimental to creditors. Article 23(2) for instance states that when the foreign proceeding is a foreign non-main proceeding, the court ought to ascertain that the action relates to assets that, under the law of that particular state, should be administered in the foreign non-main proceeding.[71] The Committee recognizes this as another remedy on recognition of foreign proceedings, in addition to Articles 20 and 21 of the Model Law. However, the UNCITRAL Guide to Enactment left it open to domestic legislation to deal with, resolve, and implement such remedy "to foreign representatives to initiate avoidance actions on recognition of foreign proceedings."[72] As such, the Committee concluded that Article 23 of the Model Law may be adopted as recommended in the Model Law, subject to the access available to the foreign representative according to

66 *Id.* ¶ 14.12.
67 *Id.* ¶ 14.14.
68 *Id.* ¶ 14.15.
69 *Id.*
70 *Id.*
71 *Id.* ¶ 15.4.
72 *Id.* ¶ 15.3.

paragraph 15.4 of the Report (that invokes adopting a conservative approach in providing access to foreign representatives till "*the development of infrastructure regarding cross-border insolvency in India*" and development of subordinate legislation), with the date of commencement of insolvency proceedings for obtaining the relief against avoidance actions being the date of opening of the foreign proceedings.[73]

In the UK, a foreign representative has the power to issue proceedings under various Sections of the UK Insolvency Act, however, leave of the court must be granted to the foreign representative by an appropriate court before issuing any proceedings where there is a concurrent British insolvency proceeding ongoing pertaining to the same debtor, as provided under Article 23(6) of the Model Law.[74] Likewise, in the USA, the foreign representative, once recognized, is granted power to bring proceedings in a separate proceeding issued under another chapter of the Bankruptcy Code which is pending.[75]

"No amendments of substance have been made to [Article 19] in Australia, New Zealand, or the UK. However, New Zealand imposes an obligation upon the foreign representative to notify the debtor in a prescribed form as soon as practical after an interim relief has been granted."[76] There is also no corresponding provision in the Canadian legislation; however, the court can apply legal and equitable rules regarding recognition of foreign insolvency proceedings. The US also provides that such interim relief cannot be granted if it might enjoin a police, regulatory or government unit. Further, the grant of relief is subject to the "standards procedures and limitations applicable to injunctions."[77] However, the US Bankruptcy Court has held that the standards for obtaining a preliminary injunction under Section 1519(e) are not the same as those for obtaining an injunction in adversary proceedings and that the court has the power to grant stays under Section 362 of the Bankruptcy Code.[78]

An interesting application of Articles 21(3) and 22(2) of the Model Law was when the English High Court granted conditional interim relief staying the enforcement of a lien in England pending the determination of an appeal over the quantity of the creditor's provable debt in Korea, the place of the main proceeding, upon an undertaking being given that the fact that the creditor who appeared in the Korean proceeding would not create an estoppel in

73 *Id.* ¶ 15.5.
74 HANNAN, *supra* note 31, at 143.
75 *Id.* at 144.
76 *Id.* at 125.
77 *Id.* at 124.
78 *Id.* at 125.

England to the creditor enforcing its lien, as decided in *Norden v. Samsun Logix Corporation* [2009] BPIR 1367.[79]

3.1.2.1 *Australia*

In Australia, the Full Federal Court held that where there is, "an application for assistance from a prescribed country under the statutory provisions in respect of personal bankruptcy, recognition must be granted."[80] The court does not have discretion in this regard. Thus, recognition is given to a foreign representative who seeks to collect the debtor's property and then distributes it according to law. The Federal Court had also indicated that an application for recognition to be made under the Model Law was not necessary, instead an application for assistance can be made under the provisions of the Bankruptcy Act 1966 (Cth) (Bankruptcy Act).[81] Hence, this suggests that the domestic law that allows the court to extend assistance to other foreign courts in nominated countries exercising bankruptcy jurisdiction takes precedence over similar provisions in the Model Law. The Cross-Border Insolvency Act 2008 (Cth) Sections 29–30 provide that to the extent the provisions of the existing law are inconsistent with the Model Law, the provisions of the Model Law shall prevail.

The common law principles of comity apply in Australia, according to which foreign representatives can be recognized. When a foreign court requests for recognition of a foreign representative to whom the Model Law does not apply or who cannot avail him/herself of the statutory rights of recognition, the principle of comity will allow a court to do the same. If recognition is granted under either Statute or the principles of comity, the court has a discretion to decide what assistance it will give to that court or representative.[82]

3.1.2.2 *Canada*

In Canada, Section 48(4) of the CCAA states that seeking an order for recognition under the provisions of its enactment of the Model Law does not prevent proceedings from being commenced under the BIA or the Winding-up and Restructuring Act. Likewise, Section 284 of the BIA provides that nothing in that Act prevents a court from applying the legal and equitable rules governing recognition of foreign insolvency orders on applications of any foreign representative or other interested party.[83] However, in Canada, there is no provision

79 *Id.* at 134.
80 *Id.* at 24.
81 *Id.*
82 *Id.*
83 *Id.* at 29.

for the adequate protection of creditors and interested persons within the meaning of Article 22 of the Model Law. Section 187(5) of the Canadian BIA allows a court to review, rescind or vary any order made under its bankruptcy jurisdiction.[84]

3.1.2.3 *New Zealand*

"Section 8 of the Insolvency (Cross-border) Act 2006 of New Zealand provides that if a court of another country in an insolvency proceeding makes an order requesting the aid of the High Court in respect of a person to whom Article 1 of the Model Law applies, the High Court may if it thinks fit, act in aid of and be auxiliary to that court in insolvency proceedings."[85] The Companies Act 1993 similarly allows an application to be made to the High Court for the liquidation of a foreign company; such applications are not contingent upon the debtor having assets in New Zealand.[86]

3.1.2.4 *United Kingdom*

The default position for English Courts is that the principle liquidation would be deemed to be the place of incorporation of the company. It is often argued, for instance in *Schmitt v Deichmann* [2012] 2 All ER 1217, 1232–3 [62–65], that under the English common law, the courts "have the power to assist foreign courts to help a foreign representative, pursuant to the principles of comity[, by acts] pursuant to domestic English law."[87]

The Insolvency Act 1986 (UK Insolvency Act) provides that a court having insolvency jurisdiction shall assist the court of another relevant jurisdiction as prescribed. This power has been said to be limited to requests made by foreign court where there is an insolvency proceeding on foot in that State. Common law allows the court to apply either the UK domestic law or the law of the relevant State and apply the rules of private international law. Moreover, nothing in such provisions restricts UK courts' powers to request assistance from a foreign court which is derived from the common law. Hence, recognition can occur as a result of an application under the Model Law or by way of a letter of request from a foreign court.[88]

84 *Id.* at 141.
85 *Id.*
86 *Id.* at 29.
87 *Id.* at 31.
88 *Id.* at 32–33.

3.1.2.5 *USA*

The common law position of comity has been recognized by the courts in the USA as early as 1883 and continues to apply. Chapter 15 of the Bankruptcy Code recognizes that the granting of recognition and any assistance given following recognition of a foreign proceeding must be consistent with the principles of comity. Where the party seeking recognition of a foreign judgment is not a foreign representative, then the relevant State law principles for recognition apply. However, the issue that persists is whether by using the word 'comity' in Chapter 15, it is a core matter under the Bankruptcy Code and whether the US Bankruptcy Court can continue to apply the common law principle of comity since the introduction of the Model Law provisions in Chapter 15.[89] In the USA, Article 22 permits a court to grant relief under Articles 19 or 21 "only if the interests of creditors and other interested parties, including the debtor are sufficiently protected" within the meaning of Section 111 USC § 1522(a)(2012).[90]

3.2 *Concurrent Proceedings*

The Committee examined Articles 28 and 29 and the lowering of the threshold of commencement of insolvency proceedings by enabling initiation of proceedings after recognition of a foreign main proceeding, provided "the debtor has assets in the enacting country."[91] The Committee read Article 28 with Article 29 to analyse that the subsistence of a foreign proceeding will not impede commencement of a local insolvency proceeding, in other words, both the foreign and domestic insolvency proceedings can take place concurrently, subject to the possible modifications of relief as provided in Article 29. The Committee thus recommended that Articles 28 and 29 of the Model Law may be included in the Draft Part Z.[92]

Similarly, the Committee suggested adoption of Article 30 of the Model Law that provides for "modification of relief given under Articles 19 or 21 for" the purpose of "coordinating multiple foreign proceedings."[93] However, the Committee excluded references to interim relief as the same has not been recommended by the Committee earlier in their Report.[94]

Article 30 deliberates how the pursuit of concurrent insolvency proceedings may culminate in receiving claims in more than one jurisdiction, hence this article seeks to address such double award of claims due to concurrent

89 *Id.* at 40.
90 *Id.* at 141.
91 Ministry of Corp. Affairs, *supra* note 17, ¶ 17.2.
92 *Id.* ¶ 17.4.
93 *Id.* ¶ 17.5.
94 *Id.* ¶ 17.4.

proceedings through effective coordination among jurisdictions. This is provided for, with the just exception that the creditor will not be denied a higher benefit in one jurisdiction if she has received part of a claim of a "lower value in a prior insolvency proceeding" against the same debtor.[95] The Committee recommended the adoption of Article 30 in the Draft Part Z with two modifications: "(i) in case of a domestic insolvency resolution process in India, the payment to creditors would be according to the resolution plan and (ii) in case of liquidation under the code, the bar for comparison ought to be creditors of the same class and ranking."[96]

Article 31 of the Model Law provides a presumption of insolvency "on recognition of a foreign main proceeding … for the purposes of … initiation of a domestic insolvency proceeding."[97] However, a test of insolvency already exists in India under Section 4 of the IBC whereby, the CIRP can be initiated on default of INR 1 lakh.[98] As such, the Committee suggested that in place of a test of insolvency, "recognition of a foreign main proceeding may be presumed" as "proof of default by the corporate debtor" to initiate CIRP.[99]

And finally, the Committee recommended adding a proviso that for a default to be deemed within the meaning of Part II of the IBC "based on recognition of a foreign main proceeding, the foreign main proceeding recognized in India" ought to have been "initiated based on an inability to pay debts or pursuant to a state of insolvency."[100] This was suggested in light of how certain jurisdictions recognise foreign proceedings though they do not strictly adhere to the definition of a "foreign proceeding."[101]

The UK interpretation of Article 28 does not restrict representatives to deal only with the local assets within Great Britain once a foreign main proceeding is recognized. In the USA, however, the subsequently appointed domestic representative is restricted to deal only with the assets which are within the territorial jurisdiction of the USA and not subject to the control of the foreign proceedings. Likewise, in the UK, when domestic proceedings are issued after recognition of a foreign proceeding, the court ought to review any leave granted to the foreign representative under Article 23 to issue proceedings for recovery of antecedent transactions.[102]

---

95 *Id.* ¶ 18.2.
96 *Id.* ¶ 18.3.
97 *Id.* ¶ 19.1.
98 *Id.*
99 *Id.* ¶ 19.2.
100 *Id.* ¶ 19.3.
101 *Id.*
102 HANNAN, *supra* note 31, at 160.

In UK, USA, and Australia, where two foreign non-main proceedings are recognized, the court is required to modify its relief in the first proceeding to facilitate coordination between the two proceedings. The Canadian legislation, however, does not deal with this possibility.[103]

4 Lessons – In Lieu of a Conclusion

The bulk of our article, sections two and three, consists of demonstrating the nature of State Practices emanating from India, a Third World nation. The emphasis on the Third World status of India has not been emphasized in our earlier sections. This is deliberate. It serves the function of demonstrating the actions that the Indian State has taken. This section is an attempt to analyse and interpret the aforementioned actions in the context of the TWAIL.

There is considerable literature, from earlier in the TWAIL movement, that define what TWAIL is.[104] It was envisioned as a movement that is political in nature but its politics was informed by a small set of coordinates[105] that allow it to navigate the illegitimacies of international law.[106] These coordinates are; that historical context matters, that both the Global North and its institutions move, that the South moves as well, and that attempts to struggle against the stranglehold of multilateral institutions are multiple.[107] TWAIL is a response to the methodological syncretism that dominated Hans Kelsen's thinking. In this, the law and the authors of it are not to be bothered by the context, social, political, economic, or otherwise, in which a set of rules operate but rather emphasize the doctrinal integrity of the rules themselves.[108]

Our second section demonstrates two major conclusions. The first of these two conclusions is that a historical inquiry into India's State Practices demonstrates that it has acted in a manner that, over time, has enabled the adoption of the Model Law (see Section 2. C. 1). By highlighting the role that a sound cross border insolvency law has in the context of a growing modern economy, the Eradi Committee opened the doors for the adoption of Model

103 *Id.* at 163.

104 Makau W. Mutua, *What Is TWAIL?*, 94 Proceedings of the American Society of International Law Annual Meeting 31 (2000).

105 Luis Eslava, *TWAIL Coordinates*, Critical Legal Thinking (Apr. 2, 2019), http://criticallegalthinking.com/2019/04/02/twail-coordinates/ (last visited Oct. 9, 2019).

106 Mutua, *supra* note 104, at 31.

107 *Id.*

108 Research Handbook on Global Justice and International Economic Law 251 (John Linarelli ed., 2013).

Law in India. The *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.* judgment enabled the foreign operational creditors to pursue insolvency proceedings in India. And the Report of the Insolvency Law Committee, 2018 finally recommended that the Model Law be adopted. Our second conclusion is that India's State Practices are operating within the context of a discourse emanating from the multilateral institutions.[109] This conclusion is consistent with Antony Anghie's analysis.[110] Third World States such as India operate within the "rules of the game"[111] set by these multilateral institutions[112] that has far exempted the scope their Articles of Agreement envisioned for them.[113]

Through mechanisms like the Ease of Doing Business Rankings that promise increases in foreign investment, a country like India is incentivized to reform its local laws in a manner conducive to the adoption of Model Law and its ilk. India's surge in the most recent rankings can directly be attributed to this induced reform.[114] The problem with this is that it remains consistent with what Anghie demonstrates is the positivist core of international law that is inherently to blame for the violence committed against the inhabitants of the Third World due to the colonial origins of international law.[115] This legitimation of violence against the peoples of the Third World brutally underscores the idea that sovereignty is the preserve of European nations and not the Third World.[116]

As such, an adherence to the International Monetary Fund and its directives and the other softer forms of global governance makes the Third World state impotent[117] and, therefore, constrains its ability to execute its basic responsibilities towards its citizens' interests.

---

109 Antony Anghie, Imperialism, Sovereignty and the Making of International Law 251 (2004).

110 Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 New York University Journal of International Law & Politics 243 (2000).

111 Douglass C. North, *Institutions, Ideology, and Economic Performance*, 11 Cato Journal 477 (1992).

112 Anghie, *supra* note 110, at 243.

113 *Id.* at 272.

114 ET Bureau, *Ease of Doing Business: India among 20 Most Improved Countries*, The Economic Times (Sept. 29, 2019), https://economictimes.indiatimes.com/news/economy/indicators/ease-of-doing-business-india-among-20-most-improved-countries/articleshow/71357483.cms.

115 Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harvard International Law Journal 1, 7 (1999).

116 *Id.*

117 Boris Kagarlitsky, The Twilight of Globalization: Property, State and Capitalism 14 (2000).

In our third section, through an exhaustive comparative exercise, we arrive at one crucial conclusion. First World common law countries, when compared with a Third World common law country like India, display differences in a manner in which they have chosen to adopt the Model Law based on domestic priorities. As India has not yet adopted the Model Law, there are important lessons for India to keep in mind when the legislature takes over the process of formally adopting the Model Law. Among the most significant domestic priorities to keep in mind is the fact that the largest source of credit, that is – financial capital, are the Public Sector Banks[118] which are in the midst of a crisis of bad loans.[119]

Thus, India's adoption of the Model Law should reflect the realities of domestic credit markets lest we end up throwing the baby out with the bathwater when adopting the Model Law. More fundamentally, this would serve as an effective response to one of international laws' inherent tendencies – a regime bias against the Third World nations[120] and thus confront the existing state of global power relations.[121] This confrontation matters.

Too often, international law operates in a manner that works against an idea of the common good.[122] That is, international law promotes too narrow an understanding of best interests while simultaneously working to undermine alternative conceptions of the idea of the good life.[123] Examining international law at one of its peripheries in the Third World enables us to carry stories from these peripheries,[124] identify its discontents,[125] and to confront its hegemonic

118 *See India Commercial Guide*, International Trade Administration, https://www.export.gov/article?id=India-Banking-Systems (last visited Oct. 9, 2019).

119 *See* Ministry of Finance, *Bank NPA*, Press Information Bureau, Government of India (June 24, 2019), https://pib.gov.in/newsite/PrintRelease.aspx?relid=190704 (last visited Oct. 9, 2019).

120 Usha Natarajan et al., *Introduction: TWAIL – On Praxis and the Intellectual*, 37 Third World Quarterly 1946, 1954 (2016).

121 Gus Van Harten, *TWAIL and the Dabhol Arbitration*, 3 Trade, Law and Development 131 (2011).

122 Michael Fakhri, *Questioning TWAIL 's Agenda*, 14 Oregon Review of International Law 1, 4 (2012).

123 B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 Melbourne Journal of International Law 499 (2007).

124 Michael Fakhri, *Law as the Interplay of Ideas, Institutions, and Interests: Using Polyani* (*and Foucault*) *to Ask TWAIL Questions*, 10 International Community Law Review 464 (2008).

125 Balakrishnan Rajagopal, *International Law and Its Discontents: Rethinking the Global South*, 106 Proceedings of the Annual Meeting (American Society of International Law) 176 (2012).

discourses. Moreover, it enables us to reframe the discourse of the outcomes produced by international law in the context of the Third World and, therefore, opens up conversations on global responsibility that are crucial to a fuller realization of justice.[126]

126 Kwadwo Appiagyei-Atua, *Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review*, 8 African Journal of Legal Studies 209, 235 (2015).

Use of Force as Self Defence against Non-State Actors and TWAIL Considerations: A Critical Analysis of India's State Practice

*Srinivas Burra**

1 Introduction

International law on the use of force has been prominently a contentious issue in the last two decades. This has been mainly after the September 11 incident. International law dealing with the use of force, principally on self defence, is sought to be applied in contexts which arguably are contentious. While Article 2(4) of the United Nations Charter prohibits the use of force in international law, Article 51 provides for the possibility of the use of force as self defence. In accordance with the text of Article 51, it is generally understood that the use of force as self defence takes place by a state against another state. However, in the recent instances of uses of force, it is asserted that this right of self defence can be invoked by a state while using force against non-state actors (NSAs) operating from another state. States which are in favour of the invocation of Article 51 in such situations of force argue that if the state from which the non-state actor is operating is unwilling or unable to deal with the non-state actors, the state which is the target of the non-state actor has the right of self defence. This argument is primarily relied upon by a few states while justifying their use of force in the recent past. These states mainly include the United States of America, the United Kingdom, Turkey and France, who claimed individual self defence against the Islamic State (IS).[1]

* Assistant Professor, Faculty of Legal Studies, South Asian University, New Delhi, India. A draft of this article was presented at the 2019 DILA-KOREA International Conference on 'Asian State Practice in International Law from the Lens of TWAIL', November 7–9, 2019, Seoul, Korea. The author thanks the participants of the conference for their valuable comments on the draft. He also thanks DILA-KOREA for facilitating his participation in the conference.

1 Permanent Rep. of the United States to the U.N., Letter dated September 23, 2014 from the Permanent Rep. of the United States to the United Nations addressed to the U.N. Secretary-General, U.N. Doc. S/2014/695 (Sept. 14, 2014); Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Identical letters dated November 25, 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland addressed to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014); Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated September 7, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United

 | DOI:10.1163/9789004437784_007

India has been involved in situations of use of force on several occasions. Some of these situations clearly amounted to armed conflicts. However, there were instances in which India resorted to the use of force against another state, primarily claiming to target non-state actors. In such situations, it was not clearly argued that the use of force was in self defence against non-state actors. At the same time, it was also not clearly spelt out as to what it would amount to. This article analyses India's state practice in relation to the use of force that it resorted to targeting the non-state actors on the territory of another state. It intends to critically evaluate India's positions to draw conclusions on the issue of the right of self defence against NSAs operating from the other state. It explores India's position at the multilateral fora on the issue. It also evaluates TWAIL methodological insights in relation to the right of self defence against NSAs. Part one of this article provides the introduction. Part two deals with the legal framework on the use of force. This is followed by part three which provides India's state practice in relation to its use of force against the non-state actors on the territory of another state. Part four presents Third World Approaches to International Law (TWAIL) reflections on the issue. Part five provides the conclusion.

2 Legal Framework on the Use of Force

The use of force in interstate relations is arguably comprehensively dealt with by the United Nations Charter. While prohibiting the use of force by states under Article 2(4), the UN Charter permits and regulates it in certain circumstances as exceptions to the general prohibition. Therefore, the general prohibition is qualified with two exceptions. One exception is in the form of permissibility of the use of force as self defence under article 51 of the UN Charter. The other exception is the use of force with the authorization of the United Nations Security Council (UNSC) which is governed by Article 42 of the Charter. Self defence under Article 51 primarily visualizes the immediate response of a state which is the victim of an armed attack. This immediate response may take the form of individual or collective self defence. Article 42

Nations addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 8, 2015); Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015); Permanent Rep. of France to the U.N., Identical letters dated September 8, 2015 from the Permanent Rep. of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015).

of the UN Charter envisages institutional collective security response to the use of force against a state in violation of Article 2(4).

2.1 *Legal Framework on the Right of Self Defence*

In the last two decades, mainly from the September 11, 2001 incident, there has been an increase in scholarly discussions as well as contending views of states on the scope of Article 51 of the UN Charter. These views also relate the discussion to the resolutions adopted by the UN Security Council after the September 11 incident. These resolutions mainly are: 1368 and 1373 adopted in September 2001 which make references to self defence.[2]

This discussion is different from others that took place on the right of self defence that revolved around anticipatory self defence and issues relating to necessity and proportionality. The present discussion is related to the scope of Article 51, focusing on when the right of self defence of a state gets activated. In other words, whether the right of self defence can be exercised by a state even if the armed attack comes from NSAs. This discussion continues to attain significance in the context of fights against terrorism and other non-state actors. This situation is experienced in the contexts of Syria, Libya, Yemen and other similar contexts. The possibility or impossibility of exercising the right of self defence by the victim state, the state which is the target of an armed attack, is evaluated from various standpoints. These standpoints can be categorized as textual analysis, customary international law perspective and analysis based on state practice. The justification for the use of force as self defence against NSAs is predominantly justified, not from political or policy considerations, but in formalist legal analyses. The first proposition of this justification comes from the interpretation of the existing law. This justification primarily relies on the interpretation of Article 51 of the UN Charter. Proponents on the view

2 S.C. Res. 1368, (Sept. 12, 2001). In its preamble, it includes the following paragraphs:
"*Determined* to combat by all means threats to international peace and security caused by terrorist acts,
Recognizing the inherent right of individual or collective self-defence in accordance with the Charter".
Similarly, in S.C. Res. 1373, (Sept. 28, 2001), the Security Council includes:
"*Reaffirming* its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001, …
Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,
Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),
Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts".

that the right of self defence exists against non-state actors operating from another state even if the second state does not have any role to play in the activities of the NSA, rely on the text of Article 51 as one of their arguments. They argue that the textual reading of Article 51 does not support the view that the armed attack should come from states only. They underline that the text of Article 51 does not refer to the attack from the state but merely refers to armed attacks. The relevant part of Article 51 states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".[3]

The text only says "if an armed attack occurs" without specifying that the armed attack should come from a state. Therefore, it is argued that the armed attack can also come from NSAs and that what matters is the armed attack and not the attacker.[4] Hence, it is argued that "the focus of Art. 51 refers to the definition of the term 'armed attack'. If states suffer from an armed attack in the sense of Art. 51 they have the right to react by using force irrespective of who is the author of the attack, a state or a non-State actor".[5] While the merit of this argument is drawn from the plain text of the provision, it apparently fails to take into consideration the nature of Article 51 in the Charter framework. Article 51 provides an exception to the general prohibition on the use of force as provided in Article 2(4) of the Charter. The text of this provision clearly provides for the prohibition of use of force in interstate relations. This provision reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[6]

It states that all members of the UN refrain from the threat or use of force. Article 3, which talks about states that are original members, and Article 4, which talks about the new members, refer only to states. Therefore, the prohibition of the use of force in the Charter framework is confined only to interstate use of force. When the prohibition of the use of force is confined only to interstate relations, an exception in the form of Article 51 cannot be read as covering the use of force involving NSAs. There is a logical link between the

3 U.N. Charter art. 51.

4 Karin Oellers-Frahm, Article 51 – *What Matters is the Armed Attack, not the Attacker*, 77 ZaöRV 49 (2017).

5 *Id.*

6 U.N. Charter art. 2, ¶ 4.

legal prohibition and an exception to such prohibition because the confines of the latter are determined by the scope of the former. An exception always needs to be read and understood only in relation to the general framework because the latter decides the contours of the former. Thus, in the present case as Article 2(4) prohibits interstate use of force, the exception in the form of Article 51 needs to be understood only within those confines. Understanding Article 51's reference only to armed attack as inclusive of armed attack from NSAs would at best remain as speculative, devoid of coherence enshrined in the UN Charter. On the other hand, reading the scope of Article 51 in relation to Article 2(4) and therefore understanding it as governing only the interstate use of force is very much within the framework of the UN Charter. For a longer period, there was no doubt that the reference to armed attack was understood as armed attack between states only.[7] Despite this logical coherence between Article 2(4) and 51, there are arguments that the drafters introduced a disconnect between the two provisions. This view underlines that if the drafters wanted a logical continuity between Article 2(4) and 51, they would have constructed Article 51 similar to Article 2(4) which prohibits the threat or use of force against the territorial integrity or political independence of any state.[8] Therefore, they are of the view that though Article 51 provides an exception to Article 2(4), its nature is different as it encompasses non-state actors also. This argument, however, does not overcome the logical incoherence it leads to in the larger Charter framework.

2.2 *Right of Self Defence and Customary International Law*

The second important proposition that is relied upon to justify the right of self defence against NSAs is based on customary international law. It is argued that there exists the right of self defence as part of customary international law. This argument attempts to establish customary international law on the right of self defence of a state against non-state actors operating from a third state based on the text of Article 51 itself. It is argued that Article 51 does not create the right of self defence and only recognises an existing right. The

7 However, there is a contrary opinion that "[w]hether States can use force in response to armed attacks by non-State actors operating from abroad is not a new issue that suddenly became relevant after 9/11. Views have no doubt changed over the past fifteen years, as more States have invoked, or endorsed the invocation of, self-defence against attacks by non-State actors. However, change is more gradual than is usually admitted". Christian J. Tams, *Embracing the Uncertainty of Old: Armed Attacks by Non-State Actors Prior to 9/11*, 77 ZaöRV 61, 61 (2017).

8 Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 The American Journal of International Law 62, 64 (2005).

text of Article 51 states that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence".[9] It is, therefore, argued that the reference to "inherent" in this provision is underlined as basis to argue that customary international law on self defence exists. Here, "inherent" is seen as referring to the existence of the right of self defence outside the UN Charter framework, and the Charter only recognises that right. Outside the UN Charter, the right of self defence exists in the form of customary international law. This view further argues that the right of self defence under customary international law is more expansive than the right of self defence under Article 51. This expansive right also includes the use of force against non-state actors.

This argument is traced to the origins of customary international law on self defence which relies on the Caroline incident.[10] The Caroline incident took place in the nineteenth century. It mainly involved the United Kingdom and the United States. It was related to the territory of Canada, which was still under British control. Those who were fighting against the British rule were involved in violent resistance. This violent resistance sometimes took place from the territory of the United States. In 1837, the Caroline, a vessel used in one such attack, was destroyed by the United Kingdom while it was in US waters. The content of the exchanged letters between Daniel Webster, on behalf of the United States, and Lord Ashburton, on behalf of the United Kingdom, arguably laid the foundation for establishing the law on self defence. In his letter to Webster, offering an explanation for the United Kingdom's use of force against the Caroline while it was on US waters, Ashburton declares that there are "possible cases in the relations of nations, as of individuals, where necessity … may be pleaded".[11] In response, Webster, while admitting the existence of self defence, notes that it is "confined to cases in which the 'necessity of that self defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'".[12] Along with those conditions that are necessary before self defence became legitimate, the action taken in pursuance of it

9 U.N. Charter art. 51.

10 For details of the Caroline incident, *see* Michael Wood, *The Caroline Incident-1837*, *in* The Use of Force in International Law: A Case-Based Approach 5 (Tom Ruys et al. eds., 2018); *see also* Abraham Sofaer, *On the Necessity of Pre-Emption*, 14 European Journal of International Law 209, 214–20 (2003).

11 John Basset Moore, 2 A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements 411 (1906).

12 *Id.* at 412.

must not be unreasonable or excessive, "since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it".[13]

The Caroline incident is not only taken as the beginning of the right of self defence under customary international law, but it is also being relied upon for the purpose of justifying the use of force as self defence against NSAs. It is argued that the use of force by the United Kingdom was against the acts of NSAs, though it took place in United States waters. Thus, it is argued that the use of force as self defence against NSAs was not opposed then and continues to be part of contemporary customary international law understanding of the right of self defence.[14] This expansive understanding of customary international law on self defence has its conceptual and historical gaps. One conceptual gap arises from the fact that the comprehensive prohibition of the use of force took place only in 1945 as part of the UN Charter. Prior to that, states had fairly established freedom to go to war, with certain restrictions at some historical junctures, for example, in the form of just war. When we relate this historical position with the right of self defence, it becomes difficult to establish the scope of customary international law on the right of self defence. This is so, because it is difficult to imagine the right of self defence when there was no clear legal prohibition on the use of force. When there was no clear prohibition of use of force, there was no legal necessity to prove that the right of self defence existed for the purpose of legally justifying the use of force.

Thus, it is underlined that that the exchange between Ashburton and Webster in the Caroline incident which constituted customary international law is filled with inconsistencies. This fairly coherent assertion views that "For the exchange in the *Caroline* incident to be formative (or even reflective of a rule of customary international law), the resort to force had to be prohibited under international law *at the time of the exchange*. Self-defence, as an exception *under international law*, can only make sense where *international law* prohibits the resort to force".[15] Another important historical as well as conceptual issue is that a single incident involving only two states led to the formation of a rule of customary international law. The critics rightly argue that it "is not clear how the *Caroline* incident meets the requirements of a widespread or general practice. Those advancing it as constitutive of customary international law make no attempt to show acquiescence on the part of other States. The

13 Malcom N. Shaw, International Law 1131 (6th ed. 2008).

14 Elizabeth Wilmshurst, *The Chatham House Principles of International Law of the Use of Force in Self-Defense*, 55 International and Comparative Law Quarterly 963 (2006).

15 Dire Tladi, *The Use of Force in Self-Defence Against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?*, *in* 1 Self-Defence Against Non-State Actors 14, 53 (Ann Peters & Christian Marxsen eds., 2019).

Caroline incident does not meet the generally accepted criteria for customary international law".[16]

As explained above, the right of self defence of a victim state against NSAs operating from other states is sought to be justified on several grounds. Two important grounds for justification, as discussed above, are based on the textual position of Article 51 and the customary law nature of the right of self defence beyond the UN Charter. To give further clarification to the existing legal understating, clarificatory principles were also adopted in scholarly engagements. These are: the Chatham House Principles,[17] the Leiden Policy Recommendations[18] and the Bethlehem principles.[19]

In light of the arguments in favour of and against the right of self defence against non-state actors operating from the territory of another state even without latter's involvement, there has also been a focus on the state practice to justify respective contending views. One of the reasons for focusing on state practice is to establish whether that state practice led to an "agreement between the Parties" regarding the interpretation of Article 51 of the UN Charter.[20] There is a possibility of a state practice being elicited from collective actions. It is equally important to know individual state actions for the purpose of understanding the formation of customary international law and/or for the purpose of looking at the emergence of an agreement between the parties through subsequent practice. With that purpose, the next section will deal with India's state practice with respect to the use of force as self defence, particularly in situations in which it was involved in such use of force.

3 India's State Practice

In the backdrop of the above discussed legal doctrinal position, the following discussion evaluates India's state practice. India was involved in several armed conflicts of interstate nature since its independence in 1947. It was

16 *Id.*

17 Wilmshurst, *supra* note 14.

18 Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-Terrorism and International Law*, 57 Netherlands International Law Review 531 (2010).

19 Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 American Journal of International Law 770 (2012).

20 Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) ("[A]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

involved in wars since 1948–49 till now with its neighboring states, particularly Pakistan and China.[21] However, for the purpose of the present chapter, the focus will be on recent military use of force, particularly after the September 11, 2001 incident. The reason behind choosing this timeline is based on the view that the question of the right of self defence against non-state actors gained prominence mainly after the September 11 incident. Though the discussion around the scope of Article 51 and the right of self defence existed prior to the September 11 incident, post this incident, discussions shifted towards self defence against non-state actors operating from another state. It is also important that the UN Security Council adopted resolutions 1368 and 1373 after the September 11 incident. Often, there have been allegations and counter allegations between India and Pakistan on cross border terrorism. Sporadic incidents of military firing are reported, however, without leading to any war-like situation. There are also instances of the use of force with an intensity and reach which would amount to the use of force in the legal sense. There are two instances of such nature which took place in 2016 and 2019. These two incidents will be evaluated for the purpose of assessing India's state practice in relation to the right of self defence against non-state actors.

3.1 *Surgical Strikes of 2016*

On September 29, 2016, the Director General of Military Operations (DGMO) of India announced that the Indian army had conducted surgical strikes against terrorist launch pads across the Line of Control (LoC). LoC separates the Indian-and-Pakistani-administered Kashmir.[22] The DGMO, in his briefing, contextualised the circumstances in which the surgical strikes were conducted. He informed that "there has been continuing and increasing infiltration by terrorists across the Line of Control in Jammu & Kashmir".[23] He further said that this infiltration "is reflected in the terrorist attacks at Poonch and Uri on 11 and 18th of September respectively. Almost 20 infiltration attempts have been foiled by the Indian army successfully during this year. During these terrorist attacks and infiltration attempts we have recovered items including Global Positioning Systems and stores which have had Pakistani markings".[24]

21 1948–49 India-Pakistan war, 1962 Sino-Indian War, 1965 India–Pakistan, 1971 India–Pakistan War and 1999 India–Pakistan War. For a discussion, *see* Rudra Chaudhuri, *War and Peace in Contemporary India*, 42 JOURNAL OF STRATEGIC STUDIES 567 (2019).

22 In India, Indian administered Kashmir is known as Jammu and Kashmir. Pakistan administered Kashmir is known in Pakistan as Azad (free) Kashmir.

23 *Transcript of Joint Briefing by MEA and MoD*, MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA (Sept. 29, 2016), https://www.mea.gov.in/media-briefings.htm?dtl/27446/Transcript_of_Joint_Briefing_by_MEA_and_MoD_September_29_2016.

24 *Id.*

The DGMO also informed that the matter was taken up with Pakistan in the past, and despite their urging "that Pakistan respect its commitment made in January 2004 not to allow its soil or territory under its control to be used for terrorism against India, there have been no letup in infiltrations or terrorist actions inside our territory".[25] Therefore, they went for this surgical strike. He further underlined that "[b]ased on very credible and specific information which we received yesterday that some terrorist teams had positioned themselves at launch pads along the Line of Control with an aim to carry out infiltration and terrorist strikes in Jammu & Kashmir and in various other metros in our country, the Indian army conducted surgical strikes last night at these launch pads".[26] The DGMO of India was clear that the strikes specifically targeted terrorists. He said that the "operations were basically focused to ensure that these terrorists do not succeed in their design of infiltration and carrying out destruction and endangering the lives of citizens of our country".[27] He further informed that "significant casualties have been caused to the terrorists and those who are trying to support them. The operations aimed at neutralizing the terrorists have since ceased".[28]

Some argued that India could justify its surgical strikes as self defence under international law.[29] Another view justified surgical strikes on two counts. It was observed that:

> [I]t was clearly an act of self-defence after the Uri attack; the Charter does not say the right of self-defence must be exercised within a prescribed time limit. Secondly, it was not legally speaking, an armed action in the territory of another state. After the partition of the Subcontinent, Pakistan signed a Standstill Agreement with the ruler of the state of Jammu and Kashmir. India did not sign this instrument. Pakistan launched an invasion of Kashmir despite having signed the Agreement. The ruler asked for India's help, but India refused in the absence of the ruler concluding the Instrument of Accession with India. Only after he did so did India rush troops to repulse the invaders. Thus, India's military action in 1947 and

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *See* Yateesh Begoore, *An Apologia for India's "Surgical Strikes" Against Terrorist Groups: The Conflict with Pakistan*, JUST SECURITY (Oct. 7, 2016), https://www.justsecurity.org/33409/apologia-indias-surgical-strikes-pakistan/; George Thomas, *The Right to Self-Defence*, THE INDIAN EXPRESS (Oct. 24, 2016, 1:04 PM), https://indianexpress.com/article/opinion/columns/surgical-strikes-kashmir-loc-indian-army-jihadist-terrorism-3099392/.

> all subsequent such actions, including the one on September 29, were within our own territory and hence not a violation of international law.[30]

Some other scholarly writings also favored categorizing Indian surgical strikes as justifiable under the right of self defence. They argued that "self defence" provides a solid international legal basis for Indian surgical strikes against terror launch pads, bases, or even states that provide 'aid' and 'assistance' to such terror groups to play havoc in India".[31] There was an opinion favoring its justification under customary international law, rather than under Article 51 of the UN Charter, as the right to use armed force pre-emptively for self-defense.[32] Another view attempted to justify it under the "unable and unwilling" version of right of self defence. It argued that:

> [U]nder the emerging customary status of the 'unable and unwilling' test, India has the right to use force in self-defence based on Pakistani inability or failure to prevent its territory from being a safe haven for terrorists. This is perhaps India's strongest argument not only to justify the strikes, but also to legitimately sanction further use of force against terrorists in Pakistan.[33]

There were also views which were skeptical of the justification of surgical strikes under self defence and under the unwilling or unable doctrine.[34]

While the scholarly and academic writings, mainly coming from India, attempted to justify the surgical strikes by India, they remained largely speculative or conjectural. The reason for this speculative or conjectural analysis can be attributed primarily to the imprecise legal position articulated by India. The

30 Chinmaya R. Gharekhan, *An Act of Self-Defence*, The Indian Express (Oct. 10, 2016, 1:12 pm), https://indianexpress.com/article/opinion/columns/surgical-strikes-india-pakistan-un-security-council-uri-attack-3074227/.

31 Bharat H. Desai, *Surgical Strikes' by India: Taking International Law Seriously*, 52 Economic and Political Weekly 23 (2017), https://www.epw.in/journal/2017/5/commentary/%E2%80%98surgical-strikes%E2%80%99-india.html.

32 Sanoj Rajan, *Legality of India's Pre-emptive Surgical Strike in PoK*, The Week (Oct. 10, 2016), https://www.theweek.in/content/archival/news/india/legality-of-india-pre-emptive-surgical-strike-in-pok.html.

33 Arpan Banerjee, *Indian Surgical Strikes: Accelerating the Emergence of Nascent Norms of Use of Force Against Non-State Actors*, Cambridge International Law Journal, (Sept. 6, 2017), http://cilj.co.uk/2017/09/06/indian-surgical-strikes-accelerating-the-emergence-of-nascent-norms-of-use-of-force-against-non-state-actors/.

34 Srinivas Burra, *How Does India's Decision to Conduct Surgical Strikes Hold Up in International Law?*, The Wire (Oct. 13, 2016), http://thewire.in/72642/does-indias-decision-to-conduct-surgical-strikes-hold-up-before-international-law/.

Indian government's justifications do not seem to fit within the framework of the UN charter or international law. Additionally, India did not report the matter to the UNSC. While the DGMO's statement suggests that India had taken up the matter with Pakistan, it does not clearly attribute the terrorist activities to Pakistan. However, it does seem to indicate that there was unwillingness on the part of Pakistan to control the activities of the terrorist groups. What is clear from the DGMO's statement is that India does not wish to contextualise the strikes within the international law framework as it only emphasises on terrorist activities and their infiltration without giving any legal justification for the military use of force. Pakistan insisted that surgical strikes did not take place. Both countries seem to imply that it did not amount to use of force under international law as they seem to be aware of the implications of such assertions. The important implication here is that any use of force under international law effectively amounts to an armed conflict between two states in the legal sense. This imposes responsibility on India to justify its actions in accordance with the UN Charter and further legal and diplomatic assertions from Pakistan.

3.2 *Balakot Strikes of 2019*

On February 14, 2019, more than 40 Indian Central Reserve Police Force (CRPF) personnel were killed in a suicide bomb in Pulwama of Jammu and Kashmir in India. Pakistani-based Jaish-e-Mohammed (JeM) reportedly claimed responsibility. This led to an escalated military situation between India and Pakistan. As a response, India sent its Air Force (IAF) aircraft into Pakistan on February 26, 2019, and claimed that they targeted a JeM training camp near Balakot in Pakistan. The Foreign Secretary of India stated that "India struck the biggest training camp of JeM in Balakot",[35] The statement stated:

> The Government of India is firmly and resolutely committed to taking all necessary measures to fight the menace of terrorism. Hence this non-military preemptive action was specifically targeted at the JeM camp. The selection of the target was also conditioned by our desire to avoid civilian casualties. The facility is located in thick forest on a hilltop far away from any civilian presence.[36]

35 *Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM Training Camp at Balakot*, MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA (Feb. 26, 2019), https://www.mea.gov.in/Speeches-Statements.htm?dtl/31089/Statement_by_Foreign_Secretary_on_26_February_2019_on_the_Strike_on_JeM_training_camp_at_Balakot.

36 *Id.*

The statement claimed that it was a non-military preemptive action targeted specifically at the JeM camp. Pakistan condemned[37] the airstrikes and called it as "Indian violation of Pakistan's sovereignty and territorial integrity". Pakistan also referred to it as "Indian aggression". On February 27, Pakistan declared that their "Air Force undertook strikes across Line of Control from within Pakistani airspace".[38] Pakistan further stated that their action was not retaliation to Indian belligerence and that its sole purpose was to demonstrate their "right, will and capability for self defence".[39] They said, therefore, they struck at a non-military target, avoiding human loss and collateral damage.[40] On the same day, India's Ministry of External Affairs (MEA) spokesperson, in a press briefing, confirmed that Pakistan has conducted airstrikes. He informed that India foiled Pakistan's attempts to target military installations and that one Pakistani fighter aircraft was shot down by the Indian Air Force. He further stated that India lost one MiG 21 and that a pilot was missing in action.[41]

Further, on the same day, it was informed in a press release by India that India condemned Pakistan's actions. The press release stated that "[t]he Acting High Commissioner of Pakistan was summoned … by MEA to lodge a strong protest at the unprovoked act of aggression by Pakistan against India …, including by violation of the Indian air space by Pakistan Air Force and targeting of Indian military posts".[42] The press release further stated, "[t]his is in contrast to the India's non-military anti-terror pre-emptive strike at a JeM terrorist camp in Balakot on 26 February 2019" and "Pakistan has acted with aggression against India".[43] These statements show that both sides were careful in legally categorizing their military actions. Both sides did not want to project their military actions as the use of force as a right of self defence. Thus, India stated that its use of force was non-military and that Pakistan wanted to show that it was

37 *Pakistan Strongly Protests Indian Aggression, Violation of Its Airspace and Promises a Befitting Response*, Ministry of Foreign Affairs, Government of Pakistan (Feb. 26, 2019), http://mofa.gov.pk/pakistan-strongly-protests-indian-aggression-violation-of-its-airspace-and-promises-a-befitting-response-2/.

38 *Pakistan Strikes Back*, Ministry of Foreign Affairs, Government of Pakistan (Feb. 27, 2019), http://mofa.gov.pk/pakistan-strikes-back-2/.

39 *Id.*

40 *Id.*

41 *Statement by Official Spokesperson on 27 February 2019*, Ministry of External Affairs, Government of India (Feb. 27, 2019), https://www.mea.gov.in/media-briefings.htm?dtl/31098/Statement_by_Official_Spokesperson_on_27_February_2019.

42 *Pakistan Demarched on the Act of Aggression Against India*, Ministry of External Affairs, Government of India (Feb. 27, 2019), https://www.mea.gov.in/press-releases.htm?dtl/31100/Pakistan_demarched_on_the_act_of_aggression_against_India.

43 *Id.*

their "right, will and capability for self defence".[44] However, both sides wanted to show that the other side's military action was an act of aggression.

Remarkably, India relied upon international humanitarian law in seeking the release of its pilot who went missing in action on February 27 and was captured by Pakistan. It stated:

> India also strongly objected to Pakistan's vulgar display of an injured personnel of the Indian Air Force in violation of all norms of International Humanitarian Law and the Geneva Convention. It was made clear that Pakistan would be well advised to ensure that no harm comes to the Indian defence personnel in its custody. India also expects his immediate and safe return.[45]

India's reference here to the Geneva Convention seemed to point to the third Geneva Convention dealing with the protection of prisoners of war. The Geneva Conventions, including the third Convention, would apply in situations of international armed conflicts. India's insistence on the Geneva Conventions implied the existence of an armed conflict. For the purpose of the application of the Geneva Conventions, there is a need for the existence of an international armed conflict in the present context. It is important to note that initially there was a general caution in terming the situation as attracting the *jus ad bellum* framework. However, with the capture of the Indian pilot by Pakistan, India insisted that he should be treated in accordance with the Geneva Convention.

On February 28, Mr. Imran Khan, the Prime Minister of Pakistan, announced that the Indian pilot would be released. Accordingly, on March 1, the Indian pilot was released and handed over by the Pakistani authorities to Indian authorities at the India-Pakistan border. Pakistan stated that "Prime Minister of Pakistan Mr. Imran Khan announced his return as a goodwill gesture aimed at de-escalating rising tensions with India".[46] This statement says that the release of the pilot was aimed at de-escalating the rising tensions and was not a response to the deescalated situation. It further stated that the pilot was "treated with dignity and in line with international law".[47] Reference to international law presumably indicates international humanitarian law

---

44 Ministry of Foreign Affairs, Government of Pakistan, *supra* note 38.

45 Ministry of External Affairs, Government of India, *supra* note 42.

46 *Return of Indian POW, Wing Commander Abhinandan Varthaman*, Ministry of Foreign Affairs, Government of Pakistan (Mar. 1, 2019), http://mofa.gov.pk/return-of-indian-pow-wing-commander-abhinandan-varthaman/.

47 *Id.*

and international human rights law. However, both states seemed to have preferred to maintain legal uncertainty.[48]

This military exchange is another instance to evaluate India's state practice on the issue of the use of force, particularly on the right of self defence. As a background to the use of force by India, the foreign secretary's statement underlined as follows: "Credible intelligence was received that JeM was attempting another suicide terror attack in various parts of the country, and the fidayeen jihadis were being trained for this purpose. In the face of imminent danger, a preemptive strike became absolutely necessary".[49] The words "imminent danger" and "preemptive strike" would suggest the involvement of the right of self defence. However, the statement does not expressly mention the same. India could have invoked the right of self defence by attributing the actions of JeM to Pakistan. However, attribution was avoided by India. Instead, the Foreign Secretary informed that "non-military preemptive action was specifically targeted at the JeM camp".[50] Reference to "non-military" must have been intended to convey that the attack only targeted the non-state actor on the territory of Pakistan and was not in violation of Pakistan's territorial sovereignty or political independence. However, this distinction does not serve much purpose as it does not help in creating any legal distinction between two positions. This was asserted by the International Law Association (ILA). The ILA observes in this regard that:

> Accordingly, using force within the territory of another State – even if the forcible measures are limited to strikes against a non-state actor – must be considered as within the notion of force as it exists in Article 2(4) of the Charter. Distinguishing between forcible measures *within* but not *against* the State does not, therefore, provide a solution for the *jus ad bellum* concerns. As a consequence, the use of force in such circumstances will not be lawful unless justified by self-defence or Security Council authorisation. By accepting that self-defence may be invoked against a non-state actor located in another State, even absent attribution to this other State, the ensuing non-consensual force would not be a violation of Article 2(4) as it would be a lawful exercise of an exception to the prohibition.[51]

48 *See* Srinivas Burra, *Legal Implications of the Recent India-Pakistan Military Standoff*, Opinio Juris (Mar. 19, 2008), http://opiniojuris.org/2019/03/08/legal-implications-of-the-recent-india-pakistan-military-standoff/.

49 Ministry of External Affairs, Government of India, *supra* note 35.

50 *Id.*

51 Int'l Law Ass'n, *Final Report on Aggression and the Use of Force*, at 16 (2018) (footnote omitted).

ILA favors the possibility of the right of self defence, without even attributing NSA actions to the host state. However, it is clear from India's positions that it did not want to call its military actions as self defence against the NSA activities. India could have claimed this position by attributing the actions of the JeM activities to the State of Pakistan. However, it did not mention it in any of its statements. It is also argued that there has been a growing view that even if a non-state actor's actions are not attributable to the host state, the victim state can exercise the right of self defence. It is argued that for this to happen, it should be established that the host state is "unwilling or unable" to deal with the activities of the non-state actor on its territory.[52] India does not rely on the "unwilling or unable" proposition, despite the fact that it clearly emphasises the unwillingness of Pakistan in dealing with the activities of the JeM. India asserts that:

> Information regarding the location of training camps in Pakistan and PoJK has been provided to Pakistan from time to time. Pakistan, however, denies their existence. The existence of such massive training facilities capable of training hundreds of jihadis could not have functioned without the knowledge of Pakistan authorities.
>
> India has been repeatedly urging Pakistan to take action against the JeM to prevent jihadis from being trained and armed inside Pakistan. Pakistan has taken no concrete actions to dismantle the infrastructure of terrorism on its soil.[53]

These statements reveal India's view that Pakistan was unwilling to take action against JeM activities on its territory. Going by India's description of the situation, this would have attracted the "unwilling or unable" test. However, India did not rely on the "unwilling or unable" test to justify its attack as self defence. This unwillingness to use this test gains importance in the light of the fact that India was informed of its right of self defence after the Pulwama suicide bombing by the United States. On February 15, 2019, there was a telephonic conversation between India's National Security Advisor Ajit Doval and the United States' National Security Advisor Amb. John Bolton. A readout of the telephonic conversation said, "Ambassador Bolton supported India's right to self-defence against cross-border terrorism. He offered all assistance to India to bring the perpetrators and backers of the attack promptly to justice.

52 *Id.* at 14–15.

53 MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA, *supra* note 35.

NSA Doval appreciated U.S. support".[54] Despite these suggestions, India did not go forward to claim it has a right of self defence to use force against NSA activities.

While looking at the state practice in relation to the "unwilling or unable" doctrine, a study identified India's position as falling under the ambiguous cases. The study said that ambiguous cases are those states "that have used force against non-state actors in third countries without clearly expressing their views on the legality of their actions under international law, and States that provided legal justifications but did not invoke the 'unwilling or unable' test or a similar concept in their justifications".[55] While this criteria makes a fair proposition, it is equally important to take into consideration India's position in a multilateral context. India is part of the Non-Aligned Movement (NAM). The NAM continuously emphasises that "consistent with the practice of the UN and international law, as pronounced by the ICJ, the Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted".[56] Clearly articulated multilateral positions and ambiguously presented explanations of its use of force so far reveal that India evidently refrains from supporting or using the "unwilling or unable" doctrine.

4 A TWAIL View

Arguments for the right of self defence against NSAs prominently come from a few states. These few states are mainly from North America and Europe. However, there are also a few states from the Global South that subscribe to this position. While it is important to know which states support or oppose this position, a methodological stance can be taken independent of states' positions. State practice helps us understand the existing international law. This happens mainly in the form of understanding customary international law as state practice constitutes an important component to elicit the formation of

54 *Readout of Telephonic Conversation Between National Security Advisor Ajit Doval and US NSA Amb John Bolton*, MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA (Feb. 16, 2019), https://www.mea.gov.in/press-releases.htm?dtl/31058/Readout_of_Telephonic_Conversation_between_National_Security_Advisor_Ajit_Doval_and_US_NSA_Amb_John_Bolton.

55 Elena Chachko & Ashley Deeks, *Which States Support the 'Unwilling and Unable' Test?*, LAWFARE (Oct. 10, 2016, 1:55 PM) https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test.

56 Non-Aligned Movement [NAM], *17th Summit of Heads of State and Government of the Non-Aligned Movement: Final Document*, at 20, NAM 2016/CoB/DOC.1. Corr.1 (Sept. 17–18, 2016).

customary international law along with *opinio juris*. Similarly, state practice is relied upon for the purpose of interpreting existing international treaty law. State practice is relied upon for the purpose of interpreting existing international treaty law as provided under Article 30(3)(b) of the Vienna Convention on the Law of Treaties.[57] The evaluation of state practice would also help to defend or critique a particular methodological position, like for the purpose of present article, providing a TWAIL critique. However, there need not be a necessary correlation between the third world state practice and the TWAIL approach in all circumstances. Coercive geopolitical considerations play a significant role in a particular practice of states often coming from the Global South. This can be the result of certain coercive measures by the dominant states from the Global North. Therefore, any evaluation of state practice should take these factors into consideration.

A TWAIL critique in general arguably, predominantly underlines the historical continuities in structurally oppressive international law. This structurally oppressive nature of international law's origin and its evolution took shape during the colonial period. Despite the decolonization and the subsequent changes in international law, its structural bias against the third world or Global South continues to shape the form and substance of contemporary international law. Extending this structural continuity argument to the current debates on international law on the use of force, it is argued that the structural bias of the past continues to occupy the substance of the present. In other words, the civilised and uncivilised distinctions of colonial times are reenacted in the arguments of the "unwilling or unable" doctrine debates. In this regard, Ntina Tzouvala argues that the "unwilling or unable" doctrine carries within it imperial aspirations and that they "form a 'red thread' that connect 'the standard of civilization' with the 'unwilling or unable' doctrine".[58] However, this critique comes with a caution that at "an epistemological level, one should also keep in mind that there are limits to the explanatory potential of historical, genealogical accounts".[59] Tzouvala further argues that the "'unwilling or unable' doctrine replicates both the substance and the methodological preferences of nineteenth-century international law. The discourse of 'civilization' keeps returning in the discipline in a manner that questions its self-portrayal

57 According to Vienna Convention on the Law of Treaties art. 31(3)(b), state practice becomes relevant for the purpose of interpretation of an existing treaty. It reads as follow: "[A]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [;]".

58 Ntina Tzouvala, *TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures*, 109 AMERICAN JOURNAL OF INTERNATIONAL LAW UNBOUND 266, 268 (2016).

59 *Id.* at 270.

as a force of progress, freedom and peaceful co-existence".[60] Tzouvala also, however, cautions that we need to keep in mind that contemporary international law is more than an "undercover" continuation of older international legal structure. "Striking the right balance between history and the present situation, continuity and rupture, constitutes the greatest challenge for TWAIL as a project that aspires to approach international law through emancipatory lenses".[61] What comes out from this observation is the movement of international law from its oppressive past to the progressive or benign present. Thus, this movement bears ruptures which create certain discontinuities with certain progressive outcomes. This phenomenon is underlined in relation to the use of force with a justifiable argument that the law relating to the use of force is "perhaps one of the starkest examples of rupture in international law, and indeed of rupture generally, favorable to the interests and concerns of the states of the Global South".[62]

This apparently may be seen as presenting a challenge to the TWAIL methodology. This challenge may emerge from at least two conceptual follies. The first problem is that TWAIL's methodological framework is sought to be confined to critiquing historically ordained oppressive structures of international law in a linear fashion, from its origins to the present. This view tends to present the TWAIL methodology in a narrow and limited sense. Contrary to this, TWAIL not only has the potential to capture the "ruptures", but it also has the potential to generate methodological tools to critically analyze these changes in international law. Therefore, TWAIL's emphasis on international law's historical complicity in colonial oppression and its continuing role in perpetuating similar oppressions in the present cannot be seen as mechanical extension of TWAIL's methodological contours. Rather, it needs to be seen as underlining international law's historically embedded oppressive and instrumentalist role in different forms, while also recognizing the transformations that international law undergoes. Therefore, the TWAIL methodology has the potential to capture international law's movement not just in a linear way but with all its ruptures.

Secondly, to argue that the law on the prohibition of the use of force in itself is a virtue to be celebrated by the Global South would be to ignore the fact that it is the same law which gives the possibility of interpretation and application for the "unwilling or unable" doctrine. The same law which prohibits the use of force with exceptions arguably is sought to be applied or further exceptions are

60 *Id.*
61 *Id.*
62 *Id.*

articulated. But everything happens in reference to the existing law and not in total deference to it. Hence, it is necessary that what is argued as the product of a rupture from the past needs to be seen in continuities. However, pre-rupture and post-rupture international law cannot be equated as one and the same nor can they be rejected as oppressive in their totality. Such an equation or rejection leads to an argument of nihilism or nothingness which is difficult to sustain as a transformative and politically relevant alternative to the dominant mainstream. Therefore, it is necessary that any critique of the "unwilling or unable" doctrine needs to take note of the relevant United Nations Charter framework on the use of force in critiquing the doctrine. This may also involve defending the existing legal framework, despite the fact that it is the same law which gives rise to the formulations like the "unwilling or unable" doctrine.

However, this kind of dualism of comprehensive critique of the structures of international law in the historical sense and selective invocation of some aspects of international law for critiquing formulations like "unwilling or unable" doctrine can be seen as selectivity and opportunism. But this can be defended as the "principled opportunism" as conceptualised by Robert Knox in a similar situation.[63] This principled opportunist position comes from the view that there are certain fundamental problems with international law from its past to the present. However, international law also provides contextual opportunities in a short term which can be invoked to sustain the internal critique of international law. Based on this proposition, the TWAIL argument may be built by seeking the need for confining to the textual position of Article 51 of the UN Charter or invocation of chapter VII "Powers of the UN Security Council", rather than relying on the conceptually flawed "unwilling or unable" doctrine.

5 Conclusion

The law relating to the use of force as a right of self defence has been under strain in the last two decades, particularly after the September 11 incident. One of the controversial issues relating to the right of self defence is the argument for its permissibility against the NSAs operating from another state. This permissibility view relies on the existing treaty and customary international law. Opposite to it is the restrictive approach which rejects the permissibility view. The permissibility view also emphasises that there is an emerging state practice

63 Robert Knox, *Strategy and Tactics*, 21 FINNISH YEARBOOK OF INTERNATIONAL LAW 193, 222–27 (2010).

in favour of the right of self defence against NSAs. Evaluating India's state practice reveals the fact that India so far has not subscribed to the permissibility view despite its involvement in situations of military use of force against NSAs in other states. It can be argued from this analysis that existing legal framework in the form of treaties and customary international law does not support the right of self defence against NSAs. A similar assertion is drawn from state practice, and the same is established through the analysis of India's state practice. A TWAIL critique while focusing on the historical continuities of structurally oppressive international law, also has the methodological potential to capture the ruptures which produce structural discontinuities in international law. UN Charter framework on the use of force can be seen as one of such structural ruptures which may be tactically defended against the problematic doctrinal deviations like the "unwilling or unable" test.

The "ASEAN Way": A Sore Thumb for ASEAN Solidarity in the Face of an Ailing Global Trade System?

*Noel Chow Zher Ming**

1 Introduction

"Standards and integrity are for Oscar winners. Everybody else has to bend over". (Ian Arkin's character, Norman Newlander, to Sandy Kominsky (Michael Douglas) in The Kominsky Method, 2019).

The Kominsky Method is a comedy series starring Michael Douglas as Sandy Kominsky, a once successful actor turned acting coach, and Alan Arkin as Norman Newlander, his recently widowed agent. Both are in their latter years. Newlander retorts with this line when Kominsky attempts to explain why he turned down numerous career enhancing opportunities in his younger years. When we strip away the fictional characters, setting and circumstances, the substance of this retort represents a struggle that is far from fictional. For many years, scholars who identify themselves as being advocates of Third World Approaches to International Law (TWAIL) have argued that the "Oscar winners" of the international community, the America and the Eurocentric West, who could afford to have standards and integrity, proceeded to shape international law with these standards and then imposed them on everyone else under the brand of human rights, civil liberties and the rule of law. TWAIL developed as a response from the "everybody else", the colonized Third World, which had to bend over.

Southeast Asia's participation in international law is uniquely recent, but important. The region was only recently decolonized, culturally and politically diverse, experiencing unprecedented economic and population growth, and integrated into the international legal order. But it is at the same time considered to be the birthplace (geographically at least) of the Third World's response to mainstream international law scholarship traditionally dominated by Western powers with a colonial lineage. The Bandung Conference of 1955 became an assembly of like-minded, recently independent and mostly Asian

* General Manager, Singapore & Malaysia, Tradewin Asia.

and African states tired of colonialism and hungry for self-determination.[1] Whether or not the TWAIL movement itself actually emerged from this conference is a subject of some subjectivity and of less importance in comparison to the significance of the fact that it remains today both a TWAIL landmark and a rallying point.[2]

As an ideology, the TWAIL scholarship challenges the mainstream "Eurocentric" international legal order in that it "1) uses colonial history to frame the impact of international law on the South; 2) avoids prioritizing the universal above the local; and 3) focuses on the interrelation between international capital and non-European cultural traditions".[3] A monolithic approach to characterizing international law in [South] and Southeast Asia, as one Southeast Asian scholar describes, "does little justice to the regions' rich diversity and complex history".[4] Herein lies the central theme of this article. What is Southeast Asia's ideological identity to begin with? What would a multilateral legal system that could do justice to the region's rich diversity and complex history look like? If such a thing were to exist, how would it work? Enter the Association of South East Asian Nations (ASEAN).

While ASEAN is often portrayed as being culturally, socio-economically, ethnically and of course ideologically diverse, with very little common ground as an impetus for integration, many of these prickly differences interestingly emerged during decolonisation, Newly formed sovereign states started grappling for regional influence, trying to make the most of what their respective former colonial masters left behind, inevitably trampling over each other's toes in the process, especially naturally when it came to issues of borders, national security and national identity.

Early Southeast Asian legal culture really only emerged from three principal clusters of legal tradition. Desierto explains that "Buddhist kingdoms in Burma, Thailand, and Laos drew from Buddhist texts providing ethical rules of conduct through theistically-driven conceptions of obligation".[5] Coastal

1 *See* R.P. ANAND, STUDIES IN INTERNATIONAL LAW AND HISTORY: AN ASIAN PERSPECTIVE 1, 1–23 (2004); THE MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF INDONESIA, ASIA-AFRICA SPEAK FROM BANDUNG 161–69 (1955), http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf.

2 *Id.*

3 Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 475, 487 (2007).

4 Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 INTERNATIONAL JOURNAL OF LEGAL INFORMATION 387, 392 (2008).

5 *Id.* at 416.

kingdoms along the Malay peninsula that make up modern-day Malaysia, Indonesia, Brunei, Singapore and the Southern Philippines drew heavily from Islamic law, characterized by the Quran and Sharia.[6] Early inland societies in Burma, Siam, Champa and Khmer (roughly spanning the modern-day Indo-Chinese cluster of Thailand, Cambodia, Myanmar, Laos and Vietnam) as well as Java owe most of their legal traditions to Hindu rules of moral and social conduct which "codified law in ten categories and solved disputes through collective decision-making (*mushawara-mufaqat*)".[7] This concept of *mushawara-mufaqat*, of consensus and collective decision-making, is exactly what has found its way into modern-day ASEAN regionalism, in what has evolved into the "ASEAN Way". Sometimes used fondly as a collective regional identity almost akin to "ASEAN state(s) practice", it was too often also used as a derogatory euphemism for talk and no action. If there was such a thing that embodied a multilateral system that "does justice to a [non-European] region's rich diversity and complex history" in a way that TWAIL scholarship imagines, this is probably as close as it gets.[8] But does it work? The next several chapters critically analyse this.

2 What is Wrong at the Global Level and How is It Affecting ASEAN?

We will consider several sides of the story in this article, each one briefly. For the sake of simplicity, let me start with Donald Trump and the US. Trump and his advocates have from even before his presidency accused the WTO of being the "worst trade deal ever".[9] Then at the start of his presidency, he threatened to pull out of the WTO, accusing the organization of needing to "shape up",[10] citing abuse of the "special and differential" treatment provision for developing countries as a principal reason. In 2018, the White House issued a memo to the US Trade Representative, calling on the WTO to review the way in which it grants "developing country" status. The memo cites 11 countries, including

6 *Id.*

7 *Id.*

8 *Id.* at 392.

9 David A. Wemer, *What is Wrong With The WTO?*, ATLANTIC COUNCIL (June 14, 2019), https://www.atlanticcouncil.org/blogs/new-atlanticist/what-is-wrong-with-the-wto/.

10 John Micklethwait et al., *Trump Threatens to Pull U.S. Out of WTO if It Doesn't 'Shape Up'*, BLOOMBERG (Aug. 31, 2018, 4:52 PM), https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-dont-shape-up.

Kuwait, Macao, Mexico, Qatar, Singapore, South Korea, Turkey, the United Arab Emirates and China.[11] Trump himself tweeted:

> When the wealthiest economies claim developing-country status, they harm not only other developed economies but also economies that truly require special and differential treatment. Such disregard for adherence to WTO rules, including the likely disregard of any future rules, cannot continue to go unchecked.[12]

US Trade Representative Robert Lighthizer echoed the tweet saying:

> [F]ar too long, wealthy countries have abused the WTO by exempting themselves from its rules through the use of special and differential treatment. This unfairness disadvantages Americans who play by the rules, undermines negotiations at the WTO, and creates an unlevel playing field. I applaud the President's leadership in demanding fairness and accountability at the WTO.[13]

The EU and Japan have similarly expressed the need for reform at the WTO and have also been largely critical of China and others who have benefitted tremendously from "gaming" the WTO system, only nowhere near the intensity of Trump's US, and are certainly not in favour of using tariffs to reform the WTO.[14] This may seem like the tipping point, but it would be naïve to think that this was the sole grievance the multilateral system had to contend with. Rather, it is one of many festering within the multilateral trading system. Differences between trading partners existed from the start and pre-date the WTO. In fact, so deep-rooted, numerous and varied were the challenges affecting multilateral trade that it came to be the reason a rules-based governing organization in the form of the WTO never came into being until 1994.[15] It is

11 The White House, *Memorandum on Reforming Developing-Country Status in the World Trade Organization* (July 26, 2019), https://www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization.

12 Kenneth Rapoza, *Trump the Trade Tyrant Targets the WTO*, Forbes (July 29, 2019, 10:00 am), https://www.forbes.com/sites/kenrapoza/2019/07/29/trump-the-trade-tyrant-targets-the-wto/#42c5c60165f8.

13 *Id.*

14 *EU Trade Commissioner Expresses Support for Japan's Goal to Reform WTO*, The Japan Times (Nov. 24, 2018), https://www.japantimes.co.jp/news/2018/11/24/business/eu-trade-commissioner-expresses-support-japans-goal-reform-wto/#.XYXmYC2Q1TY.

15 Daniel Drache, *The Short but Significant Life of the International Trade Organization: Lessons for Our Time* (Centre for the Study of Globalisation and Regionalisation, Working Paper No. 62/00, 2000), https://core.ac.uk/download/pdf/47530.pdf.

not the interest of this article to visit each one of them. They are complex and multi-faceted in nature.

What is important, though, is to accept that every member of the multilateral trading system has at some point chosen national interests over multilateralism, and will continue to do so for a variety of reasons, sometimes out of necessity and sometimes even against its own leader's desire. This is not a matter of Europeans and Americans vs. the Third World. Whatever the reason, each time a state elects to choose national interests over multilateralism, the rules-based institution erodes, no matter how apologetic the perpetrator is. With 164 current WTO members,[16] the odds only stand to increase.

In saying that, we now consider the perspective of the WTO itself. The WTO itself is the product of a compromise – of a "diplomat's jurisprudence" as Robert E. Hudec puts it.[17] It operates on the principle of "consensus" decision making. Democratic and transparent in principle, but hugely inefficient. Attempting to reach a consensus among 164 members on issues laden with overlapping national interests is the equivalent of a hunt for a unicorn. Often cited as the epitome of compromise (or failure, depending on how you look at it), WTO members in 2001 embarked on a massive attempt to update the WTO's outdated rules in Doha in what is now known as the Doha Development Agenda:

> The participating countries spent years trying to reach an agreement. Ultimately, the attempt largely fizzled out and resulted in a much more modest agreement on trade facilitation. A central problem in negotiation was the difficulty of getting well over 150 countries to reach consensus. In the previous negotiating round, potential hold-out countries could be threatened with exclusion from the new WTO. That trick could not be repeated once they were already in.[18]

The "much more modest agreement on facilitation" was concluded in Bali in 2013, known informally as the Bali Package.[19] Finally, we consider the perspective of the developing world – by far the most difficult to characterize. It is

16 *Members and Observers*, World Trade Organization, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

17 Noel Chow Zher Ming, *Professor Hudec's "Techniques of the Diplomat's Jurisprudence": Does It Still Apply?*, 6 Asian Journal of Law and Economics 23, 26 (2015).

18 Phil Levy, *What's Wrong with the World Trade Organization*, Forbes (Oct. 30, 2018, 5:53 am), https://www.forbes.com/sites/phillevy/2018/10/30/whats-wrong-with-the-world-trade-organization/#5df2755e3a49.

19 *Bali Package and November 2014 Decisions*, World Trade Organization, https://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm.

neither a single entity, nor is it entirely united with its grievances. We will have to make do with some broad examples and generalisations. To draw on The Kominsky Method parallel again, developing countries have traditionally felt they were perpetually bending over, marginalised from consensus decision-making. At the start of multilateral trade negotiations in the 1940's–50's, developing countries became increasingly fearful that liberal trade policies being negotiated at the General Agreement on Tariffs and Trade (GATT) would eventually be forced on them and impede the development of infant industries which was believed to be necessary for industrialization. This in turn was believed to be necessary for developing countries to progress from dependence on low value exports of primarily raw materials to higher value productions.[20] Over years of negotiation, they eventually felt that their needs were not sufficiently addressed in the GATT.

> Partly because developing countries felt that their trade concerns were not being effectively addressed in the GATT, they lobbied for and succeeded in the establishment of a separate organisation to deal explicitly with problems of trade and development. This organisation, the United Nations Conference on Trade and Development (UNCTAD) came into being in 1964, and became the main institution through which developing countries tried to pursue their international trade agenda during this period. The establishment of a system of preferences for developing country exports of manufactures in developed country markets and stabilisation of commodity trade were important topics on the Agenda of the new institution over the decades of the 1960's and 1970's.[21]

By 1968, developing countries had succeeded at extracting preferences from developed countries under a Generalised System of Preferences (GSP), a system allowing developing countries a variety of trade preferences without the need to reciprocate. It is not legally binding but observed by most developed countries on a voluntary basis, eventually becoming entrenched in the WTO agreements as "special and differential treatment" (S&D) for developing and least developed countries.[22] Clearly, there are now incentives for being a developing country at the WTO and it has not been difficult to "become" one. No method was negotiated or agreed on as to how a "developing country" was

20 Constantine Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* (Policy Research Dissemination Center, Working Paper No. 2388, 2000).

21 *Id*.

22 *Id*. at 15.

to be defined, so countries identified as such were regarded as such. This certainly puts Trump's and Lightizer's accusations against the WTO into context.

Developing countries' responses to the US' unilateral action naturally varied. India promptly retaliated with tariffs after having been struck off the US GSP,[23] and Singapore simply reiterated over media that it was not abusing developing country status at the WTO,[24] while Indonesia, faced with the prospect of a review of its GSP status in addition to hefty anti-dumping measures against its biofuel and textile exports, began lobbying to maintain friendly trade ties with the US.[25] South Korea, whose washing machine exports were amongst the first commodities to be struck with "America First" tariffs, brought the measure to the WTO where the arbitration panel ruled recently in its favour.[26] Vietnam took a goodwill approach – in its attempt to placate the US, it pledged to import more US goods to narrow its trade deficit.[27] China, given very little room to wriggle, responded with retaliatory tariffs while continuing to labour away at a trade deal with the US.[28]

So where does all this leave ASEAN? The answer lies in ASEAN's vulnerability to these external shocks *vis-à-vis* its participation in, and dependence on, the multilateral trade system and its institutions.

3 ASEAN's Participation in the World Trade System

This is an important question given that much of TWAIL scholarship is a reflection on the mainstream international law's failure to consider the plight of the non-European world. This was an easier argument to make in the 1950's,

23 *India Announces Retaliatory Trade Tariffs Against the US*, BBC NEWS (June 15, 2019), https://www.bbc.com/news/world-asia-india-48650505.

24 *US Aware Singapore Doesn't Take Advantage of Developing-Country Status: Chan Chun Sing*, THE STRAITS TIMES (Aug. 2, 2019, 5:00 AM), https://www.straitstimes.com/world/united-states/us-aware-singapore-doesnt-take-advantage-of-developing-country-status-chan.

25 Linda Yulisman, *Indonesia Lobbying to Maintain US Trade Ties*, THE STRAITS TIMES (July 28, 2018, 5:00 AM), https://www.straitstimes.com/asia/se-asia/indonesia-lobbying-to-maintain-us-trade-ties.

26 *WTO Awards S. Korea $85 mln Against U.S. Over Washing Machine Tariffs*, REUTERS (Feb. 9, 2019, 12:28 AM), https://www.reuters.com/article/usa-trade-southkorea-wto/wto-awards-skorea-85-mln-against-us-over-washing-machine-tariffs-idUSL5N203567.

27 *Vietnam Buys More US Goods After Trump Calls It Trade Abuser*, THE STRAITS TIMES (June 29, 2019, 1:27 PM), https://www.straitstimes.com/asia/se-asia/vietnam-buys-more-us-goods-after-trump-calls-it-trade-abuser.

28 Keith Bradsher & Ana Swanson, *Despite Tough Talk, U.S.-China Trade Negotiations Continue*, N.Y. TIMES (Sept. 21, 2019), https://www.nytimes.com/2019/09/21/business/united-states-china-trade.html.

perhaps even up to the 70's and 80's when a combination of post-colonialism and pre-industrialisation in the East and deep south made those distinguishing features prominent. Global income inequality is narrowing between wealthy and lower income states.[29] While there is a long way to closing that gap, India and China are certainly not needy anymore.[30] The same can be said for South Korea, Singapore and Malaysia. To put it quite plainly, we are past the stage where the global economic order can be split geographically between "liberal" and "protectionist", "capitalist" and "socialist" or "developed" and "developing".

What we are witnessing today is globalization in its truest form. Maybe not in the way economists and diplomats predicted but, rather, the ugly reality of it. It is everybody wanting their version of the WTO. For much of the post-World War II period, a multilateral trading system premised on liberal trade values and the rule of law was championed by the US, its European allies and Japan. This was something met, as we discussed in the previous section, with resistance from emerging economies whose industries had not yet developed, forcing the introduction of provisions in the GATT and WTO agreements for special and differential treatment for developing countries. Articulating this resistance, Linarelli, Salomon and Sornarajah in "The Misery of International Law" describe S&D as "principally a failed pre-Uruguay Round approach to promoting the interests of developing countries".[31] They highlight four problems with S&D:

> First, they specify special and differential treatment only for developing countries. Problems of justice found in the current trade architecture apply not only to states as an aggravated whole but to groups and even individuals within states. Second, they specify favoured treatment as something exceptional in the trade architecture. As explained below, one preferable option would be to write rules directly into the code of trade agreements that meet standards of justice. The aim should be to get the basic structure right in the first instance, not to get it wrong and then append dubious fixes. Third, special and differential treatment rules are too narrow because their aim is only to promote trade, when

29 Zsolt Darvas, *Global Income Inequality is Declining Largely Thanks to China and India*, BRUEGEL (Apr. 19, 2018), https://bruegel.org/2018/04/global-income-inequality-is-declining-largely-thanks-to-china-and-india.

30 *Id.*

31 JOHN LINARELLI, MARGOT E. SALOMON & MUTHUCUMARASWAMY SORNARAJAH, THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY 131 (2018).

> international agreements about trade must get the basic conditions of justice for economic arrangements between states right. Fourth and perhaps most importantly, they fail to produce any meaningful assistance through a predistributive scheme for developing countries.[32]

Beyond S&D, Linarelli et al highlight an entire system of ideas within the context of international economics dominated by developed Western countries which the authors claim is responsible for "immiseration" – the term of choice, at the expense of low-income states. One aspect of that system we address more extensively in this article is the role of multinational corporations in that chain of immiseration. Of foreign investment, the authors argue:

> While it is true that employment is created, the possibility that labour is treated otherwise than in accordance with accepted standards creates grave concerns. The environmental depletion that foreign investment may cause must be factored in. There are malpractices such as corruption, transfer pricing, and tax avoidance that reduce significantly the advantages of foreign investment.[33]

They further highlight:

> Multinational corporations and shareholders reap the benefits of such liberalization. A minority of people in the developed states, who are shareholders of large multinational corporations, benefit from such foreign investment. The other citizens of the developed states might not directly benefit. The clear majority of the citizens of the developing countries into which such investments flow do not benefit from them.[34]

ASEAN's collective participation in the international economic order, however, does not suggest that this is the contemporary regional consensus. For several reasons, amongst them, this view presents a dangerously distorted image of the symbiotic relationship between multinationals and other actors involved in a thriving emerging economy. The result is that it presents multinationals as, to borrow an expression from Gary Quinlivan, "amoral government-manipulating rent-seeking monoliths that exploit the lack of environmental regulations and

32 *Id.*
33 *Id.* at 151.
34 *Id.*

cheap foreign labor in developing countries".[35] Consequently, the message it sends is the equivalent of saying that in a mortgage transaction, the only people who benefit are a few investors, not the home owners who otherwise would not be able to afford a home, not the banks who lend the money, nor the bank's employees, nor the shops in the new neighbourhood.

Such a view ignores the reality that developing countries, including ASEAN members, have benefitted as much from foreign investment brought about by multinationals as multinationals have from access to their markets. It also refrains from recognising that multinationals "do not operate with immunity",[36] to borrow from Quinlivan again. Very often, companies are themselves victims of the very malpractices and corruption the authors refer to. While transfer pricing and "tax avoidance that reduce significantly the advantages of foreign investment" do exist, to say that governments of lower income countries are better off without the taxes multinationals pay, even if grossly manipulated for argument's sake, is a misperception of how and why corporates deploy transfer pricing tactics.[37]

Often when multinationals adjust their transfer prices, it is to mitigate tax exposure in high tax jurisdictions. This has the natural result of actually being more detrimental to developed countries, often high-tax welfare states, than to developing countries. There are at the same time many aspects of doing business in less developed countries, and in particular in developing ASEAN countries that are a risk and therefore a cost that either erode their profitability or get passed on to buyers. Ultimately, there will be winners and losers, but to say that an injection of capital is the only thing multinationals bring when they invest abroad is a very narrow view.

Very often, lower income countries welcome the direct and indirect taxes (e.g., through customs tariffs on imported goods) generated through the foreign entity's tax residence, the building of infrastructure, transfer of knowledge, skills development, job creation and what Quilivan calls the "crowd economy" created when an ecosystem of suppliers and service providers, many of whom local, gather around the foreign investor and prosper. It may displace the local economy – far left/right advocates often play this card when advocating their views, but is there a more effective way to generate growth and income in a short time? The rising tide raises all boats as the saying goes, and the evidence

35 Gary Quinlivan, Sustainable Development: The Role of Multinational Corporations (Nov. 28, 2013) (unpublished manuscript).

36 *Id.*

37 Richard Rubin, *Does Amazon Really Pay No Taxes? Here's The Complicated Answer*, The Wall Street Journal (June 14, 2019, 5:30 am), https://www.wsj.com/articles/does-amazon-really-pay-no-taxes-heres-the-complicated-answer-11560504602.

seems to suggest as much. In the case of ASEAN, its GDP grew from 23 in 1967 to 719 in 1997, before dipping to 577 in 1999, as a result of the Asian financial crisis in 1997. It then experienced exponential growth for the next two decades, peaking at 2,720 in 2017.[38] The reality of it all is that ASEAN has benefited from the legal order brought about by the multilateral trading system in its current structure. To borrow overused Brexit terminology, "hard" TWAIL probably stands only to make matters worse for ASEAN at this time. But that multilateral trade system is at the same time falling apart and ASEAN is in no position to single-handedly administer a solution to the global problem. For the time being, the only realistic Plan B is to tighten regional solidarity and weather the storm.

4 The Need for Solidarity

Weathering a storm is better done in numbers than as individuals. We again emphasise that this work is not a defence of the developed world or of multinational corporations. Nor is it an invitation for lower income countries to turn their backs on the multilateral system and stand on their own feet instead. The global multilateral system is in dire need of reform, but this requires consensus and states cannot be expected to wait indefinitely for consensus. At the same time, abandoning multilateralism in a time of increasing polarization will very likely lead only to even more polarization and, in the worst case, civil unrest. Instead, the message is this: an ASEAN pursuit of regional self-sufficiency will empower it, not only to weather a storm, but also to be a net contributor in the quest to reform the multilateral system.

By "self-sufficient" we certainly do not mean isolation from the global trade system. Far from it, it means building the regional alliance for more effective participation in it. In a global economic climate as volatile as this, ASEAN needs the collective strength of that regional alliance. At the same time, ASEAN as an alliance is probably a greater asset to the multilateral system than the sum of its parts. The starting point has pretty much been cut out by circumstances. With the US taking the lead, the developing world is already being accused of unfair trade practices, and a rational response is needed.

Such a response will inevitably involve change on the part of ASEAN. While change is difficult, it is often only immediate and radical changes that are

38 David Wijeratne, *How to Keep the ASEAN Economies Growing for Another 50 Years*, WORLD ECONOMIC FORUM (Sept. 12, 2018), https://www.weforum.org/agenda/2018/09/to-keep-growing-aseans-economy-must-adapt-heres-how.

uncomfortable. "Soft", gradual change on the other hand is perceived as less threatening. ASEAN's first step should be to close ranks and form a stronger alliance. The benefits of this are multi-faceted. For one, ASEAN member states individually benefit from the protection of a herd. But more importantly, the WTO as an institution benefits from the prospect of reduced discord. In an ideal world, ASEAN's differences would have been sorted within the ASEAN community. Of course, this is not an ideal world. So while it is easy to say, it is deceptively difficult to articulate and even more difficult to implement. We start by giving credit where credit is due. ASEAN is already on a journey to integration, and progressing steadily towards advanced cooperation. It is already recognized by global peers as a model of success for regionalism.[39] It is only that the journey ahead is fraught with challenges that constantly delay progress. In the subsequent sections, we describe some of these challenges in more detail.

The policy angle to effect rules-based regionalism has been well studied and documented. In fact, the ASEAN member states have long expressed a desire for integration towards a rules-based community underscored by the rule of law. The National University of Singapore's Center for International Law's published series entitled "Integration Through Law" documents this journey from multiple aspects, including economic, legal and trade policy. The focus of that series is, like in many academic works, on the state (ASEAN member states) and the institution (ASEAN). This article takes a different perspective by taking a deeper dive into non-state contributors to the ecosystem, especially the likes of the private sector (including the begrudging foreign multinational), public administrators and private interest groups that when mobilized effectively can be extremely effective at achieving that desired rules-based alignment. In saying that, it still must start at the top – at the regional policy level. So there is a need to dissect the "ASEAN Way", the DNA of ASEAN culture for many years, and explain why this must first modernize in order for the medicine to work, figuratively speaking.

5 The ASEAN Way: State Versus Region

For this "survival pact" (for the lack of a better expression) to have the best chance of success, it needs to be put in place before the multilateral trading system suffers further unexpected shocks. For a start, ASEAN needs to remain

39 Kishore Mahbubani & Kristen Tang, *ASEAN: An Unexpected Success Story*, THE CAIRO REVIEW OF GLOBAL AFFAIRS, https://www.thecairoreview.com/essays/asean-an-unexpected-success-story.

viable in as many ways as possible – but especially so in terms of peace, stability and economic prosperity. This may be stating the obvious – ASEAN's very foundation is premised on these principles, but it is not going to happen on its own. There is no shortage of ways to introduce such a pact into the ASEAN machinery – a memorandum of understanding, a ministerial joint declaration, perhaps even an amendment to the ASEAN trade agreements, with language appealing to ASEAN members to prioritise regional interests. Ultimately, these are all only vessels, and they will only be as effective as the member states want them to be. Of essence is the substance, not the form. What is it going to take for ASEAN's individual members to adopt regional commitments over national (self) interest? ASEAN, or the sum of its parts rather, is well known to have had a long, stubborn history of resistance to reform. This stubbornness in turn owes part of its heritage to the "ASEAN Way". Heydarian sums the issue in the following way:

> To many regional leaders, the so-called "Asean Way", where consultation and consensus underpin collective decision-making, is sacrosanct. After all, the traditional operating system allowed a highly diverse region to establish a community of peace and prosperity.
>
> Yet, as years go by, the Asean Way is proving to be a primary obstacle rather than an enabler of deeper regional integration.
>
> To begin with, this is because of the fundamental misinterpretation of "consensus" as "unanimity". In sensitive areas of decision-making, where protracted discussions and irreconcilable differences are almost inevitable by nature, this has become a recipe for disaster. Instead of action, there is paralysis.

The obsessive and obstinate search for unanimity effectively gives each member state, regardless of its size or interest, a de facto veto power over the future of Asean and, by extension, the whole region.[40]

There is one other feature of the ASEAN way which Heydarian does not bring up in his article, and a far more serious impediment to the outcome the author of this article is advocating. It is ASEAN's obsessive and obstinate adherence to the principle of non-interference. As a result of which, for sensitive areas of decision-making each member has the right to veto, as Heydarian describes, this is if the issue is even discussed. Many issues are simply passed off as being too sensitive to discuss on grounds of non-interference. If consultation and consensus is sacrosanct, non-interference is the first commandment.

---

40 Richard Javad Heydarian, *The Asean Way Needs Modifying*, THE STRAITS TIMES (Jan. 25, 2018, 5:00 AM), https://www.straitstimes.com/opinion/the-asean-way-needs-modifying.

Such a principle would have suited ASEAN's development in the early days, when most Southeast Asian countries were newly decolonised and sovereignty became a treasured possession. But it is now often used as a polite way of expressing unwillingness to cooperate.

Because the principle of non-interference trumps all else, other states tend to oblige in keeping with the ASEAN way. The Rohingya crisis in Myanmar is an often-cited example of the non-interference principle impeding collective action,[41] but this is an extreme case and in my opinion not the most helpful example. It is a thorny issue which involves elements of national security, human rights, and ethnic and socio-economic discord within a sovereign country's territory, which is something any country will be extremely cautious with getting involved in, irrespective of any prevailing regional principle of non-interference. Indonesia's repeated refusal to accept assistance to combat transboundary haze is another often cited example of ASEAN's toothless bite when a member country plays the sovereignty card over a cross-border issue.[42] This is again an extreme example, given the prospect that delivering the assistance would involve one or more countries entering Indonesia's sovereign border, with no doubt, giving the recipient country a legitimate (if not moral) reason to claim interference in domestic affairs. Neither situation was fully within ASEAN's control to act in the sense that firstly both involved navigating prickly issues of sovereignty, and secondly help could not be imposed on an unwilling recipient, unless there were provisions within international law to permit it.

A much deeper level of trust is needed between states before cooperation on such sensitive issues is even conceivable. ASEAN has not yet developed this level of mutual trust, but there are many less prickly areas to drive reform without being enough of a threat for any one member to raise the non-interference shield. Many of these reside in the realm of customs, trade and border clearance policies – all 10 ASEAN members desire economic cooperation after all.[43] From the ASEAN Economic Community (AEC) to the ASEAN Single Window (ASW), economic cooperation came to be a significant tool for

41 Angshuman Choudhury, *Why Are Myanmar's Neighbors Ignoring the Rohingya Crisis?*, THE DIPLOMAT (Sept. 25, 2018), https://thediplomat.com/2018/09/why-are-myanmars-neighbors-ignoring-the-rohingya-crisis.

42 Yiswaree Palansamy, *Accept Neighbours' Help to Fight Haze Now, Jakarta Post Urges Indonesia*, MALAY MAIL (Sept. 22, 2019, 10:32 AM), https://www.malaymail.com/news/malaysia/2019/09/22/accept-neighbours-help-to-fight-haze-now-jakarta-post-urges-indonesia/1793096.

43 SIMON CHESTERMAN, FROM COMMUNITY TO COMPLIANCE?: THE EVOLUTION OF MONITORING OBLIGATIONS IN ASEAN 12 (Joseph H.H. Weiler et al. eds., 2015).

ASEAN cooperation after 1976.[44] It is also successful cooperation in this area that is in many ways driving the rules-based integration. Of course, there are limits to any model of success, and it is important to remain grounded, keep ourselves in check and reflect on the challenges that remain.

ASEAN, individually and collectively (with perhaps the exception of Singapore and Brunei), has remained extremely ineffective in dealing with bureaucracy, red tape and obstructions to business operations, which in turn obstructs ASEAN members' opportunities for the income growth and prosperity needed for self-sufficiency. There is a very high risk of this worsening, rather than improving, as tariffs across the region drop, only to be replaced by non-tariff measures (NTMs). There are a variety of reasons for NTMs, and rarely are they deliberately introduced for the sole purpose of obstructing trade. Some may even be well intended, but an alarming statistic is the sheer number of them. This year, the joint survey by the EU-ASEAN Business Council, ASEAN Business Advisory Council and Asian Trade Centre published the following findings:

> As early as 1987, surveys noted that in spite of progress being made in lifting formal tariffs through initiatives such as 1977 ASEAN PTA Agreement, companies reported having encountered NTMs while trading in ASEAN.
>
> This trend has persisted to this day despite renewed commitment by ASEAN to eliminate NTMs in the signing of the ASEAN Economic Community (AEC) in 2015, which promised the free flow of goods. In fact, according to the Global Database on Non-Tariff Measures (TRAINS), from 2000 to 2015, NTMs in ASEAN rose significantly. Figure 3 shows that the number of sanitary and phytosanitary measures (SPS), technical barriers to trade (TBT) and other types of NTMs increased between 2000 and 2016 by 305, 218 and 266% respectively. This trend is corroborated by other literature. For instance, in a study of nine priority sectors, de Dios found evidence that NTMs remained prevalent despite attempts by ASEAN at NTM-reduction.[45]

This article is in no way critical of NTMs in themselves. It is critical of unnecessary NTMs that, if left unchecked, would simply fester into red tape and present

44 Siow Yue Chia & Michael G. Plummer, ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions 167 (2015).

45 Asian Trade Ctr., *Non-Tariff Barriers* (*NTBs*) *in ASEAN and Their Elimination from a Business Perspective*, European Ass'n for Bus. and Commerce (EABC), at 26 (2019), https://www.eabc-thailand.org/wp-content/uploads/2019/06/NTB_Study_Report_FINAL.pdf.

opportunity for corrupt practices. This in turn threatens to hinder any prospect of further growth in the region and erase the success ASEAN has achieved, let alone facilitate progress to an advanced level of regionalism. Many businesses have simply lamented that non-tariff barriers still exist, because ASEAN leaders have been slow to address them owing either to a lack of funding or political interest. These are symptoms. The cause lies in the ASEAN way of "soft diplomacy" coupled with a deep-rooted fear of interfering and being interfered with. Undoubtedly, these inhibit effective checks and balances.

In a system that prizes consensus, consultation, diplomacy and non-interference over "Western" styled concepts of law, order, transparency and the rule of law, any method introduced to monitor compliance must be, and must be seen to be, non-threatening. There are many ways of styling this without saying the "rule of law", but I will conclude this article in the way I started it. Standards and integrity. It is simple and easy to understand. It is a universal concept which can be easily identified with. Every culture and religion either prescribes a form of it, or alludes to it. It does not sound as foreign, abstract and threatening a concept as the "rule of law". Civil servants and the private sector alike, with sufficient motivation, can be taught to adhere to a set of standards and a code of conduct. With practice, it becomes habit, and with habit it becomes culture. This in turn should inspire a fresh environment conducive to overcoming the biggest obstruction to wealth creation and prosperity – the deep-rooted inefficiency caused by years of bureaucracy and red tape region-wide. The scale and context of the challenge ASEAN needs to address is addressed in the next section.

6 Setbacks: Petty Officialdom, Bureaucracy and Red Tape

The descriptions in the far-right column are perhaps not very helpful in highlighting what the real issues are, but the rankings are alarming – a tell tale sign that red tape is not being managed. There are some issues that are common across the region, like over-reliance on customs collections for revenue, low civil service salaries and poor training of border officials. But some examples are more country specific than others.

Vietnam has taken strides to simplify its trading processes. But one issue highlighted by the Vietnam Chamber of Commerce and Industry (VCCI) in 2006, which it calls "petty officialdom", remains an issue today.[46] In that report,

46 David S. Jones, *Regulatory Reform and Bureaucracy in Southeast Asia: Variations and Consequences*, 8 INTERNATIONAL PUBLIC MANAGEMENT REVIEW 97, 101 (2007).

Country	2016 Ranking/136	Top 2 Most Problematic Factors for Importing
Singapore	1	1. High cost or delays caused by international transportation 2. Burdensome import procedures
Malaysia	47	1. Tariffs and non-tariff barriers 2. Burdensome import procedures
Indonesia	79	1. Corruption at the border 2. Tariffs and non-tariff barriers
Thailand	44	1. Burdensome import procedures 2. Tariffs and non-tariff barriers
Vietnam	86	1. Burdensome import procedures 2. Tariffs and non-tariff barriers
Philippines	93	1. Burdensome import procedures 2. High cost of delays caused by domestic transportation
Cambodia	116	1. Burdensome import procedures 2. High cost or delays caused by domestic transportation
Lao PDR	114	1. Tariff and non-tariff barriers 2. Burdensome import procedures

SOURCE: WORLD ECONOMIC FORUM GLOBAL ENABLING TRADE REPORT 2016. (AVAILABLE AT: HTTP://WWW3.WEFORUM.ORG/DOCS/WEF_GETR_2016_REPORT.PDF).

a consultant by the name of Nguyen Anh Tuan of Bizconsult "referred to the way officials responsible for business registration refuse to accept an application if minor information is missing. In many cases, businesses have to wait seven days to be informed of just one minor mistake".[47] More recently in 2015, the VCCI in its survey found that, out of 3000, 28 percent of the companies paid bribes to speed up customs procedures. Those who did not report discrimination, including being treated impolitely and being asked for documents that were not required.[48] The Central Institute for Economic Management, a

47 *Id.*

48 *28 Percent of Companies in Vietnam Bribed Customs Officers: Survey*, THANH NIEN NEWS (Nov. 12, 2015, 8:30 PM), http://www.thanhniennews.com/business/28-percent-of-companies-in-vietnam-bribed-customs-officers-survey-53585.html.

Vietnam-based think tank, estimates the costs of customs red tape alone to be in the region of US$10 billion a year.[49]

Thailand has also its fair share of border-related obstruction to business in the form of its incentive scheme for border officials. According to one source, the reward sharing system at the time of interview provided for "a generous 55% of penalty recovered from an 'offender' to be distributed as a reward. Of this amount, 30% is provided to third-party whistleblowers, which may even include other government officers. The remaining 25% is shared between the customs officials who identified and handled the case".[50]

Malaysia's border enforcement activity is typically seasonal, characterized by aggressive, sometimes arbitrary, even irrational challenges to commodity classification. Often this occurs where the opportunity presents itself when a product can reasonably be classified under two or more tariff codes. On the receiving end are importers or their agents, who are unfamiliar with customs classification rules and who will often have their imports re-classified to the highest tariff.[51] Challenges in Indonesia include excessive import controls and discretionary enforcement. To illustrate this point, when the tsunami disaster struck in 2005, the Financial Times reported that "in Indonesia 1,500 containers are stacked at the Sumatran port of Medan, according to customs records, with 599 of those units unclaimed or needing import permits".[52]

That same report also highlighted Indonesian customs officials saying that "dozens of vehicles destined for Aceh province are still awaiting import permits. Fourteen ambulances recently sent to Indonesia by UNICEF, the United Nations agency for children, took two months to clear customs".[53] In the case of the Philippines, there is little integration between agencies, as a result of which one agency disrupts another by inadvertently regulating things the regulator did not intend to regulate. In an interview with the CNN, Senator Bam Aquino pointed out "for example, the Philippine National Police tightened rules on importing chemicals to ensure their safety. But in the end, it just made

49 *Customs Red Tape Costs Vietnamese Traders $10 Billion a Year: Expert*, THANH NIEN NEWS (Aug. 13, 2015, 9:13 PM), http://www.thanhniennews.com/business/customs-red-tape-costs-vietnamese-traders-10-billion-a-year-expert-50046.html.

50 Michael Ramirez & Anand Udayakumar, *Thailand's Customs Reward System: The Slow March Towards Reform*, BANGKOK POST (May 16, 2014, 6:04 AM), https://www.bangkokpost.com/business/409975/thailand-s-customs-reward-system-the-slow-march-towards-reform.

51 Deloitte Touche Tohmatsu, *Expect Increased Customs Audits in Years to Come*, THE NATION THAILAND (Mar. 11, 2013), https://www.nationthailand.com/Economy/30201693.

52 *Red Tape Leaves Tsunami Aid Stranded At Docks*, FINANCIAL TIMES (May 12, 2005).

53 *Id.*

it harder for chemical industries, like those in the paint business, to bring in their materials".[54]

Of course, not every attempt to regulate is necessarily red tape, nor is every obstruction a nefarious gesture. The statistics and interviews in these examples miss one important element – the human element behind the actions, and I hope some personal experience can convey some perspective. In my previous role in 2016, I was part of a lobby group hoping to convince the Ministry of Information and Communication (MIC) in Vietnam to reconsider the regulator's insistence that a tablet (already at that time decided by the World Customs Organization (WCO) Harmonized System Committee (HSC) to be classified as a computing device) be treated for import compliance purposes as a mobile communications device. A computing device did not require an import license, while a mobile communications device did. Then in a regional trade compliance role, my government affairs counterpart and I were tasked with convincing the authorities that a tablet did not connect to mobile networks in the same way a mobile phone did. The head of the MIC department we spoke with empathized but responded saying that they understood the principle, but because the regulation did not clearly distinguish them, "it is better for you to just apply for the license". Put in this way, it is almost innocently human in nature, yet we know that with the right tools, infrastructure, training and resources, this concern could be managed without an obstructive measure. Without this obstruction, businesses could legitimately import tablets that meet safety standards into Vietnam without the need for an additional license – a cost ultimately passed on to consumers. Businesses benefit from this reduced operational cost as much as consumers in turn benefit from lower device costs. The net result is wealth creation from efficiency without compromising consumer protection.

7 A Means to an End: Forging Rules-Based Solidarity with Standards and Integrity

Not for the lack of desire or political will, ASEAN has in fact committed itself both to a rules-based regional system[55] and to eliminating NTMs in the signing

54 Claire Jiao, *Gov't Eliminates Red Tape in Business Processes*, CNN PHILIPPINES (June 14, 2016, 1:41 PM), https://cnnphilippines.com/business/2016/06/14/eliminating-red-tape-business.html.

55 *ASEAN Economic Community Blueprint*, ASEAN SECRETARIAT 5 (2008), https://asean.org/wp-content/uploads/archive/5187-10.pdf.

of the ASEAN Economic Community (AEC) in 2015 which promised the free flow of goods.[56] But if we know the consensus model is a perpetual deadlock at the inter-state level, there is very little point in continuing to bang on that door. The rule of law and elimination of NTMs is the end; it is perhaps time to turn our attention to the means. The people actually doing the work can be a powerful place to start – meaning, alleviate the state's inhibitions by appealing to what would actually make people's jobs easier (without compromising national security of course). At the national, district and provincial levels, human beings are tasked with executing tasks. And most do exactly that: Execute tasks.

This is precisely the reason why standards and integrity, instead of the "rule of law", are more relatable, and far more effective in driving compliance at the execution level in a non-threatening way. A universally acceptable ASEAN "code of conduct" leaning in the general direction of a regional set of norms can be inserted into regular operational manuals and training materials for staff and be used to drive cross border collaboration – both for civil service and private sector employees. Private sector employees of multinationals do this very well, given the way corporations operate across borders. To use the tablets import case in Vietnam as an example, supposing Vietnam was truly unsure and hesitant, a governing, or "grandfather" set of standards in place would have allowed them to consult best practices regionally. This code of conduct will need to be localized by each country of course, but because it is not law, it probably does not need to be legislated in order to be implemented. Individual civil servants would likewise be disincentivised from insisting that local standards should prevail. They may very well still do, but probably out of pride or face-saving rather than out of a duty owed to the law. There may very well be instances where local standards must prevail without question. The idea here is to weed out petty officialdom that fuels red tape, like saving precious resources for where they are well and truly needed. This is not interference. It is cooperation at an advanced level.

Integrity can be written into a theme song or code of conduct that is then disseminated through the media, state run channels of communication, industry focus groups, and most importantly, the education system. But as is the case, government officials answer to their respective governments, not to ASEAN. But suppose a standards and ethics monitoring board under the auspices of one of ASEAN's organs was established. How such a body will be staffed and funded is complex and beyond the scope of this article, but it would be extremely effective under the right conditions. Conceptually, the idea must

56 *Id.* at 6–10.

first receive support and funding from member states, in particular from those with a chronic fear of interference. In response to such a fear, a reasonable amount of questioning and peer review is not interference. It is checks and balances, albeit one that member states must voluntarily subject themselves to. Interestingly, ASEAN's greatest challenge aside from the ASEAN way is perhaps resources and funding. Even then, when broken into practical bite size initiatives or "projects" with a common goal and interest, the private sector can be mobilized to "adopt" various phases of the projects and implement them.

The skepticism of ASEAN leaders only shows how far we need to think regionalism and progressiveness more generally. It will take some convincing of their merits, but it is a necessary part of progress.

Articles

∵

A Legal Critique of the Award of the Arbitral Tribunal in the *Matter of the South China Sea Arbitration*

*National Institute for South China Sea Studies**

1 Introduction and Overview

This critique assesses each of the dispositive findings on jurisdiction and merits in the Award of South China Sea Arbitration,[1] from the perspective of the applicable substantive and procedural rules of public international law. This critique does not address in detail the Arbitral Tribunal's Award on Jurisdiction and admissibility,[2] dated 29 October 2015. However, it refers to the Award on Jurisdiction where relevant for the purposes of our legal critique of the Award. The core conclusions in respect of the Award are summarised below. In short, our analysis indicates that there are substantial grounds to question the validity of most of the Tribunal's central findings of jurisdiction and merits in the Award.

The core conclusions in respect of the Award are as follows: First, the Tribunal's finding that it had jurisdiction over the Philippines' Submission nos. 1 and 2 is open to substantial doubt. The principal issues at stake in establishing China's maritime entitlements in the South China Sea are inextricably linked to questions of territorial title over land and maritime areas in the South China Sea – issues that are clearly excluded from compulsory international dispute settlement under UNCLOS. The Tribunal's assessment of China's historic claims in the South China Sea, within the "nine dash line", and its conclusion that those claims did not include claims to "historic titles" so as to preclude

* This research project has been undertaken by the National Institute for South China Sea Studies (NISCSS). NISCSS has specialized in research on issues concerning the South China Sea for more than 25 years. This is an independent article and is published for public dissemination. A research team was formed in this regard under the direction of Dr. Shicun Wu, President of NISCSS and was composed of international law scholars, lawyers, historians and technical experts from the United Kingdom, the Netherlands, the United States and China. NISCSS would like to express its gratitude to each team member for their efforts and contributions, and in particular to FIETTA LLP for its invaluable assistance on this project.

1 *The South China Sea Arbitration* (Phil. v. China), Case No. 2013–19, Award (Perm. Ct. Arb. 2016) [hereinafter Award].

2 *The South China Sea Arbitration* (Phil. v. China), Case No. 2013–19, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2015) [hereinafter Award on Jurisdiction and Admissibility].

 | DOI:10.1163/9789004437784_009

jurisdiction under Article 298 of the Convention, are also highly questionable. The Tribunal's sharp distinction between "historic titles" and "historic rights", and its observation that only the former can be excluded from dispute settlement procedures by way of declaration under Article 298 under UNCLOS, has no clear basis in international law. Even if the Tribunal was correct in its finding that "historic titles" for the purposes of Article 298 form only a small subset of "historic rights", the Tribunal had abundant evidence before it that China does claim "historic titles", in the form of claims to sovereignty, within the "nine dash line". Yet another doubt arises from whether the Tribunal was competent to determine that China's nine dash line and related historic rights, as well as being "contrary to the Convention", were "without lawful effect" for the purposes of Submission no. 2. Arguably, such a question does not concern "the interpretation or application of [UNCLOS]", and thus falls beyond the jurisdiction of an UNCLOS arbitral tribunal.

Second, the Tribunal's findings on the merits of the Philippines' Submission nos. 1 and 2 are also subject to substantial doubt. In particular, the Tribunal's critical conclusion that UNCLOS "leaves no space for an assertion of historic rights" is highly questionable. Historic rights can and do continue to exist alongside (and independent from) UNCLOS, as confirmed by the award in the *Eritrea/Yemen* case and even in some UNCLOS articles (such as Article 51(1) on "traditional fishing rights" in archipelagic waters). Therefore, the Tribunal's conclusion that "the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein" is likely wrong. This conclusion was central to the Tribunal's substantive findings with respect to the Philippines' Submission nos. 1 and 2. It was therefore probably improper for the Tribunal to discard the "nine dash line", and the rights to which it refers, on the basis that UNCLOS "supersedes" all historic rights. Rather, historic rights regimes in maritime areas, including the EEZ, are capable of being preserved in international law notwithstanding UNCLOS.

Third, the Tribunal's findings with respect to the legal status of the features in the South China Sea (Philippines Submission nos. 3 to 7) are highly questionable in a number of respects. The Tribunal's conclusion that Itu Aba and all of the other high-tide features in the Spratly Islands constitute "rocks", which cannot sustain human habitation or economic life of their own in the sense of Article 121(3), is open to challenge both as a matter of law and as a matter of evidence. From a legal perspective, the Tribunal interpreted Article 121(3) in a highly restrictive way that contradicts both the Vienna Convention on the Law of Treaties ("VCLT") and State practice. On the evidence before it the Tribunal could easily have concluded that both Itu Aba on its own and (*a fortiori*) the Spratly Islands as a whole are capable of sustaining human habitation for

the purposes of Article 121(3). It could also (separately) have concluded that both Itu Aba on its own and (*a fortiori*) the Spratly Islands as a whole are capable of sustaining economic life of their own for the purposes of Article 121(2) and (3). Either finding would have been sufficient to deprive the Tribunal of jurisdiction in respect of Philippines Submission nos. 5, 8, 9 and 12, and from making a number of its substantive findings on the merits (particularly dispositif nos. 7, 8, 9, 10, 14 and 16(a) and (d)).

Fourth, on the evidence before it, the Tribunal could equally have concluded that Mischief Reef is a high tide feature and is thus capable of appropriation and entitled at least to a territorial sea under UNCLOS for the purposes of Article 121(3). Had the Tribunal reached this conclusion, it would have had no jurisdiction in respect of Philippines Submission nos. 5, 8, 9, 12 (so far as they concerned Mischief Reef and its territorial sea), and would thus have been unable to reach a number of its substantive findings on the merits (particularly dispositif nos. 7, 10, 14 and 16(a) and (d), as they relate to Mischief Reef).

Fifth, the Tribunal's decision not to analyse in the Award the legal status under Article 121 of a number of other high tide features (namely, Amboyna Cay, Flat Island, Loaita Island, Namyit Island, Nanshan Island, Sand Cay, Sin Cowe Island and Swallow Reef) is surprising. By taking such a "shortcut", the Tribunal arguably violated its obligation under Article 9 of Annex VII to UNCLOS to confirm its own jurisdiction. In order to do so, the Tribunal had to assess, in a meaningful way and with reference to available evidence, the status of all of the high tide features in the Spratly Islands.

Sixth, as regards a number of the Philippines' claims concerning Chinese activities in the South China Sea (Philippines Submission nos. 8 to 13), the Tribunal probably lacked jurisdiction. In particular, it probably lacked jurisdiction over Submission nos. 8, 9 and 12, due to the conclusions summarised above. In addition, the Tribunal arguably erred in concluding that the "military exception" at Article 298(1)(b) of UNCLOS was inapplicable, and thus in taking jurisdiction over the Philippines' Submission nos. 11 and 12(b).

Seventh, to the extent that it did have jurisdiction over the Philippines' claims concerning Chinese activities in the South China Sea (Philippines Submission nos. 8 to 13), while a number of the Tribunal's specific merits findings are probably correct on the law (for example, as regards the nature and extent of States' environmental and due diligence obligations under UNCLOS), many of those findings related to isolated incidents or were based on limited evidence. Further, the Tribunal's conclusion that China's operation of its law enforcement vessels near Scarborough Shoal violated COLREGS and, as a consequence, Article 94 of UNCLOS (Philippines Submission no. 13) appears incorrect because Article 94 does not apply to territorial sea areas.

Eighth, in a number of respects, the Tribunal arguably violated its responsibility under Article 9 of Annex VII to satisfy itself that the Philippines claims were "well founded in fact and law". For example, in respect of the Philippines' Submission nos. 4 and 6, the Tribunal engaged archivists in order to seek out evidence that was ultimately relied upon in order to uphold the Philippines' claims against China. In parallel, the Tribunal failed to explore evidence that may have been readily available to it and that may have undermined the Philippines' claims (such as evidence held by Taiwan in respect of Itu Aba). In doing so, the Tribunal arguably exceeded its mandate by relieving the Philippines of its burden of proof.

Ninth, the Tribunal committed a further procedural error by failing to provide the Parties with an opportunity to cross-examine four experts that it appointed after the merits hearing, and upon whose advice it relied in the Award.

Tenth, the Tribunal misapplied the *Monetary Gold* principle with respect to third State rights and interests in finding that the "legal interests of Malaysia do not form 'the very subject-matter of the dispute' and are not implicated by the Tribunal's conclusions". Clearly, the Tribunal's findings that a number of high tide features claimed by Malaysia constitute "rocks" for the purposes of Article 121(3) of UNCLOS implicated Malaysia's legal interests. They also implicated Vietnam's legal interests. This provides another basis to question the Tribunal's jurisdiction with respect to its critical findings as to the legal status of the Spratly Islands under UNCLOS.

Following this Introduction and Overview, Section 2 below analyses the Tribunal's findings with respect to China's maritime entitlements and claims in the South China Sea, including as regards "historic rights" and the "nine dash line", as addressed at Chapter V of the Award. Section 3 analyses the Tribunal's findings on the legal status of islands and other features in the South China Sea, as addressed at Chapter VI of the Award. Section 4 analyses the Tribunal's findings with respect to Chinese activities in the South China Sea, as addressed at Chapter VII of the Award. Finally, Section 5 examines certain procedural and evidentiary issues arising from the Tribunal's handling of the merits phase of the Arbitration, including as regards the important issues of the Philippines' burden of proof and the rights and interests of third States. Annex 1 sets out two tables comparing the characteristics of Itu Aba and a number of small features around the world claimed (or accepted) as fully-entitled islands, against the five criteria identified by the Tribunal for such status under Article 121(2) of UNCLOS.

2 The Tribunal's Findings with Respect to China's Maritime Entitlements, China's Claims to Sovereign Rights Jurisdiction and "Historic Rights" and the "Nine Dash Line" (Philippines Submission Nos. 1 and 2; Award Chapter V)

The Philippines' Submission nos. 1 and 2 read:[3]

(1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea ('UNCLOS' or the 'Convention').

(2) China's claims to sovereign rights jurisdiction, and to 'historic rights' with respect to the maritime areas of the South China Sea encompassed by the so-called 'nine dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS.

This Commentary on Part V of the Award of 12 July 2016 consists of four further sections. Section A discusses the determination of the Tribunal that it had jurisdiction to consider Submission nos. 1 and 2. Section 2.1 provides a commentary on the findings of the Tribunal with respect to Submission no. 1 and Section 2.2 does so with respect to Submission no. 2. Section 2.3 summarises the general and more specific conclusions on Chapter V of the Award.

2.1 *The Tribunal's Jurisdiction in Respect of Submission Nos. 1 and 2*

2.1.1 Award on Jurisdiction and Admissibility dated 29 October 2015

In its Award on Jurisdiction and Admissibility, rendered on 29 October 2015, the Tribunal stated that Submission nos. 1 and 2 concerned neither a dispute over territorial sovereignty over any land features within the South China Sea nor a dispute over maritime boundary delimitation. Rather, they reflected a dispute concerning the source of China's maritime entitlements in the South China Sea and the interaction of China's claimed historic rights with the provisions of the Convention. Therefore, in the view of the Tribunal, this was unequivocally a dispute concerning the interpretation and application of the Convention.

Nonetheless, the Tribunal suspended its final determination on jurisdiction over Submission nos. 1 and 2 to the merits stage of the proceeding. This is because a finding of jurisdiction was dependent on the Tribunal's substantive findings on the nature of any historic rights claimed by China, and thus

3 Award, *supra* note 1, at para. 112. An earlier formulation of these submissions appears in The South China Sea Arbitration (Phil. v. China), Case No. 2013–19, Memorial of the Philippines (30 March 2014), Vol. I, at 271 [hereinafter Memorial of the Philippines].

on whether the dispute was covered by the exclusion from jurisdiction in Article 298 of the Convention for disputes concerning "historic bays or titles".[4]

In response to the Award on Jurisdiction and Admissibility, China took once again the view that the Tribunal lacked jurisdiction because "the essence of this arbitration case is territorial sovereignty and maritime delimitation and related matters."[5]

2.1.2 Final Award Dated 12 July 2016

In its final Award of 12 July 2016, the Tribunal therefore returned to address issues of jurisdiction and admissibility. It decided that it had jurisdiction to consider the matters raised in Submission nos. 1 and 2 and that the claims contained therein were admissible.[6] In doing so, the Tribunal related China's claims to maritime entitlements in the relevant areas of the South China Sea as claims to "historic rights" to the exclusive use of the living and non-living resources. Furthermore, the Tribunal also found that such "historic rights" cannot be equated with the concept of "historic titles" as it appears in the jurisdiction exemption clause of Article 298(1)(a)(i) of UNCLOS. Lastly, the Tribunal ruled that China's claims to maritime entitlements in the South China Sea can only be judged upon the basis of the principles and rules contained in UNCLOS.[7] All of these findings were essential to the Tribunal's conclusion that it had jurisdiction over Submission nos. 1 and 2.

As an overarching observation, it is difficult to disentangle the determination of China's maritime rights and entitlements in the South China Sea from the broader issue of the territorial sovereignty over the islands and maritime areas in the South China Sea. The principal issues at stake in establishing China's maritime entitlements in the South China Sea are inextricably linked to the general issue of the territorial title over the land and the maritime areas in the South China Sea – issues that are clearly excluded from compulsory international dispute settlement under UNCLOS.[8] On this basis alone, it is

4 Award on Jurisdiction and Admissibility, *supra* note 2, at paras. 398–99.

5 China, Statement of the Ministry of Foreign Affairs of the PRC on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Philippines, 30 October 2015, on the Ministry of Foreign Affairs of China website at www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml.

6 Award, *supra* note 1, at paras. 276–78.

7 *Id.* at para. 278.

8 In a 1990 Article, one of the Members of the Tribunal (Professor Alfred H.A. Soons) recognised the inseparability of questions of maritime delimitation and the status of features under Article 121 of UNCLOS. *See* Barbara Kwiatkowska & Alfred H.A. Soons, *Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own*, 21 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 139, 146, 181 (1990).

highly questionable whether the Tribunal had jurisdiction over Submission nos. 1 and 2.[9]

As explained further below, the Tribunal's assessment of China's historic claims in the South China Sea, within the "nine dash line", and its conclusion that those claims did not include claims to "historic titles" so as to preclude its jurisdiction under Article 298 of the Convention, are also highly questionable.

First, the terminology of 'historic titles' and 'historic rights' cannot be so sharply distinguished such that the former can be excluded from the dispute settlement procedures by way of declaration under Article 298 under UNCLOS, while the latter cannot. Public international law does not recognise any such sharp distinction. It is unsurprising, therefore, that China has used these terms interchangeably in the past (see sub-section 2.2.1 below). The Tribunal's assessment that the optional exception to jurisdiction in Article 298(1)(a)(i) is limited to disputes relating to a narrow definition of "historical title", and thus to disputes involving claims to sovereignty over maritime areas only, is therefore subject to substantial doubt as a matter of law.

Second, even if the Tribunal were correct in its finding that "historic titles" for the purposes of Article 298 form only a small and specific subset of "historic rights" at international law, the Tribunal had abundant evidence before it that China does claim "historic titles", in the form of claims to sovereignty, within the "nine dash line". Therefore, even if the Tribunal's legal assessment was correct, its conclusion that China's claims within the "nine dash line" do not equate to claims to "historic titles" or elements of sovereignty is subject to substantial doubt as a matter of fact.

The Tribunal's basis for finding jurisdiction in respect of Submission nos. 1 and 2 generally is, therefore, tenuous. It is hard to see how the issue of the nature and scope of China's maritime rights and entitlements can be separated from the issue of Chinese claims to territorial sovereignty over the islands and maritime areas in the South China Sea.[10] It is also difficult to conclude that the condition mentioned in the final part of Article 298(1)(a)(i) is met, namely that the dispute does not "… necessarily involve[s] the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission".

Yet another serious doubt arises from whether the Tribunal was competent to determine that China's nine dash line and related historic rights, as well as being "contrary to the Convention", were "without lawful effect" for

9 In relation to jurisdiction dispositif no. 1.

10 *See* Kwiatowska & Soons, *supra* note 8, at 153.

the purposes of Submission no. 2.[11] Arguably, such a question does not concern "the interpretation or application of [UNCLOS]", and thus falls beyond the jurisdiction of a Part XV UNCLOS tribunal. Moreover, in observing that the applicable law in the dispute was restricted to Article 293 of the Convention (in contrast to the *Eritrea/Yemen* arbitration), but nevertheless deciding that claims to "historic rights" within the EEZ areas were "without lawful effect" (in contrast, again, to *Eritrea/Yemen*), the Tribunal effectively acknowledged that, had the applicable law provision been broader as in *Eritrea/Yemen*, its conclusion may have been very different. Instead, the Tribunal should have declined jurisdiction over the question of whether China's claims are "without lawful effect" on the basis that Part XV and Article 293 of the Convention preclude consideration of such a question of general international law. The Tribunal's approach appears to have been based merely upon a textual construction which ignores the role of "historic rights" in general international law (as explained in the following sub-section).[12]

For all these reasons, it would have been more logical for the Tribunal to find a *non liquet* since it lacked jurisdiction to consider Submission nos. 1 and 2.

2.2 *The Tribunal's Conclusion that China's Maritime Entitlements in the South China Sea May Not Extend beyond Those Expressly Permitted by UNCLOS (Philippines Submission No. 1; Tribunal Merits Dispositif No. 1)*

This section appraises the two main elements contained in the Award regarding Submission no. 1. These are: the meaning of the notion of "historic rights", "historic bays" and "historic waters" (subsection 2.2.1) and the exclusiveness of UNCLOS in appraising the legal nature and status of China's claims (subsection 2.2.2). Subsection 2.2.3 then sets out some interim conclusions. As indicated in Section 2.3 below, the conclusions reached with respect to Submission no. 1 are also applicable to Submission no. 2.

2.2.1 The Meaning of the Notion of "Historic Rights", "Historic Titles" and "Historic Waters"

UNCLOS itself does not employ explicitly the phrase "historic rights". It only refers to "historic bays" in Article 10(6) relating to the limits of the territorial sea and Article 298(1)(a)(i) relating to limitations and exceptions to compulsory

11 Award, *supra* note 1, at para. 278.

12 See on the "textual constructions" of the Tribunal, M.C.W. Pinto, *Arbitration of the Philippine Claim Against China*, 8(1) ASIAN JOURNAL OF INTERNATIONAL LAW 1, 5 (2018).

procedures entailing binding decisions. The concept of "historic title" features in Article 15 and Article 298(1)(a)(i) of UNCLOS.

At paragraph 226 of the Award, the Tribunal asserted that, beyond the references to "historic titles" at Articles 15 and 298, "other "historic rights", in contrast, are nowhere mentioned in the Convention". This is incorrect. The Convention does refer to historic rights, whether explicitly by implication, in a number of contexts. For example, there is a reference to historic rights in Article 51(1) with the preservation of "traditional fishing rights" in archipelagic waters, and in Article 62(3) relating to the Exclusive Economic Zone (EEZ) where there is mention of "States whose nationals have habitually fished in the zone". In addition, some other articles include terms such as "long usage" (Article 7(5)) and "historically … regarded" (Article 46(b)), which carry historical connotations.

All three concepts of "historic titles", "historic bays", and "historic rights" are well known in international law and have long been governed by customary international law, as partly recorded in treaty law including UNCLOS. That is not to say that the meaning of these three concepts has always been clearly defined, or that their inter-relationship has been universally understood. A well-known study on historic bays prepared by the UN Secretariat in 1957 upon request by the International Law Commission concluded that the subject of historic waters is one "where superficial agreement among practitioners conceals several controversial problems as well as some obscurity or at least lack of precision".[13]

It is widely understood that 'historic title' signifies sovereignty over land or maritime territory. As defined by Gioia in the Max Planck Encyclopaedia of Public International Law: "The term 'historic title' is […] used to denote both the source and the evidence of a right over land or maritime territory acquired by a State through a process of historical consolidation".[14]

It follows from the ICJ judgment in *Continental Shelf* (*Tunisia/Libya*) that historic title can relate to sovereignty over a wider belt of territorial sea as well as special sovereign rights falling short of full territorial sovereignty beyond the territorial sea.[15] The latter may include historic fishing rights, like in the case of

13 Historic Bays: Memorandum by the Secretariat of the United Nations, at 6, U.N. Doc. A/CONF.13/1 (30 September 1957). Since the concept of historic bays is not of direct relevance to the South China Sea dispute, comments will be provided below on historical titles and historical rights only.

14 Andrea Gioia, *Historic Titles*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2013, online version), at para. 1.

15 *Case concerning the Continental Shelf* (Tunisia v. Libya), 1982 I.C.J. Rep. 18 (Feb. 24) (Judgment). In this case it concerned Tunisia's alleged zone of long-established fishing activities.

Eritrea v. Yemen which concerned traditional or artisanal fishing rights enjoyed for centuries,[16] or in *Qatar v. Bahrain* regarding Bahrain's claims to historic fishing rights over the exploitation of pearling banks (which were unsuccessful on the evidence).[17] Gioia also states that in order to be relevant such historic rights must amount to exclusive rights acquired by a State on the basis of a claim made *à titre de souverain*.[18]

According to the ICJ, the acquisition of sovereign rights falling short of full territorial sovereignty in another State's territory or on the high seas could follow "on the basis of long practice" between two or more States "accepted by them as regulating their relations",[19] for example a long custom. It should be noted that the Tribunal limits the concept of historic title to "[being] used specifically to refer to historic sovereignty to land or maritime areas",[20] thus excluding more limited rights falling short of sovereignty. These would then all come within the scope of the more generic concept of "historic rights".

"Historic waters" are based upon historical title. In the words of the Tribunal, "'[h]istoric waters' is simply a term for historic title over maritime areas".[21] This also means that, in its view, historic waters are bound to be part of the sovereign territory of a State and that sovereignty extends to the air space above the historical waters and the seabed and subsoil thereof. This is by no means certain, since the concept of historic waters may well just refer to maritime areas where nationals of coastal States enjoy traditional fishing rights or use to follow certain navigational routes.

"Historic rights" are generally seen as the comprehensive term, covering both historic titles to sovereignty over land and maritime areas and other historic rights not involving full sovereignty. This was understood by the Tribunal.[22] In the former sense, therefore, "historic rights" and "historic titles" must overlap. Indeed, the two terms are often used interchangeably. The Tribunal correctly observed that "historic rights are, in most instances, exceptional rights. They accord a right that a State would not otherwise hold, were it not for the

16 *Sovereignty and Maritime Delimitation in the Red Sea* (Eritrea v. Yemen), Case No. 1996-04, Award of the Tribunal in the Second Stage – Maritime Delimitation 92, at para. 109.

17 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), 2001 I.C.J. Rep. 40 (Mar. 16) (Merits Judgment).

18 Gioia, *supra* note 14, at para. 19.

19 *Case concerning Right of Passage over Indian Territory* (Portugal v. India), 1960 I.C.J. Rep. 6 (Apr. 12) (Merits Judgment), at para. 39.

20 Award, *supra* note 1, at para. 225.

21 *Id.*

22 *Id.*

operation of the historical process giving rise to the right and the acquiescence of other States in the process."[23]

Notably, the 1957 UN Secretariat study, cited by the Tribunal at para. 220 of the Award, recognised that "historic rights" can be claimed in respect of "the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland".[24] China has repeatedly claimed historic rights in respect of the Spratly Islands as a group, as well as their "adjacent waters".[25] The fact that the 1957 study refers also to waters "lying between an archipelago in the neighbouring mainland" demonstrates clearly that such "historic rights" may apply in respect of waters that do not constitute "archipelagic waters" the purposes of Part IV of the Convention.

According to the Tribunal, Article 298(1)(a)(i) refers to "historic [...] titles" and hence relates to claims of sovereignty over maritime areas derived from historical circumstances.[26] This implies, in the view of the Tribunal, that other historical rights falling short of sovereignty, such as historic rights to the living and non-living resources of the sea, do not fall under the term "historic titles" and hence not under the optional exception clause to jurisdiction as in Article 298(1)(a)(i).[27] This is not very convincing, in view of the lack of a definition of historical titles in UNCLOS itself and the use of the plural form ("historical titles") in Article 298 as opposed to the use of the singular form in Article 15 on the territorial sea. The latter fact indicates that the phrase historic titles in the context of the jurisdiction exclusion clause of Article 298(1)(a)(i) may have a wider meaning than the one used in Article 15 relating to the delimitation of the territorial sea. As such, the term could easily encompass historic rights beyond those based on full and exclusive sovereignty. It could certainly be the case that China had its "historic rights" firmly in mind when it filed in 2006 its Declaration excluding disputes concerning "historic bays or titles" from the compulsory dispute settlement procedures in UNCLOS.[28]

23 *Id*. at para. 268.

24 The Secretariat of the United Nations, *supra* note 13, at para. 8.

25 See, for example, the statement issued by the Chinese Ministry of Foreign Affairs on 30 October 2015, cited at para. 187 of the Award.

26 Award, *supra* note 1, at para. 226.

27 *Id*.

28 *See* People's Republic of China, Declaration Under Article 298 (25 August 2006), 2834 UNTS 327. See in Section 2.c.II. the reference to historic rights in Article 14 of the Law on the Exclusive Economic Zone and Continental Shelf of 26 June 1998.

The fact that China has never distinguished between "historic titles" and other historic rights in the context of its claims in the South China Sea is shown by the fact that, as the Tribunal itself observed, China has sometimes described its claims to the maritime areas around and between the Spratly Islands (Nansha Islands) as related to "historic title".[29]

Furthermore, the fact that China has sometimes described its claims in those terms shows that, even if "historic title" does have the narrower legal meaning ascribed by the Tribunal in the Award, China's claims fall within it. Indeed, beyond the singular example cited by the Tribunal in its assessment of China's claims, it is notable that the Tribunal referred elsewhere in the Award to multiple other instances of China having articulated claims to "sovereignty" over waters located within the "nine dash line".[30] Clearly, some of those assertions of "sovereignty" appear to have related to waters located well beyond 12nm of the islands, and thus beyond their territorial seas. Further, although China has not drawn baselines around the Spratly Islands,[31] we understand that it has raised sovereignty claims over the Spratly Islands and their adjacent waters as a "comprehensive whole" and "since ancient times".[32]

Therefore, the Tribunal had ample evidence before it that China has asserted "sovereignty" claims over the maritime areas of the Spratly Islands, including to waters which are beyond 12 NM of the islands. On the Tribunal's own analysis, such "sovereignty" claims clearly engaged matters of "historic title", linked as they were to historic evidence. And yet, the Tribunal ignored that evidence in concluding that China's claims did not engage questions of "historic title". Again, it is reasonable to assume that China considered that these sovereignty claims with respect to the waters of the South China Sea as falling within in its 2006 Declaration under Article 298.[33]

---

29 See the Chinese *Note Verbale* to the Philippines dated 6 July 2011, which the Tribunal concluded was anomalous in the context of other Chinese claims to "historic rights" (Award at paras. 209, 227).

30 See, for example, instances cited by the Tribunal at paras. 654, 656, 658 and 659 of the Award, all of which evidence Chinese claims to "sovereignty" over the "waters" of the Nansha islands.

31 Unlike the Philippines, which drew straight baselines enclosing many of the Spratly Island features by way of its Presidential Decree 1596 of 1978.

32 See, for example, statements made by Chinese officials cited at Award, paras. 658–659. Of course, Chinese sovereignty claims to the Spratly Islands and their adjacent waters fell beyond the jurisdiction of the Tribunal.

33 *See* S. Talmon, *The South China Sea Arbitration: Observations on the Award of 12 July 2016*, 14 Bonn Research Papers on Public International Law 1, 10–14 (2018).

2.2.2 Assertions of "Historic Title" and "Historic Rights" are Commonplace in International Litigation, Including since UNCLOS

In proceedings concerning territorial disputes submitted to the ICJ, it frequently occurs that a party invokes a historic title or right to the land or maritime territory in question, either in the narrow sense that title emanates from a specific act of discovery and occupation of *terra nullius,* or in the more general sense of title being based on immemorial possession – that is, possession established for such a long period whose origins cannot be easily determined but are beyond question.[34] A well-known example is the *Minquiers and Ecrehos case* (*UK v. France*),[35] in which France claimed that it possessed an original title to the islets and rocks of the Minquiers and Ecrehos groups. France argued that it always maintained and never lost this title, whereas the UK claimed an ancient title to these territories based upon the conquest of England by the Duke of Normandy in 1066. However, ultimately the Court based its decision on evidence of possession of the disputed islands from more recent times.

Other examples of where international courts and tribunals have addressed claims of historic rights include the following cases:

1) Anglo-Norwegian (U.K. v. Norway)[36] in which Norway claimed historic title to marine areas beyond the territorial sea;
2) Fisheries Jurisdiction (U.K. v. Iceland)[37] and Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)[38] in which the UK and Germany, respectively, claimed historic fishing rights in high seas areas;
3) Continental Shelf (Tunisia/Libya)[39] in which Tunisia claimed a wider belt of territorial sea based upon long-established fishing activities;
4) Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)[40] in which the Gulf of Fonseca was claimed as a historical bay by the three coastal States and El Salvador and Honduras asserted their historical titles over some or all of the islands;
5) Sovereignty and Maritime Delimitation in the Red Sea (Eritrea v. Yemen)[41] in which traditional and artisanal fishing rights of nationals of

34 *See* A. Kozłowski, *The Legal Construct of Historic Title to Territory in International Law – An Overview*, 30 POLISH YEARBOOK OF INTERNATIONAL LAW 61, 63–80 (2010).
35 *Minquiers and Ecrehos Case* (Fr. v. U.K.), 1953 I.C.J. Rep. 47 (Nov. 17) (Judgement).
36 *Anglo-Norwegian Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. Rep. 117 (Jan. 18) (Judgement).
37 *Fisheries Jurisdiction Case* (U.K. v. Ice.), 1974 I.C.J. Rep. 3 (July 25) (Judgement).
38 *Fisheries Jurisdiction* (F.R.G. v. Ice.), 1974 I.C.J. Rep. 175 (July 25) (Judgement).
39 *Continental Shelf, supra* note 15.
40 *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.), 1990 I.C.J. Rep. 92 (Sept. 13) (Judgement) at 351.
41 *Sovereignty and Maritime Delimitation in the Red Sea, supra* note 16.

both Eritrea and Yemen were at stake within areas delimited as forming the other State's EEZ;

6) Case concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)[42] relating to Bahrain's claim to exclusive rights over the exploitation of the pearling banks;
7) Case concerning the sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), in which the Court's finding on the long usage of turtle egg collection on Sipadan played a determining role in confirming Malaysia's sovereignty;[43] and
8) Case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), in which the Court acknowledged the centuries-old rule of the Sultanate of Johor over its maritime domains, including the Straits of Singapore.[44]

It is notable that several of these cases post-date the conclusion of UNCLOS. In fact, in *Tunisia/Libya*, in which the ICJ was authorised by the Parties' Special Agreement to consider "new accepted trends",[45] the ICJ ruled that the emergent trends in the new law of the sea are to be found in UNCLOS.

The Court held that:

> … the Court would have had proprio motu to take account of the progress made by the Conference even if the Parties had not alluded to it in their Special Agreement; for it could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law.[46]

However, this did not preclude the Court in this and subsequent cases from recognising the potential for the continued existence of historic rights, in parallel with maritime entitlements enshrined in the Convention. As the Court observed, "[i]t is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal *régimes* in customary international law."[47]

---

42 *Maritime Delimitation and Territorial Questions*, *supra* note 17, at 40.
43 *Sovereignty over Pulau Ligitan and Pulau Sapadan* (Indon. v. Malay.), 2001 I.C.J. Rep. 575 (Oct. 23) (Judgement), at 625.
44 *Sovereignty over Pedira Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malay. v. Sing.), 2008 I.C.J. Rep. (May 23) (Judgement), at 12.
45 *Continental Shelf, supra* note 15, at para. 4.
46 *Id.* at para. 24.
47 *Id.* at para. 100.

2.2.3 The Alleged "Exclusive" Nature of UNCLOS and the Tribunal's Finding that It "Supersedes" Historic Rights beyond Territorial Sea

In the Award, the Tribunal asserts that UNCLOS is nowadays the sole source for the establishment of sovereign maritime rights and that, to the extent that rights are claimed beyond the limits imposed by UNCLOS, these are simply invalid and nullified. This is based upon the presumption by the Tribunal that the Convention supersedes any previously existing historic rights in general international law. This implies that the regimes established by UNCLOS for the EEZ (Part V) and continental shelf (Part VI) have replaced any prior Chinese historical rights over the living and non-living natural resources in the South China Sea. As the Tribunal holds:

> … the system of maritime zones created by the Convention was intended to be comprehensive and to cover any area of the sea and the seabed. The same intention for the Convention to provide a complete basis for the rights and duties of the States Parties is apparent in the Preamble, which notes the intention to settle all issues relating to the law of the sea' and emphasises the desirability of establishing 'a legal order for the seas.[48]

Consequently, in the view of the Tribunal, "the Convention supersedes earlier rights and agreements to the extent of any incompatibility", and "the text and context of the Convention [… are] clear in superseding any historic rights that a State may once have had in the areas that now form part of the exclusive economic zone and continental shelf of another State".[49] In short, the Tribunal concluded that "the Convention […] leaves no space for an assertion of historic rights."[50]

This conclusion was critical to the Tribunal's substantive conclusions with respect to Submission nos. 1 and 2. However, it is subject to doubt on multiple fronts.

Three preliminary points can be made. First, an essential premise of the Tribunal's conclusion that the Convention "leaves no space" for China's "historic rights" claims in the maritime areas of the South China Sea was that those claims are limited to living and non-living natural resources. It is striking that the Tribunal's substantive analysis of China's "historic rights" for the purposes of Submission nos. 1 and 2 focused exclusively on "rights and jurisdiction over

48 Award, *supra* note 1, at para. 245.
49 *Id*. at paras. 246–247.
50 *Id*. at para. 261.

living and non-living resources".[51] The Tribunal did not address substantial attention to the possibility that China's claims may extend beyond natural resources.[52] To the extent that China's claims to "historic rights" extend beyond natural resources, even the Tribunal confirmed that they may not contradict UNCLOS and thus be more readily preserved.[53]

A second premise to the Tribunal conclusion appears to have been that China claims "exclusive" rights within the "nine dash line".[54] This ignores indications to the effect that China's claims may not be "exclusive" in nature.[55] Even if the Tribunal was correct to conclude that there was no evidence of China having any historic right to the exclusive use of the resources of the South China Sea prior to UNCLOS,[56] this should not preclude China from claiming non-exclusive historic rights within the "nine dash line" (for example, of the kind enjoyed by fisherfolk of both States in the *Eritrea/Yemen* case).

Third, it is striking that the Tribunal did not consider the possibility that China's claims to "historic rights" arise in the connection with the waters of the Spratly Islands as a whole, whether as an offshore archipelago or otherwise. This was despite the fact that the 1957 UN Secretariat study on "historic bays", cited by the Tribunal in the Award, explicitly recognised that "historic rights" can be claimed in respect of "the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland".[57] This is particularly surprising given the Tribunal's acknowledgement later in the Award, in Chapter VI, of the historic presence of Chinese fishermen throughout the Spratly Islands as a whole.[58] As explained in the critique of Chapter VI below, the Tribunal limited its analysis of the potential for claims based upon the Spratly Islands collectively to findings that the features cannot be enclosed within a system of archipelagic or straight baselines under the Convention.

---

51 *Id*. at paras. 234–35, 239, 246, 262.

52 *See*, *e.g.*, S. Wu & K. Zou, ARBITRATION CONCERNING THE SOUTH CHINA SEA 132, 140 (2016). For instance, according to Dr. Wu and Dr. Zou, China's claims of historic rights beyond natural resources include fishing rights, navigation rights, maritime law enforcement and marine scientific research rights.

53 Award, *supra* note 1, at para. 238(b).

54 *Id*. at paras. 243, 258, 270.

55 Wu & Zou, *supra* note 52, at 140.

56 Award, *supra* note 1, at para. 261.

57 The Secretariat of the United Nations, *supra* note 13, at para. 8.

58 For example, the Tribunal referred in Chapter VI of the Award to evidence showing that Chinese fishing communities were present in the Spratlys "for comparatively long periods of time, with an established network of trade and intermittent supply". Award, *supra* note 1, at paras. 597–601.

This is irrelevant to the entirely separate question of whether China may have enjoyed "historic rights" within the waters of the archipelago.

In any event, and more importantly, for at least eight reasons the Tribunal's claim of exclusiveness and exhaustiveness of the Convention, such that it "supersedes" any pre-existing historic rights in areas that became EEZ or continental shelf, is untenable under international law.

First, as opposed to a constitution or a formulation of general norms from which no derogation is permitted (*jus cogens*), the Convention is an ordinary multilateral treaty, however comprehensive and significant its provisions may be.[59] It does not contain an Article 103 UN Charter-type of provision according the obligations under this treaty in matters not regulated by it a superior status above other obligations of international law, and placing the treaty in a hierarchically higher position than other treaties and other sources of international law.[60]

Second, UNCLOS itself recognizes the continued validity of general international law alongside the Convention. Thus, in paragraph 8 of its Preamble the Convention states that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law". Obviously, general international law includes customary international law which, in turn, includes historic rights. Moreover, general international law is also referred to in a considerable number of other provisions of UNCLOS.[61]

Third, the ongoing relevance of customary international law alongside the Convention is confirmed in the practice of tribunals established under the compulsory procedures of the Convention entailing binding decisions. Relevant international jurisprudence demonstrates amply that the applicable law of UNCLOS tribunals is not limited to UNCLOS only but also includes, as per Article 293, other rules of international law not incompatible with UNCLOS. For example, in *The Arctic Sunrise Arbitration* (*Netherlands v. Russia*), the Tribunal stated:

---

59 The Convention regulates the main uses (albeit not all) of the seas and the oceans and establishes the principal maritime zones (i.e., territorial sea, contiguous zone, EEZ, continental shelf, high seas and deep seabed). Currently, UNCLOS has 167 State parties and the EU is also a party.

60 Article 103 of the UN Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

61 These include Arts. 2(3), 19, 22, 74, 83, 87(1), 293 & 295. Wood spotted some 40 provisions with express references to general international law in UNCLOS. *See* M. Wood, *The International Tribunal for the Law of the Sea and General International Law*, 22 International Journal of Maritime and Coastal Law 351, 359 (2007).

> Both arbitral tribunals and ITLOS have interpreted the Convention [UNCLOS] as allowing for the application of relevant rules of international law. Article 293 of the Convention makes this possible. For instance, in M/V "SAIGA" No. 2, ITLOS took account of general international law rules on the use of force in considering the use of force for the arrest of a vessel.[62]

The Tribunal continued in the same award:

> In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons.[63]

Fourth, international jurisprudence confirms specifically that customary regimes of historic rights continue to exist in parallel with separate regimes covering maritime entitlements under international law. Thus, in *Continental Shelf* (*Tunisia/Libya*), the ICJ observed in relation to the continental shelf (now governed by Part VI of UNCLOS) that: "It is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes in customary international law."[64] Judge Oda elaborated on this in his Dissenting Opinion in that case, referring to "the principle that any historic fishing right based on longstanding practice should be respected whatever the status of the submerged areas under the new régime. […] [T]he concept of the exclusive economic zone […] has nothing to do with historic titles".[65]

Fifth, international jurisprudence since UNCLOS further confirms that historic fishing rights of one State (or its nationals) can continue to exist as a

---

62 *The Arctic Sunrise Arbitration* (Netherlands v. Russia) Case No. 2014-02 (14 August 2015), Award on the Merits, para. 191.

63 *Id.* para. 198. Other relevant cases endorsing this position: *The M/V Saiga* (*No. 2*) *Case* (Saint Vincent v. Guinea), 1999 I.T.L.O.S. No. 2 (Judgment of July 1) at para. 155; *Barbados v. Trinidad & Tobago*, Case No. 2004-02 (11 Apr. 2006), Award, para. 222.

64 *Continental Shelf, supra* note 15, at para. 100.

65 *Case concerning the Continental Shelf* (Tunisia v. Libya), 1982 I.C.J. Rep. 18 (Dissenting Opinion of Judge Oda), at para. 88. Here, Judge Oda did not depart from the majority judgment of the Court.

matter of general international law even within the exclusive economic zone of another State. In *Eritrea/Yemen*, the Tribunal acknowledged the existence and continuation of pre-UNCLOS historic rights within the territorial seas and EEZs of each of the Parties, in the form of a traditional fishing regime. The Tribunal's attempts in the Award to distinguish that case on the basis of the broader "applicable law" in *Eritrea/Yemen*, and with reference to the fact that *Eritrea/Yemen* "was not an arbitration under Annex VII to the Convention", are unconvincing.[66] Certainly, they do not explain the Tribunal's conclusion, despite its narrower "applicable law", that China's claims to historic rights, or other sovereign rights or jurisdiction existing outside of UNCLOS, are "without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention".[67] On the contrary, the *Eritrea/Yemen* Award explicitly recognises the ongoing legal validity at general international law of historic rights within EEZ areas, despite the fact that such rights (as in that case) can exceed the geographic and substantive limits of maritime entitlements under the Convention. It also disproves the Tribunal's separate finding that "historical navigation and fishing, beyond the territorial sea, cannot [...] form the basis for the emergence a historic right".[68]

Sixth, Article 311 of UNCLOS deals explicitly with how the Convention relates to other conventions and international agreements. This Article only stipulates prevalence of UNCLOS over the four 1958 Conventions on the Law of the Sea, and prevalence of Article 136 (relating to the common heritage of mankind) with respect to which no amendments to the basic principles are allowed.

Seventh, the Tribunal provides no legal rationale or justification for its conclusion that "[Article 311] applies equally to the interaction of the Convention with other norms of international law, such as historic rights, that do not take the form of an agreement".[69] There is nothing in the text of Article 311 that provides for this.[70] Its scope extends only to the relation of the Convention to other conventions and international agreements, not to general international

66 Award, *supra* note 1, at para. 259.

67 *See id.* at para. 278 and merits dispositif no. 2.

68 *Id.* at para. 270.

69 *Id.* at para. 235.

70 *See also* P.S. Rao, The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility, 15 CHINESE JOURNAL OF INTERNATIONAL LAW 265, 293 (2016).

law and customary international law. Since the *Nicaragua* judgment, and as confirmed by Judge Oda in *Continental Shelf* (*Tunisia/Libya*), it is widely acknowledged that "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content".[71]

Eighth and lastly, the Convention itself provides for a number of limitations and exceptions in Articles 297 and 298 to the compulsory dispute settlement procedures entailing binding decisions (provided for in Part XV, Section 2 of the Convention).[72] This is another indication of the not entirely exclusive nature of UNCLOS, and the fact that a broad range of law of the sea disputes (including those related to historic title claims) can only be resolved outside the Convention.

2.2.4 Interim Conclusion with Respect to Submission No. 1

The finding of the Tribunal that UNCLOS "leaves no space for an assertion of historic rights" is highly questionable. The concepts of "historic titles" and "historic rights" are not as clearly and consistently distinguished as the Tribunal asserts in its Award. Rather, the two terms are often used interchangeably. Historic rights can and do continue to exist next to and independent from UNCLOS, as confirmed by the award in the *Eritrea/Yemen* case.

In effect, the Tribunal concludes that there no longer exists a body of general international law rules in parallel with the Convention. This is incorrect. Therefore, the conclusion of the Tribunal in paragraph 278 of the Award that "the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein" is probably wrong. This provides a serious basis to challenge the Tribunal's substantive findings with respect to Submission no. 1 (and thus merits *dispositif* no. 1). As elaborated in the following Section, it also provides a serious basis to challenge the Tribunal's substantive findings with respect to Submission no. 2 (and thus merits *dispositif* no. 2).

---

71 *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. Rep. 14 (June 27) (Judgment), at para. 179.

72 Disputes excluded by Art. 297 or exempted by Art. 298 of the Convention from application of the compulsory dispute settlement procedures may be submitted to such procedures only by agreement of the parties to the dispute.

2.3 *The Tribunal's Conclusions: that China's Claims to Historic Rights, or Other Sovereign Rights or Jurisdiction, with Respect to the Maritime Areas of the South China Sea Encompassed by the "Nine Dash Line" are Contrary to the Convention and Without Lawful Effect to the Extent that They Exceed the Geographic and Substantive Limits of China's Maritime Entitlements under the Convention: and that the Convention "Superseded" Any Historic Rights, or Other Sovereign Rights or Jurisdiction, in Excess of the Limits Imposed Therein (Philippines Submission No. 2; Tribunal Merits Dispositif No. 2)*

The Philippines' Submission no. 2 reads:[73]

> China's claims to sovereign rights jurisdiction, and to "historic rights" with respect to the maritime areas of the South China Sea encompassed by the so-called "nine dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS.

The so-called "nine dash line" plays a central role in the discussion on the extent of China's historic rights in the South China Sea. The background, meaning and implications of this line are discussed subsection (1). Subsection (2) surveys some of China's relevant post-war declarations and legislation on the law of the sea, followed by interim conclusions in subsection (3).

2.3.1 The "Nine Dash Line": Background, Meaning and Implications

The "nine dash line", originally an eleven-dash line and also called the U-shaped line or dotted line, first appeared in some Chinese atlases following the end of WWII and the end of Japan's occupation of the Xisha and Nansha Islands. In 1947, the Chinese Ministry of the Interior published a list of 172 geographical names, in both Chinese and English, for the islands in the South China Sea. Subsequently, in February 1948 the Chinese government released through the Commerce Press in Beijing an official atlas of all national administrative districts, which also depicted the eleven-dash line. In 1949, the four island groups in the South China Sea (Xisha or Paracel Islands, Dongsha or Patras Islands, Zhongsha Islands, and Nansha or Spratly Islands) and other attached

73 Memorial of the Philippines, *supra* note 3, at 271.

islands were placed under the authority of the Hainan District of Guan Dong Province.[74]

In 1953, two of the eleven dashes were removed following an understanding between China and Viet Nam on their maritime borders in the Gulf of Tonkin. Ever since, the "nine dash line" remained in this form on Chinese maps and in its atlases. It was this map showing the "nine dash line" which, on 7 May 2009, was appended to two *Notes Verbales* to the UN Secretary-General, through which China responded to the joint submission of Malaysia and Viet Nam on 6 May 2009 to the UN Commission on the Limits of the Continental Shelf.[75] This prompted a series of exchanges of diplomatic notes with Viet Nam, Malaysia, the Philippines and Indonesia. In such exchanges the "nine dash line" consistently features as a point of reference for China's claim to rights "formed throughout the long course of history and [...] maintained by the Chinese government consistently",[76] and "supported by abundant historical and legal evidence".[77]

There is considerable logic to the observation by Ghao and Bing Bing that around 1947: "The underlying reason for the eleven-dash line was presumably to reaffirm and reiterate China's sovereignty over the islands group in the South China Sea at the beginning of a new, postwar era."[78] It appears that the dotted line signifies the general geographical scope of China's authority (*imperium* or *domaine réservé*) over the South China Sea rather than a specific boundary, demarcating precisely its territory, internal waters and territorial seas in the South China Sea.

There has also been speculation that the dashed line roughly follows the 200-meter isobath, in the context of the emergence of international discussions on rights to the continental shelf following the 1945 Truman Proclamation on this, or served a potential delimitation purpose by drawing more or less

---

74 See for a summary of the historic evolution of the nine-dash line, Z. Ghao & B.B. Jia, *The Nine Dash Line in the South China Sea: History, Status, and Implications*, 107 American Journal of International Law 98, 100–08 (2013).

75 *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009); *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009).

76 Ministry of Foreign Affairs, People's Republic of China, Briefing by Xu Hong, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines (12 May 2016), on the Ministry of Foreign Affairs of China website at www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1364804.shtml.

77 *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011).

78 Ghao & Jia, *supra* note 74, at 103.

the median lines between the Chinese islands in the South China Sea and the opposite coasts of the neighbouring States.[79] In either of these scenarios, of course, the "nine dash line" would constitute a claim to "historic titles", even within the meaning ascribed to that term by the Tribunal in the Award, and would thus fall outside the Tribunal's jurisdiction by virtue of China's Article 298 Declaration.

2.3.2 Declarations and Legislation of China in the Field of the Law of the Sea

As regards legislative and declaratory acts in the post-war period, China issued its Declaration on the Territorial Sea on 4 September 1958, promulgating a 12 NM territorial sea for both its mainland and its coastal and off-lying islands.[80] On 25 February 1992, in the context of the forthcoming ratification of the 1982 Convention on the Law of the Sea, China enacted a new Law on the Territorial Sea and the Contiguous Zone ("1992 Law"), including for the four island groups of the South China Sea as well as for all other islands belonging to China in its Article 2.[81]

China ratified UNCLOS on 7 June 1996. On the occasion of depositing its instrument of ratification with the UN Secretary-General, China expressly reaffirmed "its sovereignty over all its archipelagos and islands as listed in article 2 of the [1992 Law]". In accordance with the Convention, China proclaimed its EEZ in an official declaration on 7 June 1996. Thereupon, it promulgated the Law on the Exclusive Economic Zone and the Continental Shelf on 26 June 1998 ("1998 Law").[82] Article 14 of the 1998 Law provides that: "No provisions of this Law can prejudice historic rights of the People's Republic of China". Notably, China uses the general concept of "historic rights" which, as discussed in Section II.B above and acknowledged in the Award, is broadly considered as including the concept of "historic titles".

Several other declarations are of relevance. As discussed above, China made on 25 August 2006 a Declaration under Article 298(1)(a)(i), excluding various categories of disputes, including those concerning maritime boundary delimitations or those involving "historic bays and titles", from the compulsory

79 *Id.* at 109.

80 These and other legal documents referred to in this paragraph can be found in COLLECTION OF THE SEA LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (3rd ed. 2001).

81 *See* Art. 2 of the 1992 Law on the Territorial Sea and Contiguous Zone.

82 Adopted at the 3rd Meeting of the Standing Committee of the Ninth National People's Congress on June 26, 1998 and promulgated by Order No. 6 of the President of the People's Republic of China on June 26, 1998.

dispute settlement procedures entailing binding decisions as contained in Part XV of UNCLOS.[83]

Notwithstanding its policy of non-appearance and non-participation in the arbitration proceedings initiated by the Philippines, China issued on several occasions public statements or position papers on the South China Sea Arbitration. On 7 December 2014 it deposited a *Note Verbale* with the PCA, attaching an extensive Position Paper in which it reiterated its historic rights in the South China Sea and explained why in its view the Tribunal lacked jurisdiction in the case.[84] Similarly, the Ministry of Foreign Affairs of the People's Republic of China issued a statement on 30 October 2015 in response to the Tribunal's Award on Jurisdiction and Admissibility of the day before, in which the Ministry declared that Award to be "null and void" and to have "no binding effect on China".[85]

In the Award, the Tribunal found that China's claim to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the "nine dash line" were contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. Therefore, the Tribunal concluded with respect to Submission no. 2 that the Convention leaves no space for an assertion of historic rights based upon the "nine dash line" beyond the rights emanating from the maritime zones included in the Convention, most notably the territorial sea, the EEZ and the continental shelf.[86]

For the reasons set out at subsection 2.2.2 above, this conclusion, which formed the heart of the Tribunal's *dispositif* no.2, is subject to substantial doubt as a matter of law (even if the Tribunal had jurisdiction over this question, which it likely did not for the reason set out at subsection A(ii) above).

---

83 *See* People's Republic of China, Declaration under Article 298 (25 August 2006), 2834 UNTS 327. The relevant part reads: "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to it in paragraph 1(a) (b) and (c) of Article 298 of the Convention".

84 See the English text of the Position Paper of the Government of China dated 7 December 2014, also published in Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, 17(2) *Chinese Journal of International Law* 207 at 655 (2018) (hereinafter Critical Study), on the Ministry of Foreign Affairs of China website at www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm.

85 *Id.* at 679.

86 Award, *supra* note 1, at paras. 261–62, 278.

2.3.3 Interim Conclusion with Respect to Submission No. 2

The "nine dash line" has for more than half a century been a consistent point of reference for China and for a long period prompted no coherent responses by neighbouring coastal States until 2009. Its particular background is the re-assertion of control over the island groups of the South China Sea in the immediate post-war period and the pre-empting of potential interference by third States. It is too simplistic for the Tribunal to completely discard the line, and the rights to which it refers, on the basis that the Convention "supersedes" all historic rights which do not exactly accord with the provisions of UNCLOS. Rather, as explained above and as international jurisprudence confirms, historic rights regimes in maritime areas, including the EEZ, are capable of being preserved in international law notwithstanding UNCLOS.

2.4 *Assessment and Conclusions on the Findings of the Tribunal on Submissions Nos. 1 and 2*

2.4.1 Jurisdiction

There are strong arguments indicating that the Tribunal incorrectly found jurisdiction in the Award over Submission nos. 1 and 2. First, in order properly to decide on the maritime rights and entitlements of China in the South China Sea, the Tribunal had to assess the underlying issue of the territorial title of China to sovereignty over the islands and maritime areas of the South China Sea. However, these issues are explicitly excluded from the compulsory dispute settlement procedures under Part XV of UNCLOS and as per the Declaration made by China under Article 298(1)(a)(i). Second, the Tribunal's conclusion that China's claims within the "nine dash line" involve issues of "historic rights" but not "historic title" (for the purpose of China's Article 298 Declaration) is legally unsound. Third, evidence before the Tribunal confirmed that, in any event, China claims elements of "sovereignty" (and thus "historic title") within the "nine dash line" (thus satisfying the Tribunal's legal test for the purpose of China's Article 298 Declaration). Fourth, the Tribunal did not have jurisdiction to declare that China's "nine dash line" and related "historic rights", as well as being "contrary to the Convention", were "without lawful effect". Indeed, to the extent that it had such jurisdiction, it should (like the *Eritrea/Yemen* tribunal) have declared that such "historic rights" can persist alongside the Convention.

2.4.2 Continued Relevance of Historic Maritime Rights: UNCLOS Does Not Mark the End of History

A central issue in the South China Sea Arbitration is the continued validity and the legality of historic maritime rights after the conclusion and entry into force of UNCLOS. Should these rights be judged only in the context of UNCLOS

or also from a general international law perspective? This is the principal question raised in the context of Philippines' Submission no. 1, but is also of critical relevance in connection with its Submission no. 2. The Tribunal reduced this key question to the status of historic rights in the context of UNCLOS only. This is a classic case of "tunnel vision". The Tribunal concluded that UNCLOS "superseded" and thus wiped out, all historic rights within maritime areas that would otherwise constitute EEZ and continental shelf under UNCLOS.[87] This is a radical proposition from a legal perspective and has far-reaching consequences, nullifying in principle (beyond the South China Sea context) all historic rights that coastal States may have to maritime areas beyond their territorial seas. Moreover, the proposition lacks legal foundation as it is contradicted by the text of UNCLOS and by international jurisprudence, both of which provide for the ongoing co-existence of historic rights in maritime space. In addition, the Tribunal did not consider in any detail the possibility that China's claims to "historic rights" within the "nine dash line" might extend beyond rights with respect to natural resources, or might not be exclusive in nature, or might be centred around the Spratly Islands collectively, as a group or offshore archipelago.

However comprehensive a treaty UNCLOS may be, and however significant its status, it cannot and does not extinguish or supersede all historical maritime rights existing under general international law. The *alfa et omega* of the international law of the sea comprises more than UNCLOS. Rather, the concept of "historic rights" is one which is long supported by state practice and international jurisprudence, both before and since UNCLOS. As such, historic rights to and within maritime areas continue to be part and parcel of general international law. Contrary to what the Tribunal appears to suggest, UNCLOS does not mark the end of history or extinguish historic rights that may exist in a variety of guises around the world.

On the contrary, UNCLOS itself provides ample room for the continued validity and applicability of general international law, including customary international law, which can obviously serve as the source of historic rights. These can relate to both territorial claims to certain land and maritime areas around or between it and to certain sovereign rights to the living (in the sense of 'habitual fishing by nationals' ex Article 62(3) of UNCLOS) and non-living resources in a certain area.

87 *Id.* at paras. 246, 247, 262, 278.

2.4.3 The "Nine Dash Line" is Not "Without Lawful Effect"

Submission no. 2 focuses on the continued validity and legality of the "nine dash line" and related claims to "historic rights". Also, here the Tribunal takes a radical position: it concludes that the line and related claims to sovereignty and historic rights are contrary to UNCLOS and therefore without legal effect to the extent that China's maritime claims exceed the geographic and substantive limits of its entitlements under the Convention. China has never claimed all maritime waters encompassed by the "nine dash line" as internal waters, territorial sea or even EEZ. Nor is it clear that China ever claimed exclusive sovereignty over the natural resources of the South China Sea. Rather, it has stated that it respects freedom of navigation in and overflight over the waters in (at least part of) the maritime areas encompassed by the "nine dash line". The "nine dash line" has been, for 50 years, a consistent point of reference for China. But there is no particular international obligation incumbent upon China to specify what exactly is meant by this historic line and its related historic rights. A comprehensive exposition could most likely only be expected in proceedings concerning territorial sovereignty over land and maritime areas of the South China Sea, or in the context of specific maritime boundary delimitation with neighbouring coastal States. However, these issues are explicitly excluded from the scope of the international dispute settlement procedures under Part XV of UNCLOS and are matters for negotiation or other agreed means of international dispute settlement voluntarily chosen by the parties concerned.

3 The Tribunal's Findings on the Status of Features in the South China Sea (Philippines Submission Nos. 3 to 7; Award Chapter VI)

3.2 *The Tribunal's Classification of Features as Low-Tide Elevations under Article 13 of UNCLOS* (*Philippines Submission Nos. 4 and 6; Tribunal Merits Dispositif Nos. 4 and 5*)

Article 13 of UNCLOS provides as follows:

> Article 13 Low-tide elevations
>
> 1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

The Tribunal made several observations in its interpretation of Article 13 and legal approach to the classification of low-tide elevations, with which we broadly agree. The Tribunal noted that the inclusion of the term "naturally formed" in the definition of both a low-tide elevation and an island "indicates that the status of the feature is to be evaluated on the basis of its natural condition".[88] The significance of the Tribunal's observation, that "human modification cannot change [...] a low-tide elevation into an island", is uncontroversial.[89] The Tribunal further observed that many of the South China Sea features in question had been "subjected to substantial human modification"[90] and that UNCLOS required that "the status of the feature be ascertained on the basis of its earlier, natural condition, prior to the onset of significant human modification."[91]

The Tribunal then noted, also un-controversially, that because Article 13(2) states that a low-tide elevation does not generate a territorial sea of its own (except when it falls within the breadth of a territorial sea generated from a high-tide feature or mainland), it is not entitled to an EEZ or continental shelf.[92] With respect to the status of low-tide elevations, the Tribunal observed correctly that low-tide elevations do not form part of the land territory of a State in a legal sense, and that they "cannot be appropriated". Rather, they coastal State only has sovereignty over low-tide elevations to the extent that they are situated within its territorial sea, since the State has sovereignty over the territorial sea itself.[93]

The Tribunal noted that both Articles 13 and 121 of UNCLOS use the term "high tide" and observed that "high tide" was "not a technical term" that could be interpreted in different ways.[94] Consequently , the Tribunal considered that "States are free under the Convention to claim a high-tide feature or an island on the basis of any high-water datum that reasonably corresponds to the ordinary meaning of the term "high tide" in Articles 13 and 121."[95]

---

88 *Id.* at para. 305.
89 *Id.*
90 *Id.* at para. 306.
91 *Id.*
92 *Id.* at para. 308.
93 *Id.* at para. 309.
94 *Id.* at para. 311.
95 *Id.*

When it came to the evidence, the Tribunal noted that the most accurate determination of whether a feature was above or below water at high tide would be based on a "combination of methods", including "direct, in-person observation".[96] However, the Tribunal observed that such direct observation was "impossible where human modifications have obscured the original status of a feature or where political considerations restrict in-person observation".[97] The Tribunal thus acknowledged the "absence of full information" in reaching its findings as regards the status of the features.

The Tribunal considered that, "given the impossibility of direct, contemporary observation",[98] the most relevant evidence relating to the status of features in the South China Sea was to be found in nautical charts, records of surveys and sailing directions.[99] All of this evidence was necessarily historic in nature, much of it deriving from British and Japanese surveys conducted during the 19th and early 20th centuries and nautical charts at a scale of no better than 1: 150,000.[100]

The Tribunal's approach goes against international jurisprudence and leading commentary, which clearly favours contemporaneous evidence, where available, over historical charts or surveys, unless these form an integral part of a particular treaty.[101] In *Nicaragua v. Colombia*, the ICJ questioned the probative value of historical surveys and preferred contemporary (including photographic) evidence presented by Colombia for the purposes of determining the status of Quitasueño and other disputed features under the Convention.[102]

The Tribunal's findings were therefore, even on its own view, based upon imperfect evidence. Had the Tribunal had access to evidence based upon contemporary, direct observation of features such as Mischief Reef and Second Thomas Shoal in their natural form, its conclusions that those features are

96 *Id.* at para. 321.

97 *Id.*

98 *Id.* at para. 327.

99 *Id.*

100 *Id.* at paras. 327–32.

101 See, in particular, *Frontier Dispute* (Burkina Faso v. Republic of Mali), 1986 I.C.J. Rep. 583 (Judgment), at para. 56, "Since relatively distant times, judicial decisions have treated maps with a considerable degree of caution [...] maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title".

102 *Territorial and Maritime Dispute* (Nicar. v. Colom.), 2012 I.C.J. Rep. (Nov. 19) (Judgment), at paras. 35–38.

low-tide elevations may have been very different. Therefore, to the extent that such contemporary (including photographic and survey) evidence is available, it would likely be of more legal weight than the historic evidence relied upon by the Tribunal in its Award. Of course, such evidence will only be available to the extent that human modifications have not concealed the natural status of the feature.[103]

3.2.1 The Tribunal's Conclusion that Mischief Reef and Second Thomas Shoal are Low-Tide Elevations and Thus Not Capable of Appropriation (Philippines Submission No. 4; Tribunal Jurisdiction Dispositif No. 2(B) and Merits Dispositif Nos. 3 and 4)

The Tribunal concluded that Mischief Reef and Second Thomas Shoal are below water at high tide and therefore constitute low-tide elevations for the purposes of Article 13 of UNCLOS.[104] As such, the Tribunal found that they are incapable of appropriation as a matter of international law.[105]

The Tribunal's finding that Mischief Reef and Second Thomas Shoal were low-tide elevations was a pre-requisite for the Tribunal's acceptance of jurisdiction in respect of Philippines Submission nos. 5, 8, 9, 12, and for a number of its substantive findings on the merits (particularly *dispositif* nos. 7, 10, 14 and 16(a) and (d)). In addition, one commentator has observed:

> by not finding any feature to be an island, the result was that two of the most contested features – Mischief Reef and Second Thomas Shoal (which the Tribunal had found to be low-tide elevations) – are thus located with the established exclusive economic zone of the Philippines, and as it is not within 200 nautical miles of any feature to which China could possibly claim sovereignty, these key features remain part of the maritime entitlement of the Philippines. It is worthwhile pausing here to reflect what the Tribunal has done. It has not ruled on sovereignty but, in effect, it has. By finding that something is a low-tide elevation (the first-order question), incapable of being possessed by means of territoriality, the Tribunal has in essence ruled out the question of sovereignty [over Mischief Reef and Second Thomas Shoal] (a second-order question).[106]

---

103 Award, *supra* note 1, at paras. 353–54. Indeed, it is notable that the Tribunal itself preferred the "more recent Chinese chart" (Chart No. 18400), based upon Chinese surveys between 1989 and 2001, to historical survey materials when concluding that McKennan Reef is a high tide feature.

104 *Id.* at paras. 378, 381.

105 *Id.* at para. 309.

106 Duncan French, *In the Matter of the South China Sea Arbitration: Republic of Philippines*, 19(1) Environmental Law Review 48, 52 (2017).

The Tribunal's conclusions as regards the legal classification of these small features therefore warrant close attention.

The Tribunal's conclusion that Mischief Reef is a low-tide elevation, and is thus incapable of appropriation and cannot generate any maritime entitlements (Tribunal merits dispositive nos. 3(c) and 4), is open to serious doubt from a legal and evidentiary perspective. The Tribunal had significant evidence before it that Mischief Reef is a high tide feature. It noted that a detailed survey and chart of the feature prepared by HMS Herald in 1933 refer to there being "a rock which dries 5 feet" on the south-east corner of the feature.[107] The Tribunal referred also to Chinese Chart No. 18500, which depicts the same rock at a height of 1 metre above "Mean Sea Level".[108] The Tribunal noted that "either measurement would at least be close to the expected level of high water".[109] In doing so, it acknowledged that both the historic British survey and more modern Chinese evidence support the existence of a high tide feature at Mischief Reef.

The Tribunal's assessment of the potentially dispositive nature of the 1933 survey evidence and Chinese Chart No. 18500 appears correct, given its own observation earlier in the Award that "the average range between Higher High Water and Lower Low Water for tides in the Spratlys is in the order of 0.85 metres, increasing to 1.2 metres during certain periods of the year.[110] 5 feet is substantially more than 1.2 metres. The Tribunal also noted that "the legend to the symbology for standard Chinese cartography indicates that Chinese charts will depict a rock or islet as one which does not cover if it exceeds the level of Mean High Water Springs", and that Mean High Water Springs would be an appropriate approximation of "high tide" if determined on the basis of Chinese nautical charts.[111] On this rationale, the Tribunal could certainly have concluded from Chinese Chart No. 18500 that Mischief Reef is a high tide feature.

The Tribunal's finding that Mischief Reef is a low-tide elevation notwithstanding the 1933 survey evidence and Chinese Chart No. 18500 arguably contradicts its findings in relation to other features on the basis of comparable evidence. For example, the Tribunal concluded that Gaven Reef (North) is a high tide feature, observing that Japanese and US records from the 1930s demonstrated the existence of a sand cay rising to a height of 1.9 metres on that

107 Award, *supra* note 1, at para. 374, citing to HMS Herald, *Report of Visit to Mischief Reef*, UKHO Ref. H3331/1933.

108 *Id.* at para. 377.

109 *Id.*

110 *Id.* at para. 316.

111 *Id.* at para. 313.

feature and noting that such a height would be "well above even Mean High Water Springs".[112] The Tribunal similarly concluded with respect to Johnson Reef that it is a high tide feature, based upon (*inter alia*) a detailed survey and chart prepared by HMS Herald in 1931 showing a 4 foot rock in the south-east corner of the feature, together with Chinese Chart No 18400, which depicts a rock rising to 0.9 m above Mean Sea Level.[113]

Taken individually, there was a strong argument that Mischief Reef is a high tide feature in its natural form. However, the Tribunal reached the opposite conclusion, observing that it did not have "direct evidence of tidal conditions at Mischief Reef", and that the reference to "drying rocks" in the HMS Herald survey materials, and to the rocks being exposed "during half-tide" in the 2011 edition of the Chinese Sailing Directions, indicated that the rock was submerged at high tide, and thus that Mischief Reef is a low-tide elevation.[114]

This conclusion is open to serious question given the Tribunal's reliance elsewhere in the Award on Royal Navy survey and chart evidence and Chinese charts, its observations about the limited tidal range in the South China Sea, and its conclusion that, due to advances in satellite navigation, modern sailing directions are "less descriptive of the features on reefs and correspondingly less useful" than more historic evidence.[115]

The Tribunal could therefore have concluded that Mischief Reef is a high tide feature and is thus capable of appropriation and entitled at least to a territorial sea under UNCLOS. The argument that Mischief Reef is a rock under Article 121(3) of UNCLOS would be even stronger if contemporaneous evidence were available to demonstrate that the rock concerned remains above water at high tide. Had the Tribunal reached this conclusion, it would have concluded that it had no jurisdiction in respect of Philippines Submission nos. 5, 8, 9, 12 (so far as they concerned Mischief Reef and its territorial sea), and would thus have been unable to reach a number of its substantive findings on the merits (particularly *dispositif* nos. 7, 10, 14 and 16(a) and (d), as they relate to Mischief Reef).

By contrast, the Tribunal's conclusion that Second Thomas Shoal is also a low-tide elevation, and is thus incapable of appropriation and cannot generate any maritime entitlements (Tribunal merits dispositive nos. 3(c) and 4), appears to accord with the evidence before it. In particular, the Tribunal referred to a Royal Navy survey in the 1930s, Chinese Chart No. 18500 and the

112 *Id.* at para. 364.
113 *Id.* at paras. 344–51.
114 *Id.* at paras. 377–78.
115 *Id.* at para. 332.

2011 edition of the Chinese Sailing Directions as demonstrating the absence of any high tide feature.[116] We see no basis on which to challenge this conclusion.

3.2.2 The Tribunal's Conclusions that Subi Reef, Gaven Reef (South) and Hughes Reef are Low-Tide Elevations (Philippines Submission Nos. 4 and 6; Tribunal Merits Dispositif No. 5)

The Tribunal concluded that Hughes Reef is a low-tide elevation, based in part upon the fact that it does not appear as a high tide feature on Chinese Chart No. 18400.[117]

The Tribunal concluded that Gaven Reef (South) is a low-tide elevation, based in part upon the 2011 edition of the Chinese Sailing Directions.[118]

The Tribunal concluded that Subi Reef is a low-tide elevation, based upon the absence of any evidence suggesting the existence of a high tide feature at that location.[119]

On the evidence that was before the Tribunal, we see no basis on which to challenge these conclusions. This is, of course, without prejudice to China's claims to sovereignty over the Spratly Islands and their adjacent waters as a "comprehensive whole".[120]

3.2.3 The Tribunal's Conclusions that Scarborough Shoal, Gaven Reef (North) Mckennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, in Their Natural Condition, are High Tide Features (Philippines Submission Nos. 3, 6 and 7; Tribunal Merits Dispositif No. 3)

The Tribunal's conclusions that the remaining features remain above water at high tide appear to have a sound legal and evidentiary basis, including (as regards some of the features) with reference to the 2011 edition of the Chinese Sailing Directions[121] and Chinese Chart No. 18400.[122] We note that the Tribunal's conclusions as regards the status of McKennan Reef and Gaven Reef (North) contradicted the Philippines' position that those features were low-tide elevations, the former based in large part upon Chinese Chart No. 18400.[123] We see no basis on which to challenge any of these conclusions.

---

116 *Id.* at paras. 379–81.
117 *Id.* at para. 358.
118 *Id.* at para. 366.
119 *Id.* at para. 373.
120 *Id.* at paras. 658–59.
121 *Id.* at paras. 333, 341.
122 *Id.* at para. 350.
123 *Id.* at paras. 354, 365.

3.3 *The Tribunal's Classification of the Remaining Features in the South China Sea as "Rocks" Generating No EEZ or Continental Shelf Entitlement under Article 121(3) of UNCLOS (Philippines Submission Nos. 3, 5 and 7)*

The Tribunal turned next to the question of the status of the high tide features in the South China Sea under Article 121 of UNCLOS. It concluded that all of the relevant features constitute "rocks" generating no EEZ or continental shelf under Article 121(3).

The Tribunal's findings that none of the high tide features in question were islands within the meaning of Article 121 were a further pre-requisite for the Tribunal's jurisdiction in respect of Philippines Submission nos. 5, 8, 9 and 12, and for a number of its substantive findings on the merits (particularly dispositif nos. 7, 8, 9, 10, 14 and 16(a) and (d)). This is of particular relevance in the case of Itu Aba, which the Tribunal concluded was a "rock" pursuant to Article 121(3). Had the Tribunal found that Itu Aba was a fully-entitled island under Article 121(2), its EEZ would extend to include Mischief Reef, which is only 74 nautical miles (nm) from Itu Aba. The Tribunal itself acknowledged that, in order that it could make a declaration in line with the Philippines Submission no. 5 (that Mischief Reef and Second Thomas Shoal are part of the EEZ and continental shelf of the Philippines), it must make "a finding that none of the Spratly Islands are fully entitled islands under Article 121".[124] Similarly, it would have to conclude that the Spratly Islands cannot be regarded as one integral island group generating maritime entitlements.

The Tribunal's conclusions as regards the legal classification of the South China Sea features under Article 121 therefore warrant close attention.

3.1.1 The Tribunal's Interpretation of Article 121 of UNCLOS

3.1.1.1 *The Tribunal's Observation that China "Has Demonstrated a Robust Stance on the Importance of Article 121(3)" by Reference to Its Position on Oki-No-Tori-Shima*

Notwithstanding China's absence from the proceeding, the Tribunal attempted to discern China's position on the meaning of Article 121 of UNCLOS.[125] However, it did so exclusively with reference to China's recorded protests and other responses to Japan's November 2008 a claim of an extended continental shelf from Oki-no-Tori-Shima.[126] In particular, the Tribunal referred

124 *Id.* at para. 399.
125 *Id.* at paras. 446–72.
126 *Id.* at para. 451.

to China's statements that Oki-no-Tori-Shima is a "rock" for the purposes of Article 121(3).[127]

The Tribunal's assumptions as regards China's position on the interpretation of Article 121, and its insinuation that such position might be transferable to the context of the Spratly Islands and the South China Sea, are legally dubious.

First, it is clear that China's statements as regards the legal status of Oki-no-Tori-Shima are limited to the unique circumstances of that feature.[128] They are not transferable as a matter of insinuation to the entirely different circumstances of the Spratly Islands. As Professor Talmon has observed, "no conclusions can be drawn from China's position on Oki-no-Tori-Shima for the legal status of larger maritime features in the South China Sea."[129]

Second, the physical and other characteristics of Oki-no-Tori-Shima are clearly distinguishable from those of the Spratly Islands, both individually and collectively. Oki-no-Tori-Shima has been described as "two coral protrusions no larger than king-size beds".[130] It has a land area of less than 0.01 km^2, while Itu Aba alone has a land area of 0.4639 km^2. This makes Itu Aba nearly fifty times larger than Oki-no-Tori-Shima in its natural form. Furthermore, Itu Aba has a long record of human population and the presence of potable water and other criteria identified by the Tribunal as relevant to determination of whether a feature is a rock or a fully-fledged island under Article 121. By contrast, Oki-no-Tori-Shima fulfils none of those criteria.

3.1.1.2 *The Tribunal's Approach to Interpretation of Article 121*

The Tribunal set out its approach to the interpretation of Article 121 at paragraphs 476 and 477 of the Award. Notably, however, the Tribunal failed to recognise the fundamental distinction under the VCLT between the basic rule of interpretation under Article 31 and supplementary means of interpretation under Article 32. A leading international law commentary provides that:

> The application of the basic rule of interpretation laid down in Article 31 of the Vienna Convention will usually establish a clear and reasonable meaning: if such is the case, there is no occasion to have recourse to other [i.e., supplementary] means of interpretation.[131]

---

127 *Id.*, quoting from *Note Verbale* from the People's Republic of China to the Secretary-General of the United Nations, No. CML/2/2009 (6 February 2009) (Annex 189).

128 *Id.*

129 Talmon, *supra* note 33, at 82.

130 *Id.*

131 Robert Jennings & Arthur Watts, Oppenheims's International Law, Part 2 to 4, 1275–76 (9th, 2008).

This approach was reinforced by the seminal *Lotus Case* (which predates the codification of treaty interpretation rules), in which the PCIJ held that:

> The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.[132]

Similarly, in an Advisory Opinion rendered in 1950 in the *Admissions* case, the ICJ explained:

> ... the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.[133]

The ICJ elaborated that:

> When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the travaux préparatoires of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to travaux préparatoires.[134]

Article 32 lists *travaux préparatoires* as a supplementary source of interpretation, to be used when the meaning of the text is ambiguous or obscure, or

---

132 S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 6 (Sept. 7).

133 *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 I.C.J. Rep. 8 (Advisory Opinion).

134 *Id.* We note that in the *Fisheries Case*, the I.C.J. held that because of the non-participation of one of the parties, it would "undertake a brief review of the negotiations that led up to [the provision in question]". However, the circumstances in that case were clearly distinguishable because it concerned the interpretation of a compromissory clause set out in an exchange of notes between two States, one of which was not present. *Fisheries*, *supra* note 38, at 11.

where applying Article 31 would lead to a manifestly unreasonable result.[135] Article 32 provides that *travaux préparatoires* may also be relied upon "in order to confirm the meaning resulting from the application of Article 31."

The Tribunal incorrectly relied on Article 32 by stating that that "recourse may be had to preparatory work of the treaty to confirm its meaning",[136] without adding that this can only be done in order to "confirm any meaning resulting from the application of Article 31". This is confirmed by the pre-VCLT jurisprudence of international courts and tribunals.[137]

The Tribunal proceeded to adopt a different approach, determining that, alongside the text, context and object and purpose of UNCLOS under Article 31, it would consider the *travaux préparatoires* under Article 32, as if both were of equal legal weight.[138]

The Tribunal's approach to the interpretation of Article 121, and partial reliance upon the *travaux préparatoires* of UNCLOS in particular, was thus, in our view, inconsistent with the rules of interpretation of treaties is contained in the VCLT.

Of additional note, Article 33 of the VCLT provides that "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail". UNCLOS, Article 320 declares the Arabic, Chinese, English, French, Russian and Spanish texts to be equally authentic.

As pointed out by one commentary, the Tribunal failed to make any reference to the non-English language versions of UNCLOS, each of which is equally

135 *See, e.g.*, Ris, Martin, *Treaty Interpretation and I.C.J. Recourse to Travaux Preparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 14(1) Boston College International and Comparative Law Review, 118, 130–31 (1991).

136 Award, *supra* note 1, at para. 476.

137 See, for example, the *Employment of Women During the Night Case* (1932), PCIJ, Series A/B, No. 50, p. 380, where the Court found that "The preparatory work thus confirms the conclusion reached on a study of the text of the Convention [of Berne] that there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words". Similarly, the I.C.J. found that "the history of the Article [28(a) of the Convention for Establishment of Inter-Governmental Maritime Consultative Organisation] and the debate which took place upon the drafts of the same (…) confirms the principle [derived from the text]", *the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, 1960 I.C.J. Rep. 150 (June 8) (Advisory Opinion) at 161.

138 Award, *supra* note 1, at paras. 476–77.

authoritative.[139] UNCLOS does not accord priority to any one language version. As that commentator points out, it is often the case that "the precise meaning of a term in a multilingual text can only be established if the meaning of the term in all authentic languages is established."[140]

The Tribunal therefore erred in not making any reference to the other language versions of Article 121 in its interpretative exercise, notwithstanding the nuances of the English language text. Where relevant, this memorandum indicates other language texts that may cast doubt on the Tribunal's interpretation of Article 121.[141]

3.1.1.3 *The Tribunal's Interpretation of the Ordinary Meaning of Article 121(3) of UNCLOS*

The Tribunal addressed six separate textual elements of Article 121(3), including (a) "rocks"; (b) "cannot"; (c) "sustain"; (d) "human habitation"; (e) "or"; and (f) "economic life of their own".[142] This memorandum therefore addresses each in turn.

3.1.1.3.1 "Rocks"

As regards "rocks", the Tribunal concludes, correctly in our view, that the term does not impose fixed geological or geomorphological limitations so as to require a feature to be composed of solid rock or otherwise to be of a rock-like nature.[143] However, the Tribunal does not give any indication of why Article 121(3) adopts the term "rocks", in contrast to the reference elsewhere in

---

139 Gerhard Hafner, *Some Remarks on the South China Sea Award: Itu Aba Versus Clipperton*, 34 Chinese (Taiwan) Yearbook of International Law and Affairs 1, 5–6 (2016).

140 *Id.*

141 French: "Les rochers qui ne se prêtent pas á l'habitation humaine ou á une vie économique propre n'ont pas de zone économique exclusive ni de plateau continental." [Literal translation: *Rocks which do not lend themselves to human habitation or an economic life of their own do not have an exclusive economic zone or continental shelf.*]; Spanish: "Las rocas no aptas para mantener habitación humana o vida económica propia no tendrán zona económica exclusiva ni plataforma continental." [Literal translation: *The rocks which are not suitable to maintain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.*]; Russian: Скалы, которые не пригодны для поддержания жизни человека или для самостоятельной хозяйственной деятельности, не имеют ни исключительной экономической зоны, ни континентального шельфа." [Literal translation: *Rocks which are not suitable for sustaining human life or for independent economic activities shall have no exclusive economic zone or continental shelf.*]

142 Award, *supra* note 1, at para. 478.

143 *Id.* at paras. 479–82, 540.

the provision to "islands". Rather, the Tribunal proceed on the basis that there is no meaningful distinction between the two terms.

This is highly questionable as a matter of interpretation. The distinction between "rocks" and "islands" is repeated across all six original language versions of the Convention. While there are no records of the discussions of the "informal consultative group" which came up with the "rocks" wording in Article 121 (3),[144] there is surely a reason why Article 121(3) refers to "Rocks which cannot sustain …" rather than "Islands which cannot sustain …".

However, the Tribunal did not consider this question. It simply observed in the Award that "repeated attempts during [the negotiation of UNCLOS] to define or categorise islands or rocks by reference to size were all rejected".[145] While this may be true, this does not mean that the drafters of, and States Parties to, UNCLOS considered that there was no object of difference between "rocks" and "islands".

On the contrary, extensive evidence exists that the drafters and States Parties acknowledged that there must be a distinction between "rocks" and "islands", albeit perhaps more nuanced than a distinction based solely on size.

During the deliberations of the topic "regime of islands" in the Second Committee of the Third United Nations Conference on the Law of the Sea, States clearly distinguished between "islands", "islets", "rocks", and "low-tide elevations". In a draft article on the regime of islands proposed by 15 African States in August 1974, a "rock" was defined as "a naturally formed *rocky* elevation of ground", while an island or an islet was defined as a "naturally formed area of land."[146] Similarly, an informal proposal submitted by Ireland on behalf of nine States defined a "rock" as "a naturally formed *rocky* elevation normally unfit for human habitation."[147] This proposal was submitted on 25 April 1975 to the Second Committee's informal working group on the regime of islands. This

144 *Id.* at para. 531.

145 *Id.* at para. 538.

146 *See* UNCLOS III, Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia: draft articles on the regime of islands, UN Doc. A/CONF.62/C.2/L.62/Rev.1, 27 August 1974, OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, VOL. III, 232–33.

147 Renate Platzöder (ed.), THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS, VOL. IV, 221–22 (1983). For the history of this proposal, *see* Mahon Hayes, THE LAW OF THE SEA: THE ROLE OF THE IRISH DELEGATION AT THE THIRD UN CONFERENCE, 61–63 (2011). *See also* Romania's argument in *Maritime Delimitation in the Black Sea* (Rom. v. Ukr.), 2009 I.C.J. Rep. (Feb. 3) (Judgment), at para. 180, that "Serpents' Island qualifies as a 'rock' because: it is a rocky formation in the geomorphologic sense."

widely overlooked proposal clearly distinguished between "islets and islands" on the one hand and "rocks" on the other.[148]

This proposal was strongly opposed by States with offshore islands, in particular the Pacific Ocean small island States and New Zealand which argued that there was no logical reason to distinguish between sovereign rights appertaining to islands and sovereign rights appertaining to other land territory. In addition, they argued that all islands comprising the State must be treated alike and should have the same ocean space as other territories.[149]

In a paper entitled "Islands: Normal and Special Circumstances" that had been widely circulated at the 1973 Geneva session of the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Robert D. Hodgson, the Geographer of the U.S. State Department, suggested a categorization of islands by size. Hodgson distinguished between "(1) *rocks*, less than .001 square mile [0,0025 km^2] in area; (2) *islets*, between .001 and 1 square mile [2,589 km^2]; (3) *isles*, greater than 1 square mile but not more than 1,000 square miles [2,589.99 km^2]; and (4) *islands*, larger than 1,000 square miles."[150] The Soviet Union in June 1975 defined "small islets" as less than 0.1 km^2 and "rocks" as less than 0.01 km^2. In exchanges with the United States Government, the Russian Government took the position that islets or rocks below 0.1 km^2 of land area should generate no continental shelf or economic zone. The prime example of a high-tide feature that would fall under Article 121(3) UNCLOS mentioned during the negotiations was the United Kingdom's "Rockall" – a tiny geological rock in the North Atlantic Ocean with a size of 0.000624 km^2.[151]

148 Platzöder (ed.), *supra* note 147, at 222. For example, Article IV provided: "1. Islets or islands without economic life and unable to sustain a permanent population shall have no marine space of their own. 2. Rocks and low-tide elevations shall have no marine space or their own."

149 UNCLOS III, Second Committee, 39th Meeting, UN Doc. A/CONF.62/C.2/SR.39, 14 August 1974, OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, VOL. II, 282, at para. 37 (Tonga).

150 Robert D. Hodgson, *Islands: Normal and Special Circumstances*, *in* John King Gamble Jr. and Giulio Pontecorvo (eds.), LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS, Proceedings Law of the Sea Institute Eighth Annual Conference, June 18–21, 1973, 137, 150–51.

151 *See*, for example, *Law of the Sea Conference: The Overall Prospects, Memorandum by the Minister of State for Foreign and Commonwealth Affairs* [January 1975], British National Archives, CAB 148/149/14, LAW OF THE SEA CONFERENCE: REPORT ON THIRD SESSION, Geneva, March – May 1975.

The drafting history, therefore, clearly shows that States considered the term "rocks" not to include "islets", let alone larger islands.[152] Professor Talmon concludes that "[t]he drafters of Article 121(3) UNCLOS considered geology and size determinative of the status of high-tide features".[153]

Academics also widely conclude that there must be a difference between "rocks" and "islands" for the purposes of Article 121. For example, Professor Alex Oude Elferink, who is a leading Dutch law of the sea academic and counsel, (in his JCLOS blog) interprets the term as imposing some size limitation on the features encompassed by Article 121(3).[154]

Professor Talmon presents a different, more nuanced, assessment. He observes that the Tribunal effectively "gave up the distinction between rocks and islands."[155] He continues:

> The distinction in Article 121(3) UNCLOS is [...] not between islands that can sustain human habitation or economic life of their own and those that cannot, as held by the Arbitral Tribunal, but between rocks that can or cannot sustain human habitation or economic life of their own and all other islands, irrespective of their capacity for human habitation or economic life of their own. This means that there are three categories of islands:
> (1) rocks that cannot sustain human habitation or economic life of their own;
> (2) rocks that can sustain human habitation or economic life of their own; and
> (3) all other islands.

Only the first category does not generate an EEZ or continental shelf.[156] Therefore, Professor Talmon concludes that the decisive question under Article 121(3) is not whether a feature qualifies as a "rock". However, an assessment of whether or not a particular feature is a "rock" is a critical first part of the application of that provision because, if a feature is not a "rock but an "island", Article 121(3) cannot apply. As he puts it, if a feature cannot be

152 Talmon, *supra* note 33, at 80.
153 *Id.*
154 Alex G. Oude Elferink, *The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First*, BLOG OF THE K.G. JEBSEN CENTRE FOR THE LAW OF THE SEA (September 2016), 2–4.
155 Talmon, *supra* note 33, at 76.
156 *Id.* at 81.

considered a rock due to its geomorphology and size, "the follow up questions of its capacity to sustain human habitation or economic live of its own do not even arise".[157]

Conversely, Professor Soons, one of the arbitrators on the Tribunal in the South China Sea arbitration, suggests in an article co-authored in 1990 with Barbara Kwiatowska that:

> it would have been more appropriate if that paragraph [Article 121(3)] had simply referred to 'islands' and not 'rocks'. As the term 'rocks' should be construed as not implying any specific geological features, the essential element of the definition is [...] that it covers only rocks (islands) 'which cannot sustain human habitation or economic life of their own.[158]

Professor Sean Murphy concludes (correctly, in our view) that:

> in asserting that the term "rock" conveys no geological or geomorphological meaning, and further that it conveys no meaning as to size, the tribunal seems to ascribe no significance whatsoever to the use of the word "rock" rather than "island" in paragraph 3. Given that the tribunal saw considerable significance in the precise wording of Article 121 in various other respects, the lack of attention to why the word "rock" was used in paragraph 3 is striking.[159]

In conclusion, the Tribunal's assimilation of the terms "islands" and "rocks" for the purposes of its interpretation of Article 121 is subject to serious doubt. As well as ignoring the adoption of markedly different language in the text of the provision, it is also undermined by the negotiating records of the Third UNCLOS Conference, which demonstrate a widespread appreciation that the terms "rocks" and "islands" mean different things.[160] It is an accepted interpretative principle that the use of different terms in the same treaty provision indicate that they mean different things. As *Oppenheim* notes, "the use of similar but different terms, or a change in terminology from an earlier text, may be presumed to involve dissimilar meanings".[161]

---

157 *Id.*

158 Kwiatowska and Soons, *supra* note 8, at 153.

159 Sean D. Murphy, INTERNATIONAL LAW RELATING TO ISLANDS 94–95 (2017).

160 In this context, reference to the *travaux préparatoires* would have been entirely proper, as confirming the ordinary meaning of terms the purposes of Article 32 of the VCLT.

161 *See* Jennings and Watts, *supra* note 131, at 1273, n. 12 (citing *Certain Expenses of the UN*, 1962 I.C.J. Rep. at 159). *See also Simon v. Court of Justice of the European Communities*, 1961 I.L.R. 32 at 124.

Moreover, the distinction between "rocks" and "islands" is recognised in State practice. Consequently, a number of remote, uninhabitable but comparatively large island features around the world are universally recognised as generating EEZ rights under Article 121(2) of the UNCLOS. For example, Jan Mayen (Norway) Kiritimati (or Christmas Island, which is part of Kiribati) and Clipperton Island (France) are all comparatively large features lacking many of the "principal factors" (such as potable water) that the Tribunal identified as contributing "to the natural capacity of a feature" the purposes of Article 121(3). Nevertheless, all of those features are widely recognised as generating EEZ rights under Article 121(2) and are thus not considered to constitute "rocks" under Article 121(3). The most obvious reason for this is that the features are not "rocks" at all, with the result that Article 121(3) cannot apply.

This is the first respect in which the Tribunal's approach arguably contradicts the basic rules of treaty interpretation under the VCLT. Had the Tribunal considered, for example, its size and geology or geomorphology as part of a distinction between "rocks" and other "islands", it could have concluded that Itu Aba is not just a "rock", such that it falls outside Article 121(3). Notably, Itu Aba is substantially larger than any of the features that are universally recognised as "rocks" for purposes of Article 121(3). Furthermore, from a geological or geomorphological perspective, it is clear that Itu Aba is not the type of "rocky elevation" referenced by a number of States during the negotiation of Part VIII of UNCLOS in the context of the "regime of islands".

3.1.1.3.2 "Cannot"

As regards "cannot", the Tribunal concluded, correctly in our view, that the word "indicates a concept of capacity", being concerned with "whether, objectively, the feature is apt, able to, or lends itself to human habitation or economic life", and that "historical evidence of human habitation and economic life in the past may be relevant for establishing a feature's capacity".[162] The Tribunal emphasised that this is an "objective criterion".[163] This interpretation is also consistent with the remaining five authoritative language versions of Article 121(3).[164]

---

162 Award, *supra* note 1, at paras. 483–84, 541.

163 *Id*. at para. 545. Professor Sean Murphy concurs that the words "cannot sustain" "appear to speak to the objective ability of the feature to sustain human habitation or economic life, rather than whether the feature is actually doing so at any given time". *See* Murphy, *supra* note 159, at 79.

164 French: the French version states "*Les rochers qui ne se prêtent pas à …*", which translates as "rocks which do not lend themselves to human habitation". This is consistent with the Tribunal's interpretation of lack of capacity; Spanish: The Spanish version is consistent with the Tribunal's interpretation of the term "cannot" as an objective criterion in its

However, when it came to applying the "capacity" criterion to the features in the South China Sea, the Tribunal arguably contradicted its finding that the word "cannot" relates only to an objective concept of "capacity". This is discussed below in connection with the Tribunal's interpretation of the word "sustain".

3.1.1.3.3 "Sustain"

As regards "sustain", with reference to the Oxford English Dictionary the Tribunal identified three components: (i) "the concept of the support and provision of essentials"; (ii) a "temporal concept", entailing support and provision that is not one-off or short-lived; and (iii) a "qualitative concept", entailing at least a minimal "proper standard".[165]

Of these, components (i) and (ii) are relatively uncontentious. However, component (iii), which introduces a "qualitative" element of sustainability, imposes a substantial additional threshold that results in more substantial island features being treated as "rocks" under Article 121(3).

According to the Oxford English Dictionary, the term "sustain" is defined, *inter alia*, as "[s]trengthen or support physically or mentally", "[c]ause to continue for an extended period or without interruption" and "[u]phold, affirm, or confirm the justice or validity of". The definition in itself does not generally include any "qualitative" element. On the contrary, used in connection with sustaining a person, the Oxford English Dictionary provides that sustain means to "maintain [...] in life and health; to provide with food, drink and other substances necessary for remaining alive; to feed, to keep."[166] Nothing here implies that sustainability requires the attainment of any particular subjective "standard" of human habitation, beyond that necessary to maintain life and basic health.

Moreover, the question of whether support and provision reaches a "proper standard" is inherently subjective and, given the major advances in global living standards since 1982, liable to the imposition of higher thresholds today than at the time of negotiation of UNCLOS. This is difficult to reconcile with the Tribunal's (correct) observation elsewhere that the term "cannot" in

---

connection with "sustain". The word "no" is linked to "aptas", i.e. "no aptas", whereas in English is only "cannot". However, both sentences structures, "cannot" and "no aptas" are consistent as indicating an objective lack of capacity.

165 Award, *supra* note 1, at paras. 485–87.

166 The Oxford English Dictionary, definition of "sustain", on the oxford dictionary website at: https://en.oxforddictionaries.com/definition/sustain.

Article 121(3) relates to the "objective capacity of the feature to sustain human habitation or economic life".[167]

Notably, a number of the other official language versions of Article 121(3) undermine the Tribunal's conclusion of a "qualitative" aspect as part of its interpretation.[168]

The "qualitative" aspect of the Tribunal's interpretation of Article 121(3), combined with the requirement for the sustainability of a "stable community" referred to below, was determinative of the Tribunal's conclusion on the status of a number of the larger features, most obviously Itu Aba.[169] However, that "qualitative" component arguably imposes a threshold to the attainment of fully-fledged "island" status that is unwarranted by the text, context and object and purpose of UNCLOS. Further, the "qualitative" component is difficult to reconcile with the Tribunal's conclusion that the concept of "human habitation" might be met with respect to "a few individuals" in remote atolls (of which the Spratly Islands are clear examples), and by "periodic or habitual residence" (of which there is a long record in Itu Aba, particularly by fishing communities prior to UNCLOS).[170]

3.1.1.3.4 "Human Habitation"

As regards "human habitation", the Tribunal again started its interpretation with reference to the Oxford English Dictionary. However, it then introduced an additional, subjective element to the term, deciding that "the use in Article 121(3) of the term "habitation" includes a qualitative element".[171] The Tribunal stated that such an element "implies a non-transient presence

167 Award, *supra* note 1, at paras. 504(b), 545.

168 French: according to the online Larousse dictionary "*se prêter à*" means, *inter alia*, "being suitable for an activity, being appropriate". Spanish: According to the "Dictionary of La Real Academia de la Lengua Espanola", the term, "mantener" (in English "maintain") has, *inter alia*, the following definitions: "to provide someone with the necessary food"; "to assume someone's financial needs"; "to keep something in its existence, to give it endurance and permanence". Thus, the French and Spanish versions do not seem to include any qualitative concept inherent to "sustain" (or "maintain" – which is the term used in Spanish). Rather, "maintain/sustain" relate more to a period of time (permanency) than a quality standard. Russian: According to the Official Dictionary of Russian language (available on the website "Gramota. Ru"), the term "поддержать" (in English "sustain" or "maintain") is defined as, *inter alia*, "to save the existence of smth" (e.g. "the existence of rare animals") or "keep [smth] in proper form, condition". Again, this does not imply a separate quantitative element.

169 Award, *supra* note 1, at paras. 618–22.

170 *Id*. at para. 542.

171 *Id*. at para. 489.

of persons who have chosen to stay and reside on the feature in a settled manner".[172] Furthermore, the Tribunal observed that the term "habitation" should also imply "habitation of the feature by a group or community of persons", in a "stable community" that "can fairly be said to constitute the natural population of the feature".[173]

Again, there is no textual basis in Article 121 for these "qualitative" elevations of the threshold for attainment of fully-fledged island status. While aspects of the Tribunal's findings are not unreasonable (for example, its observation that a community of persons "need not necessarily be large, and in remote atolls a few individuals or family groups could well suffice"),[174] the insertion of additional requirement of "stable communities" and "natural populations" will inevitably lead to the classification of more substantial features as "rocks" for the purposes of Article 121(3). Indeed, if, as explained above, the term "rocks" in Article 121(3) must have its own meaning with reference to criteria such as geomorphology and size, then it may be difficult to conceive of a "rock" that could sustain a "stable community" or "natural population" up to the "qualitative" standards imposed by the Tribunal's interpretation.

A commentator observed that:

> ... it is not clear what the legal basis is for requiring "a group or community of persons" to establish habitation, as one simply cannot infer any such requirement from the text of Article 121. [...] If clearly one person does not make a group or community, will two or a few more do? Thus, it should be possible that even two persons can form such a "group or community of persons over sustained periods of time.[175]

The Tribunal's inclusion of a "qualitative" element in relation to each of the concepts of sustainability and human habitation deflects from the important fact that, as the Tribunal found elsewhere, Article 121(3) is concerned with the objective "capacity" of a feature to sustain human habitation. This should not require the actual existence of human "communities" or "populations", nor even the capacity to sustain substantial groups of people over long periods. The imposition of "qualitative" elements into its interpretation brought with it inherently subjective criteria that undermine the application of Article 121(3)

---

172 *Id.*

173 *Id.* at paras. 491, 542.

174 *Id.* at para. 542.

175 Jiangyu Wang, *Legitimacy, Jurisdiction and Merits in the South China Sea Arbitration: Chinese Perspective and International Law*, 22(2) Journal of Chinese Political Science 185, 205 (2017).

to small features that do not display permanent populations. Certainly, this was not the intention of the drafters of the Convention.

Moreover, similarly to the qualitative element read in by the Tribunal to the term "sustain", the Tribunal's reading of an additional "qualitative element" into the term "human habitation" is not supported by a number of the other official language versions of UNCLOS.[176]

3.1.1.3.5 "Or"

As regards "or", the Tribunal disagreed with the Philippines' argument that a capacity to sustain both human habitation and economic life are required in order for a feature to be a fully-fledged island, entitled to an EEZ and continental shelf. Instead, the Tribunal concluded that "if a feature is capable of sustaining either human habitation or an economic life of its own, it will qualify as a fully entitled island".[177] We agree with this conclusion.

As Professor Elferink observes:

> The word "or" between "human habitation" and "economic life of their own" implies that these requirements do not have to be met at the same time.[178]

The drafting history of Article 121(3) further indicates that the requirements of human habitation and economic life were introduced as separate requirements.[179]

---

176 French: "Les rochers qui ne se prêtent pas á l'habitation humaine ou á une vie économique propre n'ont pas de zone économique exclusive ni de plateau continental." [Literal translation: *Rocks which do not lend themselves to human habitation or an economic life of their own do not have an exclusive economic zone or continental shelf.*]; Spanish: "Las rocas no aptas para mantener habitación humana o vida económica propia no tendrán zona económica exclusiva ni plataforma continental." [Literal translation: *The rocks which are not suitable to maintain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.*]; Russian: Скалы, которые не пригодны для поддержания жизни человека или для самостоятельной хозяйственной деятельности, не имеют ни исключительной экономической зоны, ни континентального шельфа." [Literal translation: *Rocks which are not suitable for sustaining human life or for independent economic activities shall have no exclusive economic zone or a continental shelf.*]

177 Award, *supra* note 1, at paras. 494–97, 544.

178 Elferink, *supra* note 154, at 5–6.

179 *See* United Nations, Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA: RÉGIME OF ISLANDS: LEGISLATIVE HISTORY OF PART VIII (ARTICLE 121) OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 60–70 (1988).

Notably, the Tribunal also observed that island features may have capacity to sustain only human habitation or economic life, but not both, including in cases "where multiple islands are used in concert to sustain a traditional way of life".[180] The Tribunal was "conscious that remote island populations often make use of a number of islands, sometimes spread over a significant distance, for sustenance and livelihoods".[181] A commentator observed that:

> … in practical terms the conditions will in fact be conjunctive. Nonetheless, the Award also details a possible exception in the case of populations sustaining themselves through a network of related maritime features.[182]

The Tribunal's findings in this respect may be particularly pertinent as regards the Spratly Islands, depending on the extent of evidence of any "traditional way of life" or pattern of sustenance across the islands by fisherfolk or otherwise in the past. Certainly, elsewhere in the Award, the Tribunal recognised the periodic inhabitation of the islands through history by Chinese and other fishing communities.[183] However, as a result of the "qualitative" criteria mentioned above, the Tribunal did not consider such periods of inhabitation of the islands sufficient to retain the threshold for fully-fledged island status on the Article 121.

3.1.1.3.6 "Economic Life of Their Own"

As regards "economic life of their own", the Tribunal concluded that the phrase "presupposes ongoing economic activity", and "makes clear that the feature itself (or group of related features) must have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities".

Charney strongly disagrees with this interpretation. Many years prior to the Award, he contended that the condition of "economic life" should be satisfied as long as a resource is exploited over "some period of time" and generates sufficient revenues to support all equipment and personnel.[184] There is some force to this interpretation, particularly since the requirement of "economic

180 Award, *supra* note 1, at paras. 497, 544.

181 *Id.* at para. 547.

182 Lachlan McDermott, *Philippines v. China – Rocks or Islands under International Law?*, 36(1) University of Tasmania Law Review 36, 57 (2017).

183 Award, *supra* note 1, at paras. 618–19.

184 Jonathan I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93(4) American Journal of International Law 863, 870 (1999).

life" must be interpreted disjunctively from the separate requirement of "human habitation" under Article 121(3).

Other commentators (e.g. Barbara Kwiatkowska, Alfred Soons, Oude Elferink and Jonathan Hafetz) have suggested that 'economic life' should be equated to 'economic value'.[185] It has been observed that such an approach would mean that the requirement could be met with the mere presence of a lighthouse or economic viable maritime conservation areas.[186]

Along these lines, Professor Soons (one of the arbitrators in the *South China Sea* case) explained in a 1990 publication:

> [w]hile in the past the idea that a radio or weather observation post qualified a rock as an island has been rejected, such a test seems at present to be acceptable. An increasing number of authors recognize that, for instance, a lighthouse or other aid to navigation built on an island (rock) gives a rock an economic life of its own in its value to shipping, ocean sports and so forth. If economic life need not be a commercial nature, why should rocks large enough to support a shelter (like Minerva Reefs), or used for guano harvesting (like Aves and Clipperton in the past), or rocks from which birds' eggs and turtles are collected not be considered as capable of sustaining economic life?[187]

Nevertheless, the Tribunal concluded that "distant fishermen exploiting the territorial sea surrounding a small rock and making no use of the feature itself [...] would not suffice to give the feature an economic life of its own".[188]

Certain elements of the Tribunal's conclusions as regards the meaning of "economic life of their own" in Article 121(3) are not open to substantial doubt. For example, its observation that the term implies "the ability to support an independent economic life" appears reasonable. However, as explained below, the Tribunal's subsequent application of these conclusions to the facts and

185 *See* Kwiatowska and Soons, *supra* note 8, at 167–168; Alex G. Oude Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coast?*, 32(2) Ocean Development & International law 169, 174 (2001); Jonathan L. Hafetz, *Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention*, 15(3) American University International Law Review 584, 623–627 (2000).

186 McDermott, *supra* note 182, at 54–55.

187 Kwiatowska and Soons, *supra* note 8, at 167–68.

188 Award, *supra* note 1, at paras. 498–503.

evidence before it related to, in particular, Itu Aba, which has a long history of sustaining different economic activities, is highly questionable.

3.1.1.4 *The Tribunal's Assessment of Context, Object and Purpose under Article 31 of the VCLT*

The Tribunal proceeded to consider the context of Article 121(3) and the object and purpose of the Convention at paragraphs 507–520 of the Award.

As an overarching point of context, the Tribunal's approach to the interpretation of Article 121(3) of UNCLOS ignored the context of that provision as a whole within Article 121. In particular, the Tribunal ignored the fact that the treatment of "rocks" under Article 121(3) is an exception to the general rule at Article 121(2) that islands generate full EEZ and continental shelf entitlements. As Professor Sean Murphy has observed:

> [Articles 121(2) and (3)] were a compromise between those States who wished all islands to generate the full range of maritime zones and those States who wished to limit the ability of islands to do so. The compromise was to allow islands normally to generate the full range of maritime zones, but not in situations where the island is nothing more than a paragraph 3 "rock".[189]

Professor Myron Norquist, who was Secretary of the US Delegation to the UNCLOS III Conference when Article 121 was drafted, similarly observes that Article 121(3) "was drafted as an exception to the first two paragraphs of Article 121".[190] He observes, correctly in our view, that exceptions to general rules are generally construed strictly as a matter of treaty interpretation, particularly where such exceptions are explicit (as here, given the wording of Article 121(2)) and where the exception at Article 121(3) has the effect of curtailing the EEZ entitlement of islands under the general rule. Professor Norquist concedes that "in cases of doubt, "rocks" should be presumed to be "islands" granted full maritime entitlement as land territory".[191]

By contrast, in focusing its analysis on whether Itu Aba and other features can "sustain human habitation or economic life of their own" for the purposes of Article 121(3), the Tribunal effectively reversed the burden of proof under

---

189 Murphy, *supra* note 159, at 76.

190 Myron H. Nordquist, *UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation? in* S. Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport & Hao D. Phan (ed.), THE SOUTH CHINA SEA ARBITRATION: THE LEGAL DIMENSION 185 (2018).

191 *Id.*

Article 121. This is because it assumed that, if the evidence did not positively prove the features' ability to "sustain human habitation or economic life of their own", those features must be treated as "rocks". As Professor Murphy continues:

> The tribunal's approach in deciding the case almost seems to impose a burden of proving that an island does not fall within Article 121, paragraph 3, rather than the other way around. Such a burden seems inconsistent with the structure of Article 121, which presents paragraph 3 as an exception to a general rule that all islands are entitled to full maritime zones.[192]

The Tribunal concluded that "a rock cannot be transformed into a fully entitled island through land reclamation".[193] This conclusion follows from the text of Article 121(1), which requires any island to be a "naturally formed area of land".

The Tribunal also correctly described the purpose of the EEZ as being "to extend the jurisdiction of States over the waters adjacent to their coasts and to preserve the resources of those waters for the benefit of the population of the coastal State".[194]

However, in a highly questionable passage, the Tribunal commented that Article 121(3) "serves to disable tiny features from unfairly and inequitably generating enormous entitlements to maritime space that would serve not to benefit the local population, but to award a windfall to the (potentially distant) State to have maintained a claim to such a feature".[195] Again, there is nothing in the text, object or purpose of UNCLOS to support such a broad-ranging political assertion.

Moreover, such an approach would have broad-ranging implications, casting into serious doubt the EEZ and continental shelf claims made by a number of "distant" States around "tiny features".[196] For example, France claims an EEZ around Tromelin, an island in the Indian Ocean more than 8,000 km from

192 Murphy, *supra* note 159, at 94.

193 Award, *supra* note 1, at paras. 508–10. Professor Nordquist has expressed a different view on this point, to the effect that the Tribunal "erred" by requiring that the capacity of an island feature to sustain human habitation or economic life should be based upon the feature's "natural form". Nordquist, *supra* note 190, at 177–90.

194 Award, *supra* note 1, at para. 513.

195 *Id.* at para. 516.

196 For examples of such features, *see* Table 1, 'Features fully entitled under Article 121(2)', and Table 2, 'Features unilaterally entitled under Article 121(2)', in Annex 1 to this Critique.

the mainland with an area of 0.8 km^2.[197] Venezuela claims an EEZ around the much smaller feature of Isla Aves in the Caribbean Sea, which claim has been accepted by a number of States in delimitation agreements.[198] Isla Aves has a land area of just 0.032 km^2 and is generally uninhabited, other than a small scientific station and naval contingent.[199]

The Tribunal's approach also ignores the separate question of the reduced weight that is often given to small island features in EEZ and continental shelf delimitation with continental States. The jurisprudence of the ICJ and arbitral tribunals consistently holds that very small island features may be accorded limited or no effect in EEZ or continental shelf delimitation, in order to avoid such features having a disproportionate effect in the delimitation.[200] For example, in *Newfoundland v. Nova Scotia*, the tribunal gave half effect to Sable Island out to its 200nm limit, "[h]aving regard to its remote location and the very substantial disproportionate effect this small, unpopulated island would have on the delimitation if it were given full effect".[201]

The Tribunal then strayed into another highly questionable analysis, with reference to the remarks of a representative of Peru in the Seabed Committee, to the effect that EEZ rights should not be applied "to more or less uninhabited islands, since its main justification lay not in the existence of a territory but in the presence of the population which inhabited it, whose needs should be satisfied through the use of the resources available in its environs".[202] As a result, the Tribunal concluded that "taken together with notions of settlement and residence and the qualitative aspect inherent in the term habitation, it

197 *See, e.g.*, Decree No. 78-146, 11 February 1978, OFFICIAL JOURNAL OF THE FRENCH REPUBLIC; and Decree No. 2007-1254, 21 August 2007, OFFICIAL JOURNAL OF THE FRENCH REPUBLIC, the United Nations, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/fra_mzn74_2009.pdf.

198 *See, e.g.*, the United States-Venezuela Agreement (1978), the Netherlands (Antilles)-Venezuela Agreement (1978) and the Venezuela-France Agreement (1980).

199 *See, e.g.*, *Global Security Note on Aves Island*, Globalsecurity.org, https://www.globalsecurity.org/military/world/caribbean/aves.htm. *See also*, Hafner, *supra* note 139, at 8–9.

200 *See, e.g.*, *Continental Shelf* (Libya v. Malta), 1985 I.C.J. Rep. 13 (June 3) (Judgment) at para. 64; *Maritime Delimitation and Territorial Questions*, *supra* note 17, at 104, para. 219; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), 2007 I.C.J. Rep. 659 (Oct. 8) (Judgment) at para. 302; and *Maritime Delimitation in the Black Sea, supra* note 147, at para. 185.

201 *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas*, Award of the *ad Hoc* Tribunal in the second phase, 26 March 2002, at para. 5.13. *See also* Section 3.b below, which identifies other State practice that undermines the Tribunal's approach.

202 Award, *supra* note 1, at para. 518.

should be understood to refer to the habitation of a feature by a settled group or community for whom the feature is a home".[203] In doing so, the Tribunal again ignored the critical fact that Article 121(3) is concerned with the objective "capacity" of a feature to sustain human habitation or economic life, not the question of whether a feature is in fact inhabited, and whether or not there is in fact a group or community that calls the feature "home". Still less is there any prohibition against "more or less uninhabited islands" generating EEZ and continental shelf rights.

For example, the remote Norwegian island of Jan Mayen, which is a scientific outpost that has never had any permanent population, was accepted by Denmark and the ICJ in the *Jan Mayen* case as constituting an island that generates substantial EEZ and continental shelf rights for Norway.[204] This is despite the fact that the feature is located in the Arctic Circle, in an isolated location. Indeed, in its Memorial in that case, Denmark described the feature as a desolate island without natural resources of any significance, referring to the fact that mining and hunting had been attempted there but abandoned, and describing an attempt to build a harbour as a fishing base that had similarly been abandoned. Other than its size (373 km^2), it thus exhibits a number of features indicating less capacity than Itu Aba to sustain human habitation or economic life of its own.[205] Nevertheless, at the hearing in the *Jan Mayen* case, Denmark accepted that Jan Mayen was not a rock but an island for the purposes of Article 121.[206]

As with its textual interpretation, in a number of respects the Tribunal's assessment of context, object and purpose under Article 31 of the VCLT is therefore highly questionable. It had the inevitable effect of again raising the threshold to be met by any feature in order to be accorded fully-fledged

---

203 *Id.* at paras. 518–20.

204 In its Judgment, the I.C.J. stated that "the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline" and thus concluded that "there is no reason to consider either the limited nature of the population of Jan Mayen or socio-economic factors as circumstances to be taken into account". *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. Rep. 41 (June 14) (Judgment), at para. 80.

205 For example, in his Separate Opinion, Judge Schwebel observed that "the singular characteristics of Jan Mayen Island may leave room for argument about whether it meets the standards of Article 121, but Denmark did not make that argument; it accepted that Jan Mayen Island is not a rock but an island". *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. Rep. 41 (June 14) (Separate Opinion of Judge Schwebel), at 126.

206 *Id.*

island status under Article 121 of UNCLOS. Further, as observed by a number of commentators,[207] it effectively reversed the burden of proof under Article 121(3) by imposing a presumption that a high-tide feature is a "rock" unless proven otherwise. As explained at Section III.B.(vi) and illustrated at Annex 1 below, the Tribunal's approach would have a substantial impact on State practice and ICJ jurisprudence that accords EEZ and continental shelf entitlements to features that appear no more capable than Itu Aba of meeting the requirements of Article 121.

3.1.1.5 *The Tribunal's Assessment of the Travaux Préparatoires of UNCLOS under Article 32 of the VCLT*

As explained above, the Tribunal moved on to consider the *travaux préparatoires* of UNCLOS, without indicating any legal basis for doing so as a supplementary means of interpretation under Article 32 of the VCLT. The Tribunal simply stated that it considered that "further examination of the circumstances that led to the adoption of Article 121 is warranted for the light it sheds on the purpose of the provision itself".[208] This is not a valid reason for making reference to *travaux préparatoires* under the VCLT or customary international law.

The Tribunal's lengthy discussion of *travaux préparatoires* in its interpretation of Article 121(3), at paragraphs 521–538 of the Award, is all the more remarkable given its acknowledgement that there are no existing records around the preparation of the final text by an informal consultative group at the Third UN Conference in 1975. Even the Tribunal acknowledged that the *travaux préparatoires* are an "imperfect guide" to interpretation of Article 121(3).[209] Even if it was legitimate for the Tribunal to refer to the *travaux préparatoires*, they were therefore of limited value as an interpretive tool.[210]

The Tribunal nevertheless drew a number of conclusions from the *travaux préparatoires* to confirm its restrictive textual interpretation of Article 121(3). In particular, it considered that the *travaux préparatoires* show that Article 121(3) was intended to prevent "encroachment on the international seabed reserved

207 Murphy, *supra* note 159, at 94.

208 Award, *supra* note 1, at para. 521.

209 *Id.* at paras. 531, 534.

210 Jennings and Watts, *supra* note 131, at 1277, para. 633: "The value of preparatory work in shedding light on the meaning of a treaty will vary from case to case. Often the records of treaty negotiations are incomplete and do not adequately cover compromises arrived at during the final stages of a conference or those reached privately away from the negotiating table: the negotiating records inevitably relate to matters taking place before the final expression of the parties' intentions has been made."

for the common heritage of mankind and of avoiding the inequitable distribution of maritime spaces under national jurisdiction".[211]

Other aspects of the *travaux préparatoires* indicate caution against small, largely uninhabited islands in denied any EEZ or continental shelf rights, particularly where those features or their surrounding waters comprise an important part of the economy of populations permanently located elsewhere. For example, Micronesia is recorded as having stated:

> Suggestions have also been made that uninhabited islands should not have a full economic zone. Almost all of our high islands, and almost all of our atolls, made up of low islands, are inhabited. But some islands are inhabited only part of the year, while others are used not as residences but for fishing or in some functional way other than for permanent habitation. They are all the same as vital a part of our economy and livelihood as some islands that may have permanent dwellings on them, but may have little or no fish resources near them. We do not believe that the criteria of inhabitation or size are practical or equitable.[212]

Moreover, the Article 121 classification of the Spratly Islands in the South China Sea, which is a semi-enclosed sea the vast majority of which falls within areas of national EEZ/continental shelf jurisdiction in any event, does not risk material encroachment on deep sea-bed areas. Therefore, the concerns around protection of the "common heritage of mankind", highlighted by the Tribunal with reference to the *travaux préparatoires*,[213] are less pertinent in the South China Sea than they are in areas of ocean space.

As far as "inequitable distribution of maritime spaces" is concerned, that is a matter for delimitation rather than a factor in the interpretation of entitlement under Article 121. After all, Articles 74 and 83 of UNCLOS provide for delimitation of the exclusive economic zone and continental shelf claims specifically in order to "achieve an equitable solution". Matters of delimitation fell squarely outside the jurisdiction of the Tribunal. The Tribunal's interpretation and application of Article 121(3) so as to "avoid inequitable distribution of maritime spaces under national jurisdiction", and thus to deprive the Spratly

211 Award, *supra* note 1, at para. 535.

212 Statement by the Chairman of the Joint Committee of the Congress of Micronesia submitted on behalf of the Congress by the United States of America, Official Records of the Third United Nations Conference on the Law of the Sea, UN Doc. A/CONF.62/L.6 (27 August 1974), the United Nations, http://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_3/a_conf62_l6.pdf.

213 Award, *supra* note 1, at para. 536, n. 574.

Islands from generating any maritime entitlements beyond 12 NM, had the effect of improperly circumventing China's Article 298 declaration withdrawing matters of delimitation from the Tribunal's jurisdiction. As explained at Section III.B.(vi), there are many examples around the world of small island features being accorded limited weight in delimitation beyond 12 NM, thereby avoiding any "inequitable distribution". Indeed, the need to prevent a small island feature (Jan Mayen) from generating entitlements that would be "excessive and inequitable" vis-à-vis a large neighbouring landmass (Greenland) was an explicit basis for the ICJ's delimitation of a boundary closer to Greenland in the *Jan Mayen* case.[214]

Notably, in a 1990 publication, Professor Soons, one of the arbitrators in the Arbitration, observed the practical inseparability between the legal definition of "rocks" under Article 121(3) of UNCLOS and considerations of equity in maritime boundary delimitation.[215]

In conclusion, the Tribunal's reference to the *travaux préparatoires* of Article 121 of UNCLOS and related materials was legally questionable, selective and contributed to the Tribunal's restrictive interpretation that is difficult to reconcile with the ordinary meaning of the text. As such, the Tribunal's interpretation of Article 121, and Article 121(3) in particular, is subject to serious doubt.

3.1.2 The Tribunal's Conclusion as Regards the "Principal Factors" that Contribute to the Natural Capacity of a Feature for the Purposes of Article 121(3)

The Tribunal considered that the "principal factors that contribute to the natural capacity of a feature" include "the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time". However, it observed that the relative contribution and importance of the various factors will vary from one feature to another. Accordingly, the Tribunal did not consider that "an abstract test of the objective requirements to sustain human habitation or economic life can or should be formulated".[216] We agree with these aspects of the Tribunal's findings.

---

214 *Delimitation in the Area between Greenland and Jan Mayen*, *supra* note 204, at para. 87.

215 Kwiatowska and Soons, *supra* note 8, at 146, para. 1.5.

216 Award, *supra* note 1, at para. 546.

The Tribunal concluded that "the most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put".[217] Again, we agree with this conclusion. To the extent that evidence can be presented demonstrating a history of human habitation on any feature or connected group of features, including habitation that has been cut short by "intervening forces" such as warfare, that evidence should be dispositive of the status of the feature or features under Article 121.

Finally, we agree with the Tribunal's conclusion that "evidence of human habitation that predates the creation of exclusive economic zones may be more significant than contemporary evidence, if the latter is clouded by an apparent attempt to assert a maritime claim".[218] That conclusion is of clear relevance in the context of the Spratly Islands, a number of which display a long history of human habitation and economic activity that pre-dates the negotiation of UNCLOS.

3.1.3 The Tribunal's Conclusions that Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) and Mckennan Reef, in Their Natural Condition, are Rocks that Cannot Sustain Human Habitation or Economic Life of Their Own under Article 121(3) of UNCLOS (Philippines Submission Nos. 3, 6 and 7; Tribunal Merits Dispositif No. 6)

Having set out its approach to the interpretation of Article 121, the Tribunal turned to the application of that provision to the individual features raised by the Philippines in its Submission nos. 3 and 7, together with Gaven Reef (North) and McKennan Reef (each of which the Tribunal had found to be high tide features, contrary to The Philippines' Submission no. 6).

The Tribunal's conclusion that Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) and McKennan Reef, in their natural condition, were "rocks" for the purposes of Article 121(3) appears correct on the basis of the evidence before the Tribunal. We also agree with the Tribunal's conclusion that recent construction activities on these features, however extensive, cannot elevate their status from a rock to a fully-entitled island under Article 121.

217 *Id.* at para. 549.
218 *Id.* at para. 550.

3.1.4 The Tribunal's Conclusions Regarding the Application of Article 121 to the Spratly Islands as a Whole

The Tribunal turned to address certain Chinese statements to the effect that it enjoys exclusive economic zone and continental shelf rights based on the Spratly Islands "as a whole".[219]

The Tribunal stated that, to the extent that China considers that the criteria of human habitation and economic life under Article 121(3) must be assessed with reference to networks of closely related maritime features, it agreed. In particular, it commented that Article 121(3) must not be applied "in a strictly atomised fashion" with respect to small island populations using groups of reefs or atolls to support their livelihood. We agree with this conclusion, which also reflects the comments made by Micronesia during the negotiation of UNCLOS, cited above.

The Tribunal continued that, to the extent that China asserts that the Spratly Islands can be enclosed within a system of archipelagic or straight baselines, according an entitlement to maritime zones as a single unit, it could not agree. This was because China is not an archipelagic State for the purposes of Article 46 of the Convention, and the limits imposed by Article 47 would prohibit the use of archipelagic baselines in any event. The Tribunal also commented that any application of straight baselines to the Spratly Islands would be contrary to UNCLOS and is, in effect, excluded by the combination of Articles 7, 46 and 47.

The Tribunal's findings that China is not an archipelagic State, that an archipelagic baseline around the Spratly Islands would not meet the criteria set for archipelagic States by Article 47 of UNCLOS, and that a straight baseline around the Spratly Islands could not be justified by reference to Article 7 of the Convention, although *obiter dicta* and absent from the Tribunal's dispositive findings, are correct.

However, notably, the Tribunal observed that UNCLOS does not expressly preclude the use of straight baselines in other circumstances.[220] Further, it stated that it was aware of the practice of some States in employing straight baselines with respect to offshore archipelagos.[221] One commentator notes that the Tribunal's reference to State practice in this context was made in a conclusion, but that the Tribunal did not follow through by analysing

219 *Id*. at paras. 571–76.
220 *Id*. at para. 573.
221 *Id*. at paras. 575–76.

that State practice and considering how that practice may have impacted its conclusion.[222] Notably, for example, the Tribunal did not analyse the Philippines' unilateral declaration of straight baselines enclosing many of the Spratly Island features in its Presidential Decree 1596 of 1978. The Tribunal simply concluded that UNCLOS "excludes the possibility of employing straight baselines" in situations other than those expressly provided under Article 7 and Part V, "in particular with respect to offshore archipelagos".[223]

The Tribunal's summary approach to this important issue is surprising because there is significant State practice of enclosing offshore archipelagos with straight baselines.[224] This includes in the South China sea itself, where the Philippines effectively declared such an archipelago when making its Kalayaan Island Group declaration (Presidential Decree 1596) in 1978. Much of this State practice clearly does not relate to archipelagos that form a "fringe of islands along the coast in its immediate vicinity" for the purposes of Article 7 of UNCLOS. Accordingly, those claims appear to have been made outside the straight baseline and archipelagic baseline provisions of UNCLOS. As stated above, the Tribunal confirmed that UNCLOS does not expressly preclude such baselines.[225]

Alongside the Philippines'1978 claim around the Kalayaan Island Group, relevant pre-UNCLOS State practice in this context includes straight baseline measures taken by Denmark in respect of the Faroes in 1963 (subsequently revised in 1976 and 2002), Norway in respect of Svalbard and its surrounding features in 1970 (amended in 2001), Ecuador in respect of the Galapagos Islands in 1971 (repeated in 2012), Spain in respect of the Canary Islands in 1977, and France in respect of the Kerguelen Islands in 1978[226] (see Section II.B(ii) on claim to offshore archipelagic status based on historic rights).

State practice in respect of the drawing of straight baselines around offshore island groups has continued since the adoption of UNCLOS. It includes the United Kingdom in respect of the Turks and Caicos and the Falklands in 1989 (and Argentina for the same, i.e., Malvinas, in 1991), China in respect of the Paracels in 1996, France in respect of Guadeloupe and its surrounding features in 1999 and in respect of the Loyalty Islands in 2002, and Myanmar in respect of Co Co and Peparis Islands in 2008.[227]

---

222 J. Ashley Roach, *Offshore Archipelagos Enclosed by Straight Baselines: An Excessive Claim?*, 49(2) OCEAN DEVELOPMENT & INTERNATIONAL LAW 176, 179–180 (2018).

223 Award, *supra* note 1, at para. 575.

224 Roach, *supra* note 222, at 179. *See also* appendix to the article for details.

225 Award, *supra* note 1, at para. 575.

226 *See* Table 1 and Appendix in Roach, *supra* note 222, at 180–81, 197–202.

227 *Id.*

Only six of the fifteen claims to enclose offshore archipelagos have been protested, by a total of nine States. Several claims are by States that failed in their effort during the negotiation of UNCLOS to have the archipelagic regime of Part V apply to offshore archipelagos.[228]

It would be inaccurate to conclude, as the Tribunal appears to do, that the question of drawing straight baselines is a settled matter under UNCLOS and customary international law. In particular, as elaborated in the critique of Section V of the Award (above), UNCLOS does not preclude the possibility of offshore archipelagic claims based on historic rights.[229] Accordingly, the Tribunal's apparent conclusion that any attempt to draw straight baselines around the Spratly Islands as an offshore archipelago would be contrary to international law is open to serious question.

One commentator has observed that the Tribunal "did not apply the approach used in previous international arbitration for assessing claims by continental or archipelagic states to maritime features as a single or archipelagic unit."[230] The approach, as exemplified in *Nicaragua v. Colombia*, involves "an examination for whether there is a treaty basis as well as natural and historical bases for such claims."[231] The commentator observes that the Tribunal failed to consider the San Francisco Peace Treaty and the Taipei Peace Treaty as possible bases to regard the Spratly Islands as a single unit.[232] She concludes that:

> The parties to the peace treaties knew and understood the Spratly Islands to mean Sinnan Gunto, an area in the South China Sea whose limits were well defined and the principal components of which were identified. This provides a sufficient basis to conclude that the Spratly Islands is "in [international] law a unit [...] [such] that the fate of the principal part may involve the rest," and this includes the named features in the Philippines/China Arbitration.[233]

228 *Id.*

229 *See* Section 2.b II.

230 Melissa H. Loja, *The Spratly Islands as a single unit under international law: A commentary on the Final Award in Philippines/China Arbitration*, 47(4) JOURNAL OF OCEAN DEVELOPMENT & INTERNATIONAL LAW 309, 311 (2016).

231 *Id.*

232 *Id.* at 316.

233 *Id.*

The Tribunal did not contemplate the possibility of such claims persisting following UNCLOS. For the reasons given in the critique of Section V of the Award, above, this conclusion is dubious.

3.1.5 The Tribunal's Conclusion that None of the High Tide Features in the Spratly Islands, in Their Natural Condition, are Capable of Sustaining Human Habitation or Economic Life of Their Own under Article 121 (3) of UNCLOS (Philippines Submission No. 5; Tribunal Jurisdiction Dispositif No. 2(A) and Merits Dispositif No. 7)

3.1.5.1 *The Tribunal's Decision Not to Address Specifically the Status of a Number of High Tide Features under Article 121 of UNCLOS Notwithstanding Their Manifest Relevance to Its Jurisdiction*

The Tribunal observed that, by requesting in Submission nos. 5, 8 and 9 declarations about the Philippines' own EEZ, the Philippines effectively requested a general determination that all of the high tide features in the Spratly Islands are "rocks" for the purposes of Article 121(3) of UNCLOS. Accordingly, the Tribunal considered it necessary to interpret and apply Article 121(3) for "all significant high-tide features in the Spratly islands that could impact the Tribunal's jurisdiction to decide the matters raised" in those Submissions.[234]

However, notably, the Tribunal focused its analysis under Article 121(3) upon only six features, which it described as "the six largest features amongst the other high-tide features in the Spratly Islands":[235] namely, Itu Aba (controlled by Taiwan), Thitu (controlled by the Philippines), West York Island (controlled by the Philippines), Spratly Island (controlled by Vietnam), North-East Cay (controlled by the Philippines) and South-West Cay (controlled by Vietnam) (the "Primary High Tide Features").

The Tribunal noted that a number of other high tide features of relevance to the extent of the Philippines' EEZ: namely, Amboyna Cay, Flat Island, Loaita Island, Namyit Island, Nanshan Island, Sand Cay, Sin Cowe Island and Swallow Reef (the "Secondary High Tide Features"). However, it declined to discuss them individually, on the basis that "if the six largest features described above are all to be classified as rocks for purposes of Article 121(3) of the Convention, the same conclusion would also hold true for all other high tide features in the Spratly Islands".[236] Therefore, when later concluding that the six "largest" features were "rocks" for the purposes of Article 121(3), the

234 Award, *supra* note 1, at paras. 393, 396.

235 *Id.* at para. 400.

236 *Id.* at para. 407.

Tribunal observed that, although it had "considered, and reache[d] the same conclusion with respect to" the Secondary Features, it was not necessary to list them individually.[237]

This is a surprising, and arguably unlawful, approach to a critical issue before the Tribunal (namely, whether it had jurisdiction over a number of the Submissions made by the Philippines, which in turn would depend upon whether any of the high tide features in the Spratly Islands potentially generate EEZ and continental shelf entitlement under Article 121).

First, this approach contradicts the Tribunal's own assessment of the drafting history of UNCLOS, which shows that proposals to impose "bright-line rules" around criteria such as surface area or size in the context of the rock/island distinction were explicitly rejected.[238] Accordingly, the Tribunal concluded that "size cannot be dispositive of the feature's status as a fully entitled island or rock and is not, on its own, a relevant factor".[239] But, in concluding that it was not necessary to discuss the Secondary High Tide Features individually, purely on the basis that they were smaller than the Primary High Tide Features, the Tribunal in effect imposed its own "bright-line rule".

Second, as a result, the Tribunal in effect imposed an arbitrary criterion in its interpretation of Article 121(3) that has no legal basis or justification. Indeed, even the Philippines had acknowledged that size alone could not be determinative of the status of a feature under Article 121(3),[240] such that it considered it necessary to make specific submissions and submit specific evidence with respect to the Secondary High Tide Features.[241]

Third, it is a fundamental principle of international law that any court or tribunal seized of a dispute or complaint must satisfy itself that it has jurisdiction over that dispute or complaint.[242] As elaborated in Section VI.B(i) below, Article 9 of Annex VII to UNCLOS requires that an arbitral tribunal must satisfy itself that a claim is well-founded in fact and law. By refusing to address specifically the question of whether any of the Secondary High Tide Features constituted fully-fledged "islands" with their own EEZ and continental shelf

237 *Id.* at paras. 622, 625.

238 *Id.* at paras. 537–38.

239 *Id.* at para. 538.

240 *Id.* at para. 412.

241 *Id.* at para. 443.

242 *See, e.g., Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30) (Dissenting Opinion of Judge John Bassett Moore) at 57–58: "[t]here are certain elementary conceptions common to all systems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has not (sic) jurisdiction".

entitlements, the Tribunal arguably disregarded its duty to satisfy itself of its jurisdiction as regards the Philippines' Submission nos. 5, 8 and 9. In this regard, the Tribunal simply stated that it had "also considered" and reached "the same conclusion with respect to, the other, less significant high-tide features in the Spratly Islands, which are even less capable of sustaining human habitation".[243] The Tribunal's brief comment, without any accompanying reasoning or analysis related to the Secondary High Tide Features, is arguably insufficient to fulfill the Tribunal's duty to satisfy itself that it had jurisdiction over the relevant submissions of the Philippines. In default proceedings involving only one party, this duty is particularly acute.

Fourth, the Tribunal failed to give any reasons for its conclusions as regards the status of the Secondary High Tide Features under Article 121. It is a general principle of international law that any court or tribunal must give reasons for its decisions, *a fortiori* any decisions that are fundamental to its jurisdiction.[244] By concluding that it was not necessary to discuss any of the Secondary High Tide Features individually, the Tribunal openly disregarded its obligation to give reasons with respect to issues that were a *sine qua non* of its jurisdiction over Submission nos. 5, 8 and 9.

3.1.5.2 *The Tribunal's Decision that All of the High Tide Features in the Spratly Islands Constitute "Rocks" for the Purposes of Article 121(3) of UNCLOS*

The Tribunal proceeded to review five aspects of conditions on the Primary High Tide Features, in turn, namely: (i) "the presence of potable fresh water"; (ii) "vegetation and biology"; (iii) "soil and agricultural potential"; (iv) "presence of fishermen"; and (v) "commercial operations".[245] On their face, each of these factors appears legitimate for the purposes of an analysis of a feature under Article 121. However, as explained below, in applying these factors to the Primary High Tide Features, the Tribunal gave substantial (and arguably improper) weight to the additional, "qualitative" and inherently subjective, legal factors that it had identified when interpreting Article 121.

Moreover, as elaborated below, the Tribunal's assessment of the available evidence as to whether or not the Primary High Tide Features fulfilled its five factors is highly questionable.

---

243 Award, *supra* note 1, at para. 622.

244 *See Case concerning Arbitral Award of 31 July 1989* (Guinea-Bissau v. Sen.), 1991 I.C.J. Rep.53 (Nov. 12) (Judgement); *see also Application for Review of Judgement No. 158 of the United Nations Admin. Tribunal*, 1973 I.C.J. Rep. 210–211 (July 12) (Advisory Opinion).

245 Award, *supra* note 1, at paras. 579–614.

First, in applying its five factors the Tribunal appears to have ignored some of the evidence before it. The Tribunal commented that it had reviewed "a substantial volume of evidence concerning the conditions on the more significant of the high tide features in the Spratly Islands".[246] It referred in this regard to evidence presented by the Philippines, evidence in other publicly available sources and materials obtained by the Tribunal from certain Western (British and French) archives. Notably, however, the Tribunal made no reference in this passage to the 39 evidentiary exhibits that had been provided by the Chinese (Taiwan) Society of International Law in its *Amicus Curiae* submission of 23 March 2016, which primarily related to human habitation and economic life on Itu Aba.[247]

The photographic evidence of human habitation on Itu Aba presented in the *Amicus Curiae* submission was only indirectly referred to in paragraph 432 of the Award, in the context of the Tribunal's summary of the Philippines' (largely rhetorical) assessment of that evidence. The Tribunal failed to refer to the photographic evidence when assessing, *inter alia*, the availability of potable fresh water, vegetation, agricultural potential commercial operations and the presence of fishermen.[248] In effect, therefore, the Tribunal only referred to the evidence presented in the *Amicus Curiae* submission to the extent that it was addressed by the Philippines in its own submissions, and otherwise ignored it altogether.

Professor Wang notes that the Tribunal:

> … ignored to analyze contrary evidence, like the ample documentary and other evidence submitted in the Amicus Curiae by the Chinese (Taiwan) Society of International Law. Taiwan's Amicus Curiae, citing numerous books, reports, and other forms of empirical or scientific research, aimed to prove that the Taiping Island not only had a "longstanding history of human habitation," but also "currently sustains the habitation of hundreds of people.[249]

246 *Id.* at para. 577.

247 Chinese (Taiwan) Society of International Law, *Amicus Curiae submission on the Issue of the Feature of Taiping Island* (*Itu Aba*) *Pursuant to Article 121*(*1*) *and* (*3*) *of the 1982 United Nations Convention on the Law of the Sea*, 23 March 2016 http://www.assidmer.net/doc/SCSTF-Amicus-Curiae-Brief-final.pdf.

248 Award, *supra* note 1, at 580–614.

249 Wang, *supra* note 175, at 205.

Second, even on the evidence to which it did refer, it appears that Itu Aba (and possibly other features) satisfied all of the factors that it had identified as central to its Article 121(3) analysis. This is especially the case if the "qualitative" aspects of the Tribunal's interpretation of Article 121(3) are set aside. The following section sets out how Itu Aba appears to satisfy all five factors identified by the Tribunal.

3.1.5.3 *The Tribunal's Decision Ignores Evidence Indicating that Itu Aba Satisfied Its Own Five Factors for the Purposes of Article 121(3)*

The Chinese (Taiwan) Society of International Law submitted to the Tribunal a series of photographs evidencing historic and continuous human habitation on Itu Aba.[250] Some of the photographs, however, evidence the presence of three of the five factors considered by the Tribunal in determining whether a feature can sustain human habitation on its own, including: (1) potable water (Exhibit 29); (2) vegetation and biology (Exhibit 27); (3) soil and agricultural potential (Exhibits 31, 38(1) and 38(2)). As described below, the Tribunal had further non-photographic evidence before it on all five factors. It is notable that the Tribunal does not cite to any of the photographs introduced as evidence with the Chinese (Taiwan) Society of International Law's *Amicus Curiae* submission, which provide clear evidence of human habitation on Itu Aba.

As regards its first factor ("the presence of potable freshwater"), despite extensive historical evidence as to the "considerable quantity" and "abundant" volumes of drinkable water on Itu Aba in particular, the Tribunal concluded that the "quality of this water will not necessarily match the standards of modern drinking water and may vary over time".[251] This is despite the absence from Article 121(3) of any requirement that drinking water must be up to "modern standards" (a term which the Tribunal did not attempt to define, but which follows from its imposition of "qualitative" elements in its interpretation of that provision). In fact, as Professor Nordquist has observed, no reference is made to water at all in the text of Article 121(3), nor was any meaningful discussion held about the presence (or not) of water as a relevant during its negotiation.[252] Also, as elaborated at Annex 1 below, it is clear that many fully-entitled island features generating EEZ entitlements do not host potable freshwater, still less sufficient freshwater up to "modern standards" to support a human population.

250 Chinese (Taiwan) Society of International Law, *supra* note 247. The historic evidence includes photographs of buildings, temples and groundwater wells (Exhibit 27).

251 Award, *supra* note 1, at para. 584.

252 Nordquist, *supra* note 190, at 177–90.

While the presence of potable freshwater is, in our view, a legitimate (though not decisive) indicator of the capacity of a feature to sustain human habitation, the Tribunal unduly inflated the importance of that factor and subjected it to unreasonable "qualitative" and "quantitative" limits that are unsupported by the text of Article 121. As a result, while the Tribunal acknowledged that the freshwater resources "have supported small numbers of people in the past",[253] it did not consider this to be conclusive as to the status of Itu Aba.

Notably, the Tribunal's assessment of the evidence of potable freshwater on Itu Aba was also lacking. For example, it did not even address the evidence before it as to the substantial volume of drinkable water available on Itu Aba, and the hundreds of people that were reliant on it during certain periods.[254]

In particular, the Tribunal ignored the evidence submitted by the Chinese (Taiwan) Society of International Law with its *Amicus Curiae* submission, including evidence from the Water Quality On-site Survey stating that the quality of the groundwater drawn from the four wells has been proved to be suitable for daily human use, and in particular, the quality of the water drawn from Well No. 5 is suitable for drinking.[255]

The Tribunal also failed to consider the historical evidence of potable drinking water on Itu Aba before it:

> In fact, quality freshwater on Taiping Island has been recorded and attested to by a great deal of historical documentary evidence, including the China Sea Directory in 1879 and Asiatic Pilot in 1925, all evidencing that the water found in the wells on Taiping Island is suitable for drinking, and that its quality is superior to water in other locations. In 1937,

253 Award, *supra* note 1, at para. 584.

254 *See, e.g.*, Exhibits 1, 2, 28 and 29 to the Chinese (Taiwan) Society of International Law, *Amicus Curiae* submission. *See also* Determination Regarding Jurisdiction of New Southern Archipelago will be Announced Today [新南群島の管轄決定きょう公告], Osaka Asahi Shimbum [大阪 朝日新聞], 18 April, 1939, Exhibit 25 and Hitoshi Hiratsuka (平塚均); The advanced base for expanding fishery business to southern area: New Southern Archipelago – Report of On-site Survey [漁業南進の 前哨地. 新南群島 – 實地調查記], Taiwan Times [台湾時報], May 1939, at 208–210, Exhibit 30 to the Chinese (Taiwan) Society of International Law, *Amicus Curiae* submission. According to the Amicus Curiae submission, both empirical facts and scientific studies establish that the Itu Aba has an abundant natural supply of fresh water which "is easily replenished by precipitation", which "averages 1800–2000 mm per year". It was further presented that the four groundwater wells provided drinking and cultivating water to 237,000 tons per year. Chinese (Taiwan) Society of International Law, *supra* note 247.

255 *Id. See, e.g.*, Exhibit 29, Ta-Wei Chang, Water Quality and Agricultural Environment Survey – Groundwater Quality and Hydrology Survey Report.

> a Japanese government official, Hitoshi Hiratsuka (平塚均), was sent to Taiping Island and recorded that out of the four wells on the Island, one well can supply about 10 tons of drinking water per day. Osaka Asahi Newspapers in 1939 also reported that drinking water was available a long time ago on Taiping Island, and fishermen used to visit the Island to obtain drinking water during sailing trips. Historical documentary evidence also shows that Taiping Island had a freshwater supply when the ROC government took over, and thereby recovered Taiping Island in 1946.[256]

As regards its second factor ("vegetation and biology"), the Tribunal observed various evidence that the larger features in the Spratly Islands have historically been vegetated, including through the introduction of fruit trees and vegetables to supply food on Itu Aba before and after World War II. It observed also historical evidence of the farming of chickens and pigs.[257] Notably, the Tribunal had before it (but made no reference to) evidence presented of livestock being raised in modern times on Itu Aba, showing that locally raised "goats, chickens, and eggs are a source of food for people on the island".[258]

As regards its third factor ("soil and agricultural potential"), the Tribunal cited a 1994 scientific study indicating that "people may cultivate crops" on Itu Aba, and considered the "most instructive evidence to be the clear indication that fruit and vegetables were being grown on Itu Aba during the period of Japanese commercial activity". It observed that such cultivation "most likely reflects the capacity of the feature in its natural condition". Certainly, such evidence indicates the presence of fertile soil and agricultural potential.

However, the Tribunal went on to say that "agriculture on Itu Aba would not suffice, on its own, to support a sizeable population".[259] Again, the ability of a feature to support "a sizeable population" is not relevant to the assessment of status under Article 121 of UNCLOS. Moreover, the Tribunal's reference to it contradicts its observation earlier in the Award that the "human habitation" criterion does not require capacity to support a large population, and that in remote atolls "a few individuals or family groups could well suffice".[260] The Tribunal's reference to an inability is to support a "sizeable population" again

256 *Id.*

257 Award, *supra* note 1, at paras. 586–91.

258 Chinese (Taiwan) Society of International Law, *supra* note 247. *See, e.g.*, Chien-Fan Chen, Water Quality and Agricultural Environment Survey of Taiping Island–The Flora and Vegetation Survey Report, Exhibit 32.

259 Award, *supra* note 1, at para. 596.

260 *Id.* at para. 542.

appears to follow from its restrictive interpretation of Article 121(3) and the imposition of "qualitative" elements.

The Tribunal had further evidence before it showing that "[s]oil on Taiping Island is naturally formed and supports indigenous vegetation as well as agricultural crops."[261] The Tribunal observed that "the historical record before the Tribunal contains less information concerning soil quality on features in the Spratly Islands".[262] However, it failed to mention the following account of cultivated vegetation presented by the Chinese (Taiwan) Society of International Law *Amicus Curiae* submission:

> Personnel stationed on the island have long utilized all types of resources on the island and cultivated various tropical vegetables and fruits, including staple foods such as corn and sweet potato as well as 10 other types such as okra, pumpkin, loofah gourd, bitter melon, and cabbage.[263]

As regards its fourth factor ("presence of fishermen"), the Tribunal noted evidence indicating "the consistent presence of small numbers of fishermen, mostly from Hainan, on the main features in the Spratly Islands". It cited 19th-century evidence that fishermen were able to "remain for years" among the Spratly Islands, including some that were "comfortably established" on Itu Aba, supplying themselves with water from that feature.

The Tribunal referred to 20th-century French evidence observing that the fishing communities were growing coconut, banana and potatoes on Itu Aba, and that "there is no doubt that since time immemorial, these islands were frequented and even temporarily inhabited by the Chinese, Malay and Annamite fishermen that haunt these parts".[264]

The Tribunal concluded that the evidence showed that fishing communities were present in the Spratlys "for comparatively long periods of time, with an established network of trade and intermittent supply".[265]

As regards its fifth and final factor ("commercial operations"), the Tribunal observed various evidence of significant commercial activities in the early 20th century around "the working of phosphates", fisheries, guano mining and the associated presence from time to time of hundreds of workers on Itu Aba. Evidence showed that the workers obtained drinking water on the feature, and

---

261 Chinese (Taiwan) Society of International Law, *supra* note 247. *See* Exhibit 31, Zueng-Sang Chen, Brief Report of Soil Resources Survey of Taiping Island.

262 Award, *supra* note 1, at para. 594.

263 Chinese (Taiwan) Society of International Law, *supra* note 247.

264 Award, *supra* note 1, at para. 599.

265 *Id.* at paras. 597–601.

that the place was "considerably developed as a fishery" and "a flourishing concern" before it was abandoned during World War II.[266]

On the basis of the evidence before it, the Tribunal concluded that "the principal high-tide features in the Spratly Islands are capable of enabling the survival of small groups of people", and that "the principal features of the Spratly Islands are not barren rocks or sand cays, devoid of fresh water, that can be dismissed as uninhabitable".[267]

On this basis, the Tribunal should have been able to conclude, at a minimum, that both Itu Aba on its own and (*a fortiori*) the Spratly Islands as a whole are capable of sustaining human habitation for the purposes of Article 121(3). It should also (separately) have been able to conclude that both Itu Aba on its own and (*a fortiori*) the Spratly Islands as a whole are capable of sustaining economic life of their own for the purposes of Article 121(3).

The Tribunal considered that, since a number of the features "fall close to the line in terms of their capacity to sustain human habitation", it was required to consider the historical evidence of actual human habitation and economic life before reaching any conclusions. This should not have been necessary, given the overriding "capacity" criterion in Article 121(3), which had been acknowledged by the Tribunal earlier in the Award. Nevertheless, that historical evidence indisputably showed that actual human habitation and economic life has been present on the features for significant periods in the past.

The Tribunal, however, concluded that "the criterion of human habitation is not met by the temporary inhabitation of the Spratly Islands by fishermen, even for extended periods", because they did not represent the "natural population of the Spratlys". Moreover, fishermen had not been "accompanied by their families" or comprise a "stable community". Accordingly, the shelter and facilities evidenced before it did not attain the level that the Tribunal "would expect for a population intending to reside permanently". Similarly, labourers living on the islands purposes of Japanese commercial activities during the early 20th century had not moved "to make a new life for themselves" or establish a "settled community".

As a result, the Tribunal concluded that Itu Aba, Thitu, West York, Spratly Island, South-West Cay and North-East Cay are not capable of sustaining human habitation within the meaning of Article 121(3).[268]

266 *Id.* at paras. 602–12.
267 *Id.* at paras. 615–16.
268 *Id.* at paras. 618–22.

This critical conclusion is subject to criticism on a number of grounds. First, as explained above, it appears to be belied by the evidence that was before the Tribunal. As Professor Nordquist has observed, the failure of the Tribunal to take note of certain developments over time on Itu Aba, about which evidence was readily available to the Tribunal, is "baffling".[269] Second, as also explained above, it is based upon an overly-restrictive interpretation of Article 121, which imposes unjustified "quantitative" and inherently subjective considerations upon a definition that is inherently objective in nature. Third, the Tribunal ignored the fact that the most substantial historical population appears to have abandoned Itu Aba as a result of an "intervening force", in the form of World War II, despite the fact that it had explicitly acknowledged that such factors are relevant in the application of Article 121. Fourth, the Tribunal accorded undue weight to the presence of military or other governmental personnel on the features during modern times, and associated concerns about States establishing "artificial populations in the hope of making expansive [EEZ] claims", all of which should have been irrelevant given the substantial pre-UNCLOS evidence before it showing capacity to sustain human habitation.[270]

As regards "economic life", the Tribunal concluded that "all of the economic activity in the Spratly Islands that appears in the historical record has been essentially extractive in nature", for the benefit of populations elsewhere. It observed that "economic activity must be oriented around the feature itself and not be focused solely on the surrounding territorial sea or entirely dependent on external resources".[271]

As a result, the Tribunal concluded that Itu Aba, Thitu, West York, Spratly Island, South-West Cay and North-East Cay are not capable of sustaining economic life of their own within the meaning of Article 121(3).[272]

Again, this conclusion is subject to criticism on a number of grounds. First, as explained above, it appears to be belied by the evidence before the Tribunal of a history of economic life that was far from being "focused solely on the surrounding territorial sea or entirely dependent on external resources". Second, as explained above, it is again based upon the Tribunal's overly-restrictive interpretation of Article 121, which imposes unjustified "quantitative" and inherently subjective considerations upon a definition that is inherently objective in nature. Third, the Tribunal ignored the fact that the most substantial economic activity within the past 100 years appears to have ceased on Itu Aba

269 Nordquist, *supra* note 190, at 197.

270 Award, *supra* note 1, at paras. 620–21.

271 *Id.* at para. 623.

272 *Id.* at paras. 623–25.

as a result of an "intervening force", in the form of World War II. Fourth, the Tribunal commented out of the blue, and without any justification on the text of Article 121, that the introduction of the EEZ by UNCLOS "was not intended to grant extensive maritime entitlements to small features whose historical contribution to human settlement is as slight as that". There is nothing in the text, or even the context, object and purpose, of Article 121 to indicate that a feature (or group of features) must have made a significant "historical contribution to human settlement" in order to be capable of generating EEZ and continental shelf rights.

In conclusion, on the evidence before it the Tribunal could easily have concluded that both Itu Aba on its own and (*a fortiori*) the Spratly Islands as a whole are capable of sustaining human habitation for the purposes of Article 121(3). It could also (separately) have concluded that both Itu Aba on its own and (*a fortiori*) the Spratly Islands as a whole are capable of sustaining economic life of their own for the purposes of Article 121(3). Either finding would have been sufficient to lead the Tribunal to conclude that one or more of the features generates EEZ and continental shelf entitlement. This, in turn, would have precluded the Tribunal from taking jurisdiction in respect of Philippines Submission nos. 5, 8, 9 and 12, and from making a number of its substantive findings on the merits (particularly dispositif nos. 7, 8, 9, 10, 14 and 16(a) and (d)).

3.1.6 The Tribunal's Conclusion that Itu Aba and Other Features in the Spratly Islands Constitute "Rocks" for the Purposes of Article 121(3) Contradicts State Practice as Regards EEZ Claims Made around Equivalent (Or Less Significant) Maritime Features

As well as being legally questionable for the reasons set out above, the Tribunal's conclusion that Itu Aba and other features constitute "rocks with no EEZ or continental shelf entitlement" for the purposes of Article 121(3) contradicts State practice.

Notably, the Tribunal ignored this State practice in its Award. Rather, and in contrast with its lengthy analysis of the *travaux préparatoires*, it restricted its assessment of State practice to considering whether "one can speak of an agreement reached concerning the interpretation of the provision in question".[273] The Tribunal observed that the threshold to be met in order to establish such an agreement is "quite high", and concluded that "there is no evidence for an agreement based upon State practice on the interpretation of Article 121(3)".[274]

273 *Id.* at para. 552 (referring to Article 31(3)(b) of the VCLT).

274 *Id.* at paras. 552–53.

Accordingly, the Tribunal did not take any account of widespread State practice showing that small uninhabited islands, including a number that are uninhabited (and without any fresh water source for the most part), have been treated as "islands" generating full maritime entitlements, including Australia's Elizabeth Island; Brazil's Martim Vaz Island; Chile's Sala y Gomez Island; Colombia's Low Cay (Bajo Nuevo Bank) and France's Matthew Island (all smaller in size than Itu Aba).[275]

While, in some cases, claims to EEZ and continental shelf rights around small uninhabited features are unilateral in nature, in others they have been more widely accepted by way of delimitation or otherwise. For instance, as discussed above in Section III.B(i), Venezuela's delimitation agreements with neighbouring States conferring Isla Aves maritime entitlements beyond 12 NM. For details demonstrating that Isla Aves is clearly less capable than Itu Aba of meeting the Tribunal's five tests for fully-entitled island status under Article 121, see Table 1 (*Small features mutually recognised as being fully entitled under Article 121(2)*) in Annex 1 to this Critique. Table 1 also contains further examples of features that have been mutually accepted as being fully-entitled islands in delimitation, but which fail more obviously than Itu Aba to meet the Tribunal's five tests. Table 2 identifies a number of further examples of features much more insignificant than Itu Aba that are nevertheless claimed unilaterally by States as being fully-entitled islands under UNCLOS.

As one commentator has observed, the Tribunal's reasoning and conclusion in relation to Itu Aba alone, "if applied universally, would imply that a large number of such high-tide elevations in the oceans should be stripped of their present EEZ and continental shelf entitlements."[276]

In a recent study,[277] Myron Nordquist and William Phalen identified a number of islands, recognised as such through "decades of State Practice",[278] which would likely be considered Article 121(3) "rocks" if the Tribunal's reasoning were to be applied:

(i) Johnston Island and Atoll (area 2.63km2): in its natural condition does not contain fresh water, food and living space and materials for human shelter nearly to the extent as does Itu Abu. Further, the only major industry outside of military activities that has occupied the islands has been guano mining, which the Tribunal classified as a "purely extractive

275 *See* Talmon, *supra* note 33, at 83–86.

276 Hafner, *supra* note 139, at 10.

277 Myron H. Nordquist & William G. Phalen, *Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award*, in INTERNATIONAL MARINE ECONOMY (2017).

278 *Id.* at 69.

economic activity, thus disqualifying the Atoll from any ability to sustain an economic life of its own.[279] Nonetheless, the United States has claimed the EEZ surrounding the atoll, without objection, since March 1983.

(ii) Clipperton Island (area 6km2): serves as another glaring example of a maritime feature that has long been recognized by the international community as an Article 121 island entitled to a 200nm EEZ and continental shelf. Yet, the island would fail the test in the Award as applied to Itu Aba.[280] Attempts at settlement on the island in the early 20th century failed without continuous resupply ships, so the history of the island suggests that the feature cannot independently sustain human habitation or an economic life of its own according to the test laid down by the Tribunal.

(iii) Trindade Island (area 10.1km2): the island today is almost entirely barren" and the "current physical characteristics of Trindade would make survival on the feature's resources without the aid of modern technology extremely difficult if not impossible.[281] In 2004, Brazil declared an EEZ, which included a 200 nm zone surrounding Trindade. There has been no objection from the international community.

If the Tribunal's analysis were to be adopted as a universal standard, it would potentially result in the reclassification of certain islands which unequivocally have full maritime entitlements.

For example, in its Award, the Tribunal stated that: (i) a "feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does not meet the requirements of Article 121(3);[282] (ii) the economic life "must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea";[283] and (iii) "size cannot be dispositive of a feature's status as a fully entitled island or rock and is not, on its own, a relevant factor."[284]

Taking each of these in turn in relation to Kiritimati (otherwise known as Christmas Island): (i) the island is susceptible to severe drought and "the contemporary population of nearly 8,000 people is dependent upon shipments from Kiribati's capital for potable water and food";[285] (ii) whilst the island's reef system is productive and supports the population's nutrition, this does not

279 *Id.* at 70.
280 *Id.* at 71.
281 *Id.* at 72.
282 Award, *supra* note 1, at para. 547.
283 *Id.* at para. 543.
284 *Id.* at para. 538.
285 Nordquist & Phalen, *supra* note 277 at 67.

satisfy the Tribunal's preference that resources of the feature itself should be considered when determining habitability; and (iii) according to the Tribunal, the size of the island cannot be determinative in its classification, in part because there is no substantive difference between an "island" and a "rock". Therefore, Kiritimati would apparently fail to meet the characteristics imposed by the Tribunal in order to be classified as an "island" under Article 121. To the contrary, in fact Kiritimati is internationally recognised as an island having full maritime entitlements.[286]

Nordquist and Phalen "believe, for reasons explained in [their] Study, that it is unrealistic to expect widespread repudiation of decades of unprotested State Practice relevant to the regime of islands throughout the world's oceans."[287] In our view, supported by the examples set out above, the Tribunal's decision on Itu Aba contradicts State practice with regards to EEZ claims made around equally small or much smaller features, or features that are less likely than Itu Aba to be able to sustain human habitation or an economic life of their own. The Tribunal therefore erred in dismissing the relevance of State practice in this instance. The universal application of its reasoning could result in reclassifications that would contradict State practice, depriving many States of long-standing maritime rights.

4 The Tribunal's Findings with Respect to Chinese Activities in the South China Sea (Philippines Submissions Nos. 8 to 13; Award Chapter VII)

This section analyses the Tribunal's conclusions and findings with respect to the Philippines' submissions relating to certain Chinese activities in the South China Sea. After an introductory section on issues of jurisdiction, it considers the following Tribunal findings:

Section 4.1: that China breached its obligations under Articles 77 and 56 of UNCLOS with respect to the Philippines' sovereign rights over the non-living resources of its continental shelf in the area of Reed Bank and the living resources in its EEZ (Submission no. 8; Tribunal merits dispositif nos. 8 and 9);

286 *Id.* at 67–68. "While the island of Kiritimati has nearly all of the limitations for human habitation identified by the Tribunal in its analysis of Itu Aba/Taiping (*i.e.* minimal freshwater, calcareous soil, zero agricultural potential), before this Award there was consensus in the international community that it was entitled to a 200-nm EEZ as demonstrated by uncontested State Practice."

287 *Id.* at 77–78.

Section 4.2: that China failed to exhibit "due regard" for the Philippines' sovereign rights over fisheries in its EEZ, and accordingly China breached its obligations under Article 58(3) of UNCLOS (Submission no. 9; Tribunal merits dispositif no. 10);

Section 4.3: that, from May 2012 onwards, China unlawfully prevented Filipino fishermen from engaging in traditional fishing at Scarborough Shoal (Submission no. 10; Tribunal merits dispositif no. 11);

Section 4.4: that, with respect to the protection and preservation of the marine environment in the South China Sea, China breached its obligations under Articles 123, 192, 194(1), 194(5), 197, and 206 of UNCLOS (Submissions nos. 11 and 12(b); Tribunal merits dispositif nos. 12 and 13);

Section 4.5: that, through its construction of artificial islands, installations and structures at Mischief Reef, China breached Articles 60 and 80 of UNCLOS (Philippines Submission no. 12 (a) and (c); Tribunal merits dispositif no. 14); and

Section 4.6: that China's operation of its law enforcement vessels on 28 April 2012 and 26 May 2012 violated Rules 2, 6, 7, 8, 15, and 16 of the Convention on the International Regulations for Preventing Collisions at Sea ("COLREGS") and, as a consequence, breached its obligations under Article 94 of UNCLOS (Philippines Submission no. 13; Tribunal merits dispositif no. 15).

4.1 *Issues of Jurisdiction*

A few important points on jurisdiction are worth noting from the outset.

4.1.1 The Effect of the Tribunal's Previous Determinations on "Historic Rights" and the Status of Features in the South China Sea

As discussed and critiqued above, the Tribunal had previously determined that:

> there is no legal basis for any Chinese historic rights, or other sovereign rights and jurisdiction beyond those provided for in the Convention, in the waters of the South China Sea encompassed by the 'nine-dash line';[288]

288 Award, *supra* note 1, at para. 692. We note that this finding is not set out in the *dispositive* on Submissions nos. 8, 9 and 12, however, it is a necessary assumption underlying the Tribunal's findings on its jurisdiction.

> none of the high-tide feature in the Spratly Islands is a fully entitled island for the purposes of Article 121 of [UNCLOS];[289] and
>
> Mischief Reef and Second Thomas Shoal are low-tide elevations [which], as such, generate no entitlement to maritime zones of their own.[290]

The Tribunal relied heavily on these three premises in reaching its substantive conclusions in Chapter VII – in particular, with respect to its findings on Submission nos. 8,[291] 9[292] and 12.[293] For reasons elaborated elsewhere in this critique, each of these premises is subject to substantial doubt, whether from a legal or a factual perspective.

Had the Tribunal found differently with respect to China's historic rights and/or the status of features in the South China Sea (including the status of Mischief Reef), it would also have faced the possibility of overlapping entitlements in the disputed areas. Accordingly, it would have been required to decline jurisdiction over the Philippines' Submissions nos. 8 and 9[294] and it could not have found that China had breached Articles 77 and 56 of UNCLOS,[295] nor Article 58(3).[296]

Similarly, had the Tribunal found that some of the features in the Spratly Islands (in particular Itu Aba) were fully-entitled islands for the purpose of Article 121(1) of UNCLOS, or that Mischief Reef was a high-tide feature, it would have faced the possibility of overlapping entitlements and would thus have

289 *Id*. at para. 692; *see also* Tribunal jurisdiction dispositif nos. 3(a) and 5(a) which state that: "no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal constitutes a fully entitled island for the purposes of Article 121 of the Convention and therefore [...] no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal has the capacity to generate an entitlement to an exclusive economic zone or continental shelf".

290 Award, *supra* note 1, at para. 693; Tribunal jurisdiction dispositif nos. 3(b) and 5(b).

291 Award, *supra* note 1, at paras. 692–93.

292 *Id*. at para. 734.

293 *Id*. at para. 1025.

294 *Id*. at para. 691. Contrary to its finding in the jurisdiction dispositif no. 3. As acknowledged by the Tribunal with respect to Submission no. 8: "[h]ad the Tribunal found that another maritime feature claimed by China within 200 nautical miles of the relevant areas were a fully entitled island for purposes of Article 121 of [UNCLOS] and capable of generating an entitlement to an exclusive economic zone and continental shelf, it would necessarily have had to decline jurisdiction over the dispute".

295 *Id*. at merits dispositif nos. 8 and 9.

296 *Id.* at merits dispositif no. 10.

been required to decline jurisdiction over Submissions nos. 12(a) and (c).[297] Accordingly, it could not have found that, through its construction of artificial islands, installations, and structures at Mischief Reef, China had breached Articles 60 and 80 of UNCLOS.[298]

4.1.2 The Tribunal's Finding that China's Activities were of a Civilian Nature and that It Therefore had Jurisdiction over Submission Nos. 11 and 12(B) (Tribunal Jurisdiction Dispositif No. 4)

For the purposes of the Philippines' Submission nos. 11 and 12(b), the Tribunal was required to determine whether its jurisdiction was constrained by the "military activities" exception set out at Article 298(1)(b) of UNCLOS.[299]

Pursuant to Article 9 of Annex VII to UNCLOS, "[b]efore making its award, the arbitral tribunal must satisfy itself not only that it had jurisdiction over the dispute but also that the claim is well founded in fact and law".[300]

The ICJ, which is subject to a similar provision (Article 53 of the ICJ Statute), held in the *Nuclear Tests* cases that "[i]n view of the non-appearance of the Respondent, it was especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts".[301]

Judge Wolfrum, in an earlier ITLOS case, considered that the phrase "well founded in fact and law" was "not a standard of proof in the sense of 'preponderance of evidence'" and that it was "rather comparable to the standard of proof in the sense of 'proof beyond reasonable doubt' as applied in

297 Contrary to the Tribunal's finding in the jurisdiction dispositif, no. 5.

298 Award, *supra* note 1, at merits dispositif no. 14.

299 *Id.* at paras. 934–38.

300 The Tribunal explicitly confirmed that it had the responsibility to establish the limits of its jurisdiction proactively (see, in particular, Procedural Order No. 4, 21 April 2015, at para. 1.4). The Tribunal also referred to the "special responsibility" that China's non-participation imposed on the Tribunal. Award, *supra* note 1, at para. 129.

301 *See, e.g.*, Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. Rep. 253 (Dec. 20) (Judgement) at para. 31. The Court also considered that "It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings [jurisdiction], and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so **must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant**. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law" (at para. 15) (emphasis added).

many national legal systems".[302] Certain commentators have explained that "[t]he methods applied by the [ICJ] in order to verify that the submissions of the appearing party are well founded in fact" include, *inter alia*, "expert inquiries" and "information in the public domain".[303] This is notwithstanding that the Court "cannot by its own enquiries entirely make up for the absence of one of the Parties".[304]

In this case, the Tribunal upheld the Philippines' argument that "China has repeatedly characterised its island-building as being for civilian purposes".[305] Relying on "China's repeated statements that its installations and island-building activities are intended to fulfil civilian purposes" the Tribunal held that it "will not deem activities to be military in nature when China itself has consistently and officially resisted such classifications and affirmed the opposite at the highest levels".[306] The Tribunal thus relied exclusively on statements of China's officials supporting the Philippines' position in determining that the "military activities" exception did not apply, and that it therefore had jurisdiction to consider the Philippines' complaints about China's island-building and land reclamation activities.[307]

The Tribunal could (and, arguably, should) have looked for further evidence in relation to this important jurisdictional issue. We note, in particular, that the Tribunal asked the Philippines to comment on the statements of China's Foreign Ministry spokesperson, Hua Chunying, who stated on 9 April 2015, *inter alia*, that "[a]fter the constructions, the islands and reefs will be able to provide all-round and comprehensive services to meet various civilian demands besides satisfying the need of necessary military defense".[308]

---

302 *The M/V Saiga* (*No.* 2) *Case* (Saint Vincent v. Guinea), 1999 I.T.L.O.S. No. 2 (Separate opinion of Vice-President Wolfrum) at para. 12.

303 A. Zimmermann, K. Oellers-Frahm, C. Tomuschat & C. J. Tams, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1347 (2013) at para. 59.

304 *Military and Paramilitary Activities, supra* note 71, at para. 30.

305 Award, *supra* note 1, at para. 893.

306 *Id.* at paras. 935, 938. The Tribunal relied, in particular, on statements from a Chinese Foreign Ministry Spokesperson, the Head of China's delegation to the Meeting of States Parties to the UN Convention of the Law of the Sea and China's President, Xi Jiping (Award, at paras. 936–937). *See also* Award, *supra* note 1, at paras. 1027–1028, regarding Philippines Submissions nos. 12(a) and 12(c).

307 Award, *supra* note 1, at para. 938.

308 Philippines' responses to the Tribunal's 5 February 2016 Request for Comments, 11 March 2016, at para. 5.

Despite this statement, the Philippines argued that the "military exception" at Article 298(1)(b) of UNCLOS was inapplicable,[309] and that "mixed-use projects" and situations "in which a military unit is used to protect other activities" were not covered by this exception.[310] The Tribunal did not decide on the dual-use of projects argument, however, and simply held that it accepted "China's repeatedly affirmed position that civilian use compromises the primary (if not the only) motivation underlying the extensive construction activities on the seven reefs in the Spratly Islands".[311]

The Tribunal's reasoning does not appear to account for any "reasonable doubt" on the civilian nature of the constructions, which plainly existed based on the above-mentioned statement. The Tribunal could have asked the Philippines to produce further evidence on this issue or could have looked for information in the public domain (which in fact demonstrated military elements of the construction and land reclamation activities).[312] In any event, had the Tribunal decided to rely on contemporaneous information in the public domain it should have requested that the Parties comment on it. Arguably, this violated its duty under Article 9 of Annex VII to UNCLOS to satisfy itself that it had jurisdiction over the dispute.

4.2 *The Tribunal's Finding that China Breached Its Obligations under Articles 77 and 56 of UNCLOS (Philippines Submission No. 8; Tribunal Merits Dispositif Nos 8 and 9)*

4.2.1 The Tribunal's Finding that China's Actions in Connection with the Survey Operations of M/V Veritas Voyager Amounted to a Breach of Article 77 of UNCLOS

The Philippines presented three complaints that China had violated its sovereign rights to the continental shelf. These related to: first, Chinese diplomatic objections to the Philippines government regarding certain offshore oil and gas activities; second, a Chinese statement to a Philippines concessionaire (Nido Petroleum Ltd) to the effect that the concession area was claimed by China; and third, specific actions by Chinese maritime surveillance vessels with regard to survey operations undertaken by the M/V Veritas Voyager around Reed Bank.

309 *Id.* at para. 6.

310 Award, *supra* note 1, at para. 893; Merits Hearing Tr. (Day 4) at 104.

311 Award, *supra* note 1, at para. 938.

312 *See, e.g., China lands military plane on disputed South China Sea reef*, 18 April 2016, BBC News, https://www.bbc.co.uk/news/world-asia-china-36069615; *Philippines warning over China's South China Sea reclamation*, 20 April 2015, BBC News, https://www.bbc.co.uk/news/world-asia-32377198.

The Tribunal found no violation in respect of the first two complaints. In relation to the third incident, the Tribunal declared that China had breached its obligations under Article 77 of UNCLOS:

> China has, through the operation of its marine surveillance vessels in relation to M/V Veritas Voyager on 1 and 2 March 2011, breached its obligations under Article 77 of the Convention with respect to the Philippines' sovereign rights over the non-living resources of its continental shelf in the area of Reed Bank [Liyue Tan].[313]

In finding that China's actions in connection with the survey operations of M/V Veritas Voyager amounted to a breach of Article 77 of UNCLOS, the Tribunal relied on the Philippines Navy's account of events, which it accepted as "accurate".[314] Based on that evidence, the Tribunal considered that "China acted directly to induce M/V Veritas Voyager to cease operations and to depart from an area that constitutes part of the continental shelf of the Philippines".[315]

The Tribunal further stated that "China was unequivocally aware that there existed a difference of views regarding the Parties' respective entitlements in the South China Sea and, in particular, in the area of Reed Bank".[316] It considered that, instead of seeking to resolve the dispute through negotiation or other modes of dispute resolution identified in Part XV of [UNCLOS] and the UN Charter, "China sought to carry out its own understanding of its rights through the actions of its marine surveillance vessels".[317]

The fact that China tried to dissuade M/V Veritas Voyager from undertaking further work in the disputed area does not seem to be disputed. If accurately reported by the Philippines, China confirmed that "[o]n 2 March, Chinese maritime surveillance vessels were in the area" and that "[t]he vessels dissuaded the Forum vessel from further work".[318] China explained that "[t]his was an action that China had to take to safeguard its sovereignty and sovereign rights as a result of the unilateral action from the Philippine side".[319]

---

313 Award, *supra* note 1, at para. 716.

314 *Id.* at para. 707.

315 *Id.* at para. 708.

316 *Id.*

317 *Id.*

318 *Id.* at para. 658 (referring to Memorandum from the Acting Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs (10 March 2011) (Annex 70)).

319 *Id.*

The Tribunal's finding that China violated Article 77 of UNCLOS with respect to the M/V Veritas Voyager incident is limited to that specific event and must be understood in that context.

The Tribunal dismissed the Philippines' remaining two complaints. It accepted that China had asserted claims to rights in waters within 200 NM of the Philippines' baselines "in good faith", and did not dispute that China's understanding of its rights in the South China Sea had been "genuinely held".[320] Accordingly, it dismissed the Philippines' complaints about China's diplomatic objections generally regarding offshore oil and gas activities,[321] and about the Chinese Embassy's with Nido Petroleum.[322]

The implications of the Tribunal's finding of violation by China of Article 77 of UNCLOS are therefore highly limited in both time and scope. They relate to one solitary incident that occurred over two days in March 2011.

More generally and, as explained above (Section IV.A(i)), the Tribunal's conclusion is premised on its finding that the area in dispute "can only constitute the exclusive economic zone of the Philippines"[323] and "constitutes part of the continental shelf of the Philippines".[324] Had the Tribunal not reached this (highly questionable) conclusion, it could not have found that China had breached Article 77 of UNCLOS.

4.2.2 The Tribunal's Finding that the 2012 Moratorium on Fishing in the South China Sea Amounted to a Breach of Article 56 of UNCLOS

The Tribunal also found a breach of Article 56 of UNCLOS, again based on a single Chinese measure:

> China has, by promulgating its 2012 moratorium on fishing in the South China Sea, without exception for areas of the South China Sea falling within the exclusive economic zone of the Philippines and without limiting the moratorium to Chinese flagged vessels, breached its obligations under Article 56 of the Convention with respect to the Philippines' sovereign rights over the living resources of its exclusive economic zone.[325]

320 *Id.* at para. 704.
321 *Id.* at para. 705.
322 *Id.* at para. 706.
323 *Id.* at para. 695.
324 *Id.* at para. 708.
325 *Id.* at para. 716.

The Tribunal found that China's 2012 moratorium on fishing in the South China Sea (the "2012 fishing moratorium") "constituted an assertion by China of jurisdiction in areas in which jurisdiction over fisheries is reserved to the Philippines through the operation of the provisions of [UNCLOS] concerning the [EEZ]".[326] It concluded that "such an assertion of jurisdiction amounts to a breach of Article 56 of [UNCLOS], which accords sovereign rights to the Philippines with respect to the living resources of its [EEZ]".[327]

Two points can be noted in the Tribunal's reasoning. First, the Tribunal failed to adduce any evidence that the 2012 fishing moratorium was enforced against any Philippines vessels in areas allegedly falling within the Philippines' EEZ. The Tribunal asked the Philippines whether it could provide evidence that this had happened.[328] When the Philippines failed to do so, the Tribunal appears simply to have changed the question, holding instead that "the relevant question is whether China's 2012 promulgation of the fishing moratorium itself, irrespective of whether the moratorium was directly enforced, infringes on the rights of the Philippines and constitutes a breach of the Convention".[329]

Second, the Tribunal's finding on the "deterring effect" of the 2012 fishing moratorium was similarly not corroborated by clear evidence. Rather, the Tribunal appears to have based its finding on a series of inferences; namely, that "the moratorium established a realistic prospect that Filipino fishermen, seeking to exploit resources of the Philippines' exclusive economic zone, could be exposed to the punitive measures spelled out in the moratorium" and that "such developments may have a deterring effect on Filipino fishermen and their activities".[330]

Again, the Tribunal dismissed with respect to this submission most of the acts invoked by the Philippines in support of its allegations.[331] The Tribunal's finding of a breach should once more be understood in that narrow context.

---

326 *Id.* at para. 712.

327 *Id.*

328 *Id.* at para. 710.

329 *Id.* at para. 711.

330 *Id.* at para. 712.

331 In particular, the Tribunal did not consider that the Hainan Regulation "infringe[d] on the rights of the Philippines or amount[ed] to a breach of the provisions of the Convention concerning the [EEZ]" (*Id.* at para. 713). It also held that, in the absence of evidence showing that "Chinese Government vessels acted to prevent Filipino fishermen from fishing at either Second Thomas Shoal or Mischief Reef", it was not "prepared to find a violation of the Convention on this basis" (*Id.* at paras. 714–15).

4.3 *The Tribunal's Finding that China Breached Its Obligations under Article 58(3) of UNCLOS (Philippines Submission No. 9; Tribunal Merits Dispositif No. 10)*

The Tribunal declared that China had breached its obligations under Article 58(3) of UNCLOS on the following basis:

> that in May 2013, fishermen from Chinese flagged vessels engaged in fishing within the Philippines' exclusive economic zone at Mischief Reef and Second Thomas Shoal;
>
> that China, through the operation of its marine surveillance vessels, was aware of, tolerated, and failed to exercise due diligence to prevent such fishing by Chinese flagged vessels; and that therefore China has failed to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its exclusive economic zone.[332]

The Tribunal considered that the "obligation to have due regard to the rights of the Philippines is unequivocally breached when vessels under Chinese Government control act to escort and protect Chinese fishing vessels engaged in fishing unlawfully in the Philippines' [EEZ]".[333] As a matter of fact, it determined that "Chinese fishing vessels, accompanied by the ships of [China Marine Surveillance], were engaged in fishing at both Mischief Reef and Second Thomas Shoal in May 2013".[334]

Once more, the Tribunal made its finding on the basis of limited evidence, itself acknowledging that "[t]he record of Chinese fishing at these features is restricted to reports from the Armed Forces of the Philippines and confined to a single period in May 2013".[335] Despite that limited evidence, the Tribunal held that it was prepared to accept the Philippines' account of events as "accurate".[336]

---

332 Award, *supra* note 1, at merits dispositif no. 10.

333 *Id*. at para. 756.

334 *Id*. at paras. 746, 753.

335 *Id*. at para. 745. The Tribunal referred to the Armed Forces of the Philippines. *Near-occupation of Chinese Vessels at Second Thomas Shoal* (*Ayungin*) *in the Early Weeks of May 2012* (May 2013) (Annex 94). The Tribunal also considered that "China's *de facto* control over the waters surrounding both features effectively limit the information available to the Philippines and to this Tribunal" (*Id.*).

336 *Id*. at para. 746. It is also noteworthy that the incidents described in the Armed Forces report, and which constituted the basis for the Tribunal's finding of a breach of Article 58(3) of UNCLOS, happened *after* the "dispute" had crystallised and *after* the Philippines had initiated arbitration against China.

The Tribunal provided two reasons for accepting the Philippines' Armed Forces report's account of events. It first found that China's assertion of jurisdiction over the activities of Chinese fishermen in the South China Sea – evidenced through the issuance of a 'Nansha Certification of Fishing Permit' – supported the Philippines' contention that Chinese vessels had been fishing at Mischief Reef and Second Thomas Shoal.[337] The two documents on which the Tribunal relied do not, however, provide direct evidence that such permit was actually issued at the relevant time (i.e. in May 2013), nor for the relevant areas (i.e. Mischief Reef and Second Thomas Shoal).[338] Furthermore, as explained below in Section VI.B(iii), the fact that China asserts the right to fish does not mean that Chinese vessels have conducted such fishing activities; still less does it show that China failed to have "due regard" to any rights to which the Philippines may be entitled for the purposes of Article 58(3).

The Tribunal then considered that "the pattern of Chinese fishing activity at Mischief Reef and Second Thomas Shoal [was] consistent with that exhibited at other reef formations for which the Tribunal has information".[339] The Tribunal here appears to have determined pertinent facts simply by analogy and inference:

First, the Tribunal referred to the presence of Chinese fishing vessels at Subi Reef in May 2013 and at Scarborough Shoal in April and May 2012.[340] It considered that "the accounts of officially organised fishing fleets from Hainan at Subi Reef and the close coordination exhibited between fishing vessels and government ships at Scarborough Shoal support an inference that China's fishing vessels are not simply escorted and protected, but organised and coordinated by the Government".[341]

Second, it noted that "Subi Reef and Scarborough Shoal [were] not, as a legal matter, comparable to Mischief Reef and Second Thomas Shoal".[342] It considered, however, that "the similarities in Chinese fishing activities at all of these features [were] a significant indication of what has taken place at Mischief Reef and Second Thomas Shoal".[343]

---

337 *Id.* at para. 747.

338 *Note Verbale* from the Department of Foreign Affairs, Republic of the Philippines, to the Embassy of the People's Republic of China in Manila, No. 15-2341 (16 June 2015) (Annex 690).

339 *Id.* at para. 748.

340 *Id.* at paras. 748–49.

341 *Id.* at para. 755.

342 *Id.* at para. 750.

343 *Id.* at para. 751.

The evidence relied upon by the Tribunal in finding that China had breached its obligations under Article 58(3) of UNCLOS was thus very limited and, in many respects, circumstantial. Arguably, as set out in Section VI.B.(iii) below, the Philippines failed to meet its burden of proof with respect to this claim, and it should have been discussed. The implications of the Tribunal's conclusion on this Submission are in any event highly limited due to the fact that it arose out of one solitary incident in May 2013.

4.4 *The Tribunal's Finding that, from May 2012 Onwards, China Unlawfully Prevented Filipino Fishermen from Engaging in Traditional Fishing at Scarborough Shoal* (*Philippines Submission No. 10; Tribunal Merits Dispositif No. 11*)

The Tribunal found that "Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities" and declared that "China has, through the operation of its official vessels at Scarborough Shoal from May 2012 onwards, unlawfully prevented fishermen from the Philippines from engaging in traditional fishing at Scarborough Shoal".[344]

A number of elements of this holding are open to question. Particularly questionable are the Tribunal's conclusions that: (i) traditional fishing rights can exist in territorial sea areas but not EEZ areas; (ii) even then, traditional fishing rights can vest only in the individual in respect of traditional artisanal fishing, as opposed to vesting in the coastal State; and (iii) the evidence before it demonstrated the existence of Filipino traditional artisanal fishing rights around Scarborough Shoal. Each of these points is addressed in turn below.

4.4.1 The Tribunal's Position on the Survival of Traditional Fishing Rights in the Different Maritime Zones after the Adoption of UNCLOS

The Tribunal analysed whether traditional fishing rights had survived the adoption of UNCLOS in the different maritime zones.

With regard to archipelagic waters, the Tribunal observed that traditional fishing rights were expressly protected by Article 51(1) of UNCLOS.[345]

---

344 *Id.* at merits dispositif no. 11; *Id.* at para. 814. *See also*, Award, *supra* note 1, at para. 810: "since May 2012, Chinese Government vessels have acted to prevent entirely fishing by Filipino fishermen at Scarborough Shoal for significant, but not continuous, periods of time. The Philippines has provided evidence of Chinese vessels physically blockading the entrance to Scarborough Shoal, and Filipino fishermen have testified to being driven away by Chinese vessels employing water cannon. During these periods, Chinese fishing vessels have continued to fish at Scarborough Shoal".

345 *Id.* at para. 804(a).

The Tribunal also held that traditional fishing rights could be recognised in the territorial sea. It considered that UNCLOS "continued the existing legal regime largely without change".[346] The Tribunal saw "nothing that would suggest that the adoption of [UNCLOS] was intended to alter acquired rights in the territorial sea and conclude[d] that within that zone … established traditional fishing rights remain protected by international law".[347] The Tribunal sought support for this finding by "not[ing] that the vast majority of traditional fishing takes place in close proximity to the coast".[348] This statement is unsubstantiated and we see no basis for the finding. It is also at odds with the Tribunal's finding (noted above) that traditional fishing rights continue to exist in archipelagic waters because UNCLOS expressly protects them.

In contrast to its findings in respect of archipelagic waters and the territorial sea, the Tribunal considered that traditional fishing rights in the EEZ were "extinguished".[349]

The Tribunal first noted that it disagreed with the *Eritrea v. Yemen* tribunal, which held that "the traditional fishing regime in the Red Sea extended throughout the maritime zones of those States".[350] It considered that "that tribunal was able to reach the conclusions it did only because it was permitted to apply factors other than the Convention itself under the applicable law provisions of the parties' arbitration agreement".[351] As explained above in connection with Chapter V of the Award, the mere fact that the *Eritrea/Yemen* tribunal benefited from a broader "applicable law" provision does not justify a finding that its substantive conclusion as regards the continuing nature of traditional fishing rights within EEZ areas was wrong as a matter of international law.

The Tribunal then relied on Article 62(3) of UNCLOS, which requires coastal states to exercise their sovereign rights in the EEZ in such a way that minimises the economic dislocation of foreign fishermen. It considered that "the inclusion of this provision – which would be entirely unnecessary if traditional fishing rights were preserved in the [EEZ] – confirms that the drafters of the Convention did not intend to preserve such rights".[352] It concluded that, following UNCLOS, traditional fishing rights can continue within the EEZ only at the discretion of the relevant coastal State.

346 *Id.* at para. 804(c).
347 *Id.*
348 *Id.*
349 *Id.* at para. 804(b).
350 *Id.* at para. 803.
351 *Id.*
352 *Id.* at para. 804(b).

This seems mistaken. As explained earlier (see Section II), and contrary to the Tribunal's conclusion, historic rights (including historic fishing rights) may continue as a matter of general public international law, within both EEZ and territorial sea areas, notwithstanding the Convention.[353] It is also non-sensical for the Tribunal to have concluded that the protection of traditional fishing rights at international law is a matter within the discretion of the coastal State following UNCLOS.

Commentators have also highlighted the "serious anomaly" that the Tribunal's interpretation of traditional fishing rights in the different maritime areas would create: namely, that foreign fishermen may have greater rights to fish in the coastal State's territorial sea than they would have in its EEZ.[354]

4.4.2 The Tribunal's Interpretation of Traditional Fishing Rights as Private Rights (As Opposed to State Rights)

The Tribunal held that traditional fishing rights were private rights rather than States' rights. It first noted that the "[t]he legal basis for protecting artisanal fishing stems from the notion of vested rights".[355] It then considered that "artisanal fishing rights attach to the individuals and communities that have traditionally fished in an area" and were "not the historic rights of States, as in the case of historic titles, but private rights".[356] The Tribunal relied on *Eritrea v. Yemen*, where the tribunal "declined to endorse 'the western legal fiction whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State'".[357]

It is questionable as to whether the *Eritrea v. Yemen* tribunal's reasoning should have been so readily applied to the South China Sea. In particular, the *Eritrea v. Yemen* tribunal explained that it had based "this aspect of its Award on Sovereignty on the respect for regional legal traditions".[358] These included, for instance, "[t]he basic Islamic concept by virtue of which all humans are 'stewards of God' on earth, with an inherent right to sustain their nutritional needs through fishing from coast to coast with free access to fish on either side and to trade the surplus".[359] This "regional legal tradition" is of course absent

353 *See* Section 2.b.

354 *See, e.g.*, Chris Whomersley, *The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique*, 16 CHINESE JOURNAL OF INTERNATIONAL LAW 387, 413 (2017).

355 Award, *supra* note 1, at para. 798.

356 *Id.*

357 *Id.*

358 *Sovereignty and Maritime Delimitation in the Red Sea, supra* note 16, at para. 92.

359 *Id.*

from the South China Sea context with respect to the bilateral relationship between China and the Philippines.

The Tribunal's observation that the *Eritrea/Yemen* tribunal considered artisanal fishing rights is vesting only in private individuals, rather than States, is also questionable. In *Eritrea/Yemen*, the tribunal observed that the "traditional fishing regime" in the Red Sea applied to the mutual relations between the two States concerned, beyond the fishermen as "immediate beneficiaries".[360] Moreover, it is clear that traditional fishing rights themselves can vest in the coastal State as a matter of international law. Thus, in *Fisheries Jurisdiction* (*United Kingdom v. Iceland*), the ICJ stated that "in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland, as a State specially dependent on coastal fisheries, be reconciled with the traditional fishing rights of the [United Kingdom]".[361] Moreover, in some situations (such as the *Jan Mayen* case), the extent and importance of fishing activity will be sufficient to shift a maritime boundary in the coastal State's favour.

Furthermore, as highlighted by the Chinese Society of International Law, the only provision in UNCLOS which mentions traditional fishing rights, Article 51(1), treats those rights as rights of the States:

> an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States …

Since the Tribunal's analysis was restricted to artisanal fishing rights enjoyed by individual Filipino (and Chinese) fishermen, its findings with respect to China's interference with Filipino fishing at Scarborough Shoal did not extend to any traditional fishing rights that maybe enjoyed by the State. For the reasons explained at Section II above, the Tribunal's conclusion that States' historical rights under customary international law were "superseded", and thus effectively wiped out, by UNCLOS is probably wrong.

Incidentally, Professor Talmon notes that "[i]n Submission No. 10 the Philippines […] did not claim a violation of its own rights under the Convention and general international law but a violation of the rights of its citizens – the Filipino fishermen".[362] He concludes that the Philippines "brought a claim on

360 *Id*. at para. 93.
361 *Fisheries*, *supra* note 38, at para. 69.
362 Talmon, *supra* note 33, at para. 187.

behalf of its citizen fishermen by way of diplomatic protection" and that this claim would accordingly be submitted to the rule of exhaustion of local remedies contained in UNCLOS at Article 295 – which the Tribunal did not raise in its Award on Jurisdiction.[363] If traditional fishing rights are to be treated exclusively as private rights – as the Tribunal appears to have assumed – then we concur with Professor Talmon that the rule on the exhaustion of local remedies would apply, and should have been considered by the Tribunal.

4.4.3 The Tribunal's Recognition of Traditional Artisanal Fishing Rights at Scarborough Shoal

The Tribunal adopted a restrictive approach in determining that traditional fishing rights existed around Scarborough Shoal. In particular, its legal and factual analysis of the traditional fishing rights of Filipino fishermen focused exclusively on the artisanal aspect of those rights, as opposed to the extent to which such rights vested more broadly in the coastal State.

The Tribunal considered that:

> [t]he legal basis for protecting artisanal fishing stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears. Thus, traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of community, in other words to "those entitlements that all fishermen have exercised continuously through ages".[364]

It further held that:

> traditional fishing rights are customary rights, acquired through long usage, [...] that the methods of fishing protected under international law would be those that broadly follow the manner of fishing carried out for generations: in other words, artisanal fishing in keeping with the traditions and customs of the region.[365]

363 *Id*. at paras. 187–92.
364 Award, *supra* note 1, at para. 798.
365 *Id*. at para. 806.

The importance of the temporal aspect of traditional artisanal fishing rights was highlighted in *Eritrea v. Yemen*, where the tribunal explained that "[t]he traditional fishing regime covers those entitlements that all the fishermen have exercised continuously through the ages".[366] That tribunal recognised traditional artisanal fishing rights in a situation where there was "abundant literature on the historical realities which characterized the lives of the populations" and a "well-established factual situation reflected in deeply rooted common legal traditions which prevailed during several centuries".[367] In the tribunal's opinion, "What was relevant was that fishermen from both of these nations had, from time immemorial, used these islands for fishing and activities related thereto."[368]

In the vicinity of Scarborough Shoal, the Tribunal determined that "there was evidence that the surrounding waters have continued to serve as traditional fishing grounds for fishermen, including those from the Philippines, Viet Nam, and China (including Taiwan)".[369] It also accepted that "the claims of both the Philippines and China to have traditionally fished at the shoal are accurate and advanced in good faith".[370]

In reaching this conclusion, the Tribunal noted that:

> the stories of most of those who have fished at Scarborough Shoal in generations past have not been the subject of written records;[371]
>
> traditional fishing rights constitute an area where matters of evidence should be approached with sensitivity;[372]
>
> it "does not have before it extensive details of the fishing methods traditionally used by either Filipino or Chinese fishermen, or of the communities that have traditionally dispatched vessels to Scarborough Shoal";[373] and
>
> it was "not prepared to specify any precise threshold for the fishing methods that would qualify as artisanal fishing".[374]

366 *Sovereignty and Maritime Delimitation in the Red Sea, supra* note 16, at para. 104.
367 *Id.* at para. 92.
368 *Id.* at para. 95.
369 Award, *supra* note 1, at para. 761; *see also id.* at para. 805.
370 *Id.* at para. 805.
371 *Id.*
372 *Id.*
373 *Id.* at para. 806.
374 *Id.*

Despite these reservations as to the factual and evidentiary basis for establishing traditional artisanal fishing rights, the Tribunal concluded that it "was of the view that at least some of the fishing carried out at Scarborough Shoal has been of a traditional, artisanal nature".[375]

The Tribunal's finding of traditional artisanal fishing around Scarborough Shoal was thus reached without having conducted a full examination as to whether a tradition (i.e. the temporal aspect) had been established and, once more, on the basis of sparse evidence. In this respect also, the Award is distinguishable from the Eritrea/Yemen case, where the existence of continuous fishing "through the ages" was clear.

By contrast, in concluding that Filipino traditional artisanal fishing rights existed around Scarborough Shoal, the Tribunal referred only to an extract from a 1953 book published by the Philippines Bureau of Fisheries and an article from the Philippines Farmers Journal of 1960 allegedly depicting "Scarborough Shoal as having historically served as one of the 'principle fishing areas' for Filipino fishermen".[376] Neither of these documents categorically establishes the existence of traditional Filipino fishing around Scarborough Shoal "through the ages".[377]

The Tribunal also referred to a Memorandum from the Philippines Navy of April 2012 that described Scarborough Shoal as "a traditional fishing ground of fishermen from neighbouring Asian countries" and stated that "[b]oth foreign and local fishermen are among those who venture to this atoll".[378] This statement, produced by the Philippines less than a year before it commenced the arbitration, equally cannot confirm or establish Filipino traditional artisanal fishing at Scarborough Shoal.[379]

The Tribunal finally referred to the affidavits of six Filipino fishermen which, according to the Tribunal, "provid[ed] direct documentation of Philippines fishing activities in the area at least since 1982 and indirect evidence from

375 *Id*. at para. 807.

376 *Id*. at para. 762; P. Manacop, *The Principal Marine Fisheries*, *in* Philippine Fisheries: Handbook Prepared by the Technical Staff of the Bureau of Fisheries 103, 121 (D.V. Villadolid ed., 1953) (Annex 8); A.M. Mane, *Status, Problems and Prospects of the Philippine Fisheries Industry*, 2(4) Philippine Farmers Journal 32, 34 (1960) (Annex 244).

377 Award, *supra* note 1, at para. 798 (referring to *Eritrea v. Yemen*, Award, 17 December 1999 at para. 104).

378 *Id*. at para. 761 (referring to Memorandum from Colonel, Philippine Navy, to Chief of Staff, Armed Forces of the Philippines, No. N2E-0412-008 (April 2012) (Annex 77)).

379 *Critical Study*, *supra* note 84, at para. 762.

1972".[380] These affidavits were key to the Tribunal's finding of "traditional, artisanal nature" fishing at Scarborough Shoal. It was these affidavits which formed the foundation for the Tribunal's conclusion that "at least some of the fishing carried out at Scarborough Shoal has been of a traditional, artisanal nature".[381]

The Award's finding with respect to the existence of traditional artisanal fishing by Filipino fishermen at Scarborough Shoal is therefore based on a limited evidentiary record. It is also unduly restrictive in focusing on traditional artisanal fishing rights (enjoyed by the individual) and excluding the possibility of traditional fishing rights enjoyed by the State.

We note that the Tribunal found that Chinese fishermen equally enjoy traditional artisanal fishing rights around Scarborough Shoal.[382] As explained above, however, the Tribunal was probably mistaken to exclude the possibility of Chinese artisanal fishing rights extending beyond the 12-mile limit around Scarborough Shoal.

4.5 *The Tribunal's Finding that, with Respect to the Protection and Preservation of the Marine Environment in the South China Sea, China Breached Its Obligations under Articles 123, 192, 194(1), 194(5), 197, and 206 of UNCLOS (Philippines Submissions Nos. 11 and 12(b); Tribunal Merits Dispositif Nos. 12 and 13)*

The Tribunal found that, with respect to the harvesting of endangered species, China had breached its obligations under Articles 192 and 194(5) of UNCLOS.[383] It further found that, with respect to construction activities on seven reefs in the Spratly Islands, China had breached its obligations under Articles 123, 192, 194(1), 194(5), 197 and 206 of UNCLOS.[384]

380 Award, *supra* note 1, at paras. 763, 807.

381 *Id*. at para. 807. The Tribunal also relied on a report from FRPLEU/QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to the Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012) (Annex 80). Nevertheless, this article mainly relates to the activities of Chinese fishermen.

382 *Id*. at paras. 805–07.

383 *Id*. at merits dispositif no. 12.

384 *Id*. at merits dispositif no. 13.

4.5.1 The Tribunal's Finding with Respect to the Harvesting of Endangered Species

The Tribunal declared that "China has breached its obligations under Articles 192 and 194(5) of [UNCLOS]" based on the following findings:

> that fishermen from Chinese flagged vessels have engaged in the harvesting of endangered species on a significant scale;
>
> that fishermen from Chinese flagged vessels have engaged in the harvesting of giant clams in a manner that is severally destructive of the coral reef ecosystem; and
>
> that China was aware of, tolerated, protected, and failed to prevent the aforementioned harmful activities....[385]

The Tribunal found no breaches by China with respect to the alleged use by Chinese fishermen of explosives and cyanide at Scarborough and Second Thomas Shoal. It considered that there was "scant evidence in the case record [of such practices] over the last decade or Philippine complaints about its use", which suggested that China "may have taken measures to prevent such practices in the Spratly Islands".[386]

4.5.1.1 *The Tribunal's Finding that China Breached Its Obligations under Articles 192 and 194(5) of UNCLOS to Take Necessary Measures to Protect and Preserve the Marine Environment with Respect to the Harvesting of Endangered Species from the Fragile Ecosystems at Scarborough Shoal and Second Thomas Shoal*

The Tribunal found that "fishermen from Chinese flagged vessels have engaged in the harvesting of endangered species on a significant scale".[387] It listed various instances in or at Scarborough Shoal between 1998 and 2012,[388] and one instance at Second Thomas Shoal in May 2013.[389] The Tribunal also noted that "recent evidence indicates the large-scale harvest of endangered hawksbill sea turtles by Chinese fishermen, whose arrest by Philippine authorities led to

385 *Id*. at merits' dispositif no. 12; *see also id.* at para. 992.
386 *Id*. at para. 975.
387 *Id*. at merits' dispositif no. 12(a); *see also id.* at para. 950.
388 *Id*. at para. 950.
389 *Id*. at para. 951.

protest by China".[390] In the absence of contradictory evidence, we see no basis on which to challenge these factual findings.

The Tribunal also held that it had "no hesitation" in finding that China breached its obligations under Articles 192 and 194(5) of UNCLOS to take the necessary measures to protect and preserve the maritime environment.[391] It reached this conclusion in two steps.

First, the Tribunal considered that China was aware of the poaching practice by Chinese vessels,[392] and that there was "no evidence in the record that would indicate that China has taken any steps to enforce [...] rules and measures [including CITES, to which China is a party, and China's 1989 Law of the Protection of Wildlife] against fishermen engaged in poaching of endangered species".[393]

While not on the record (due to China's non-participation), publicly available evidence did exist to show that China had taken certain measures to prevent the illegal harvesting of endangered species in the South China Sea. The Critical Study of the Chinese Society of International Law refers to some examples, including: (i) the adoption of joint law enforcement actions by various governmental entities in June 2003 and June 2012;[394] (ii) the adoption by the Qionghai City and Tanmen Town in Hainan province in March 2015 of an "Implementation Program for Carrying out the Special Inspection for Combating Illegal Acts such as Dredging, Transporting and Selling of Giant

390 *Id*. at para. 952.

391 *Id*. at para. 964.

392 *Id*. at paras. 962–63.

393 *Id*. at para. 964. *See also id.* at para. 915: "the Tribunal has seen no evidence that Chinese fishermen involved in poaching of endangered species have been prosecuted under Chinese law".

394 *Critical Study*, *supra* note 84, at para. 797. As noted by the Chinese Society of International Law, "on 25 June 2003, Ministry of Agriculture, State Administration for Industry and Commerce, General Administration of Customs and Ministry of Public Security jointly started a special law enforcement program to penalize illegal hunting, killing, purchasing, selling, transporting, importing and exporting aquatic wild animals"; and "[o]n 28 June 2012, Ministry of Agriculture, Ministry of Public Security and General Administration of Customs organized another special law enforcement program to combat illegal harvesting, trading and utilizing, and smuggling of aquatic wild animals", referring to xinhuanet.com articles, *China's Ministry of Agriculture: a Special Action will be launched to save aquatic wild animals*, http://news.xinhuanet.com/newscenter/2003-06/25/content_937686.htm; *Wildlife conservation office of China's Ministry of Agriculture: joint law enforcement will be conducted by China's several Ministries for aquatic wild animal protection*, http://news.xinhuanet.com/politics/2012-06/28/c_.

Clams";[395] and (iii) at least two cases in which Chinese fishermen were arrested, prosecuted and imprisoned.[396]

The evidence of enforcement measures and prosecutions in the specific areas at issue is however relatively sparse, particularly when contrasted against the evidence of widespread illegal and damaging activities in those areas upon which the Tribunal relied.[397] We therefore consider that this would do little to disprove the Tribunal's conclusion.

Second, the Tribunal considered that, at least for the April 2012 incidents, the evidence in fact "points directly to the contrary", i.e., in its opinion, China protected and tolerated the harvesting of giant clams.[398] The Tribunal relied on various pieces of contemporaneous evidence, including photographic evidence, in reaching its conclusion that "China must have known and deliberately tolerated, and protected the harmful acts".[399]

In the absence of contradictory evidence, we see no basis on which to challenge the Tribunal's conclusions in these respects.

---

395 *Id.* at para. 799. As noted by the Chinese Society of International Law, Qionghai City of Hainan province and the local government of Tanmen Town have respectively issued and formulated such programs (*see Implementation Program for Carrying out the Special Law Enforcement Inspection for Combating Illegal Dredging, Transporting and Selling of Giant Clams in Qionghai City*, http://xxgk.hainan.gov.cn/qhxxgk/bgt/201503/t20150326_1539023.htm and *Implementation Program for Carrying out the Special Inspection for Combating Illegal Acts such as Dredging, Transporting and Selling of Giant Clams*, http://xxgk.hainan.gov.cn/qhxxgk/tmz/201509/t20150925_1672393.htm). Through these programs the Qionhai city and the Tanmen town are willing to "implement the Law of the [PRC] on the Protection of Wild Animals and other relevant laws and regulations, and further strengthen the protection of aquatic animal resources, and maintain a balanced development of the marine ecological environment". The programs target, *inter alia*, fishing vessels which illegally collected shells from the Spratly Islands and Scarborough Shoal.

396 *Id.* at para. 800. The Chinese Society of International Law reports two cases where the harvesting of endangered species happened in the South China Sea. In the first case, "Li, Fu and Yang were arrested [on 3 December 2007] for illegal purchasing, transporting, selling sea turtles, and subsequently prosecuted and punished by a People's Court in the suburban areas of Sanya City, Hainan Province", citing *Three persons were sentenced to imprisonment from 9 months to 2 years respectively for purchasing, transporting, and selling 54 sea turtles*, http://www.hi.chinanews.com/hnnew/2008-08-07/121212.html. The press article reports that the fishermen illegally caught sea turtles in the Nansha sea. In the second case, "Yao was arrested [in May 2004] for illegal selling of red corals products, and subsequently sentenced to imprisonment by a People's Court in Guangzhou City, Guangdong Province".

397 Award, *supra* note 1, at paras. 950–53.

398 *Id.* at para. 964.

399 *Id.*

More generally, we consider that given the nature of the "due diligence" obligations enshrined in Articles 192 and 194(5) of UNCLOS, the Tribunal's conclusion of a violation of these Articles was correct, regardless of whether or not China "tolerated" or "protected" the harmful activities. These articles respectively provide that "States have the obligation to protect and preserve the marine environment" and that the measures taken "shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life". The Tribunal's findings about the China's alleged "tolerance" and "protection" were incidental, given its finding that China had failed to take such necessary measures to protect and preserve the maritime environment.

4.5.1.2 *The Tribunal's Finding that China Breached Its Obligation to Protect and Preserve the Marine Environment in Respect of Its Toleration and Protection of the Harvesting of Giant Clams by the Propeller Chopping Method*

The Tribunal established that "fishermen from Chinese flagged vessels have engaged in the harvesting of giant clams in a manner that is severally destructive of the coral reef ecosystem".[400] It held that the Tribunal was "satisfied based on its review of satellite imagery, photographic and video evidence, contemporaneous press reports, scientific studies and the materials from Professor Mc Manus, that in recent years, Chinese fishing vessels have been engaged in widespread harvesting of giant clams through the use of boat propellers to break through the coral substrate in search of buried clam shells".[401]

The Tribunal then considered that "the small propellers vessels involved in harvesting the giant clams were within China's jurisdiction and control".[402] It found that "China, despite its rules on the protection of giant clams, and on the preservation of the coral reef environment generally, was fully aware of the practice and has actively tolerated it as a means to exploit the living resources of the reefs in the months prior to those reefs succumbing to the near permanent destruction brought about by the island-building activities".[403]

The Tribunal overtly based its conclusion on: (i) the Ferse Report; (ii) the McManus Report; and (iii) an article from the website *The Diplomat*. Yet neither the Ferse Report nor the McManus Report refer to China's awareness or "active tolerance" of this practice. The Tribunal's fundamental finding is thus primarily

400 *Id.* at merits dispositif no. 12(b).
401 *Id.* at para. 953, 957–58.
402 *Id.* at para. 965.
403 *Id.*

based on an article from the website *The Diplomat*.[404] Notwithstanding the limited evidence, we see no basis on which to challenge the Tribunal's finding in the absence of any evidence to the contrary.

4.5.2 The Tribunal's Finding with Respect to Construction Activities on Seven Reefs in the Spratly Islands

The Tribunal declared that "China has breached its obligations under Articles 123, 192, 194(1), 194(5), 197, and 206 of the Convention" based on the following findings:

> … China's land reclamation and construction of artificial islands, installations, and structures at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef has caused severe, irreparable harm to the coral reef ecosystem;
>
> […] China has not cooperated or coordinated with the other States bordering the South China Sea concerning the protection and preservation of the marine environment concerning such activities; and
>
> […] China has failed to communicate an assessment of the potential effects of such activities on the marine environment, within the meaning of Article 206 of the Convention.[405]

4.5.2.1 *The Tribunal's Position on China's Obligation to Cooperate or Coordinate with Other States Bordering the South China Sea*

The Tribunal held that, "[w]ith respect to China's island-building program", it had before it "no convincing evidence of China attempting to cooperate or coordinate with the other States bordering the South China Sea".[406] It consequently found a breach of Articles 197 and 123 of UNCLOS.[407]

ITLOS has declared the duty to cooperate a fundamental principle of international law.[408] Nevertheless, the precise scope of that duty is dependent on

---

404 V.R. Lee, *Satellite Imagery Shows Ecocide in the South China Sea*, THE DIPLOMAT (15 January 2016), https://thediplomat.com/2016/01/satellite-images-show-ecocide-in-the-south-china-sea/. According to this article, there "is abundant evidence that China's navy and coast guard have been aware of the Tanmen fishermen's practice of chopping reefs, and tolerated or condoned it".

405 Award, *supra* note 1, at merits dispositif no. 13.

406 *Id.* at para. 986.

407 *Id.* at merits dispositif no. 13.

408 *Mox Plant Case* (Ireland v. U.K.), Case No. 10, Order of Dec. 3, 2001, ITLOS Rep. 82: "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law"; *Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Case

the specific nature of each relevant regime.[409] We understand in this context that the Chinese language version of Article 197 enumerates a duty that is potentially more restrictive than that contained in the English language version.[410] Had the Tribunal reviewed (and taken account of) that different understanding of the duty contained in Article 197, then it may have reached a different conclusion as to the scope of the obligation and, consequently, China's breach. It goes without saying that the various official language versions of UNCLOS (in Arabic, Chinese, English, French, Russian and Spanish) are all equally authentic (Article 320), and there is thus no reason to prefer the English over the Chinese.[411]

The Tribunal's finding in any case overlooks the fact that China appears to have undertaken various initiatives at the multilateral level to enhance cooperation on marine environmental protection.[412] For example, China and

---

No. 12, Order of Oct. 8, 2003, ITLOS Rep. 92; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (*SRFC*), Case No. 21, Advisory Opinion of Apr. 2, 2013, ITLOS Rep. 140.

409 *See* Robert Steenkamp, *UNCLOS, CITES and the IWC – A Tailored International Duty to Cooperate?* EJIL: TALK (6 November 2018), https://www.ejiltalk.org/unclos-cites-and-the-iwc-a-tailored-international-duty-to-cooperate/.

410 Article 197 of UNCLOS, in English, provides that: "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".

The English translation of the Chinese version of this Article reads as follows: "When formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention in order to protect and preserve the marine environment, states shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, and take into account characteristic regional features".

These two provisions clearly differ: while the English language version enumerates a general duty to cooperate, the Chinese language version appears only to attach such duty to circumstances where States choose to "formulat[e] and elaborate[e] international rules, standards and recommended practices and procedures consistent with this Convention".

411 We note, however, that the French and Spanish language versions are more similar in meaning to the English than the Chinese, lending weight to a preference for adopting the former's scope of obligation. We have not reviewed the Arabic and Russian language versions.

412 *Critical Study*, *supra* note 84, at para. 814. The Chinese Society of International Law refers, *inter alia*, to China's establishment in 2011 of the "China-ASEAN Maritime Fund" and to the adoption of the "Cooperation Framework Plan on the South China Sea and

the Philippines both participated in the 'Action Plan for the Protection and Development of the Marine Environment and Coastal Areas of the East Asian Seas Region' (including the South China Sea).[413] This Action Plan covers, *inter alia*, the protection of the marine and coastal environment and is steered by a Coordinating Body on the Seas of East of Asia (COBSEA).

The question remains as to whether such evidence, if before the Tribunal, would have been sufficient to alter its conclusion. In isolation, this seems unlikely. The Tribunal seemed to be looking for specific evidence of cooperation "with respect to China island-buildings program".[414] In the *MOX Plant* case, the duty to cooperate was interpreted by ITLOS to include an obligation to exchange information on the risks or effects of an activity that could potentially harm the other state.[415] Furthermore, as pointed out by the Tribunal, in the ICJ's *Pulp Mills on the River Uruguay* case, the Court noted that "by cooperating [...] the States concerned can manage the risks of damage to the environment that might be created by the plan initiated by one or [the] other of them, so as to prevent the damage in question".[416] Therefore, evidence of a more compelling nature would show that China also cooperated and coordinated with other States bordering the South China Sea with respect to its reclamation and construction activities on the seven features themselves.[417]

---

its Surrounding Waters (2011–2015)" published by the SOA, which focused, *inter alia*, on marine environmental protection and marine ecosystem and biological diversity. China had engaged in bilateral co-operation on marine environmental protection with littoral countries such as Thailand, Cambodia and Indonesia.

413 *See* COBSEA, https://www.cobsea.org/aboutcobsea/background.html.

414 Award, *supra* note 1, at para. 986.

415 *Mox Plant Case, supra* note 408, at para. 84. *See also dispositive*, *supra* note 288 at 110–11: the tribunal prescribed, *inter alia*, that "Ireland and United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant [...]". On the duty of prior information and the duty to cooperate, *see also Land Reclamation Case*, *supra* note 408, at paras. 92, 99.

416 Award, *supra* note 1, at para. 987 (referring to *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 77 (Apr. 20)).

417 We also note that the Tribunal stated that "Throughout the course of China's island-building project, in multiple exchanges of diplomatic notes, the Philippines has strongly protested China's activities and China has rejected 'the groundless protest and accusation' by the Philippines. China has also pointed out that 'the Philippine side has constructed and kept expanding facilities including airports, harbors, stilt houses and schools on some of the illegally occupied islands and reefs'". Award, *supra* note 1, at para. 859.

4.5.2.2 *The Tribunal's Position on China's Obligation to Assess and Communicate the Environmental Impacts of the Constructions*

Relying on Article 206 UNCLOS, the Tribunal considered that "given the scale and impact of the island-building activities [...], China could not reasonably have held any belief other than that the construction 'may cause significant and harmful changes to the marine environment'".[418] It considered that "China was required, 'as far as practicable', to prepare an environmental impact assessment" and that "[i]t was also under an obligation to communicate the results of the assessment".[419]

The Tribunal held that, while it could not make a definitive finding that China had not prepared an environmental impact assessment, "[t]o fulfil the obligations of Article 206, a State must not only prepare an EIA but also communicate it".[420]

The Tribunal held that China had "delivered no assessment in writing to [competent international organisations] or any other international body as far as the Tribunal is aware".[421] It concluded that "China ha[d] not fulfilled its duties under Article 206 of the Convention".[422] In the absence of contradictory evidence, we see no basis on which to challenge this conclusion.[423]

4.6 *The Tribunal's Finding that, through Its Construction of Artificial Islands, Installations and Structures at Mischief Reef, China Breached Articles 60 and 80 of UNCLOS (Philippines Submission No. 12(A) and (C); Tribunal Merits Dispositif No. 14)*

With regard to this submission, the Tribunal first found that "China has engaged in the construction of artificial islands, installations, and structures at

418 Award, *supra* note 1, at para. 988.

419 *Id.*

420 *Id.* at para. 991.

421 *Id.*

422 *Id.*

423 We note that during the Hearing on Merits, the Tribunal asked the Philippines if it was "aware of any experts from China or elsewhere that have published or articulated views about the environmental impact of China's activities or toleration of activities by others within its control that are contrary or different to those of the Philippines". *Id.* at para. 921. As explained in the Award, the Philippines explained that "its searches had turned up only 'a brief statement from the State Oceanic Administration'". *Id.* at para. 921. The Tribunal also invited the Chinese Government "to indicate whether it has conducted an environmental impact study as per Article 206 of the Convention and, if so, to provide the Tribunal with a copy" and that "China did not respond to the Tribunal's request". *Id.* at para. 924.

Mischief Reef without the authorisation of the Philippines".[424] It then recalled "(i) its finding that Mischief Reef is a low-tide elevation, (ii) its declaration that low-tide elevations are not capable of appropriation, and (iii) its declaration that Mischief Reef is within the exclusive economic zone and continental shelf of the Philippines".[425] The Tribunal finally declared that "China has breached Articles 60 and 80 of the Convention with respect to the Philippines' sovereign rights in its [EEZ] and continental shelf".[426]

Subject to the jurisdictional concerns raised in Section IV.A(i) above, we have no further comments on the Tribunal's findings with respect to the Philippines' Submission no. 12.

4.7 *The Tribunal's Finding that China's Operation of Its Law Enforcement Vessels Violated COLREGS and, as a Consequence, Breached Article 94 of UNCLOS (Philippines Submission No. 13; Tribunal Merits Dispositif No. 15)*

The Tribunal found that China's operation of its law enforcement vessels in the vicinity of Scarborough Shoal on 28 April 2012 and 26 May 2012: "created serious risk of collision and danger to Philippine ships and personnel; and … violated Rules 2, 6, 7, 8, 15, and 16 [COLREGS]".[427]

The Tribunal accordingly declared that "China has breached its obligations under Article 94 of the Convention".[428]

4.7.1 The Tribunal's Application of COLREGS and Article 94 UNCLOS

The Tribunal upheld the Philippines' position that the COLREGS is "one of the 'general accepted international regulations' to which flag States are required to conform".[429] It held that "Article 94 incorporates the COLREGS into the Convention, and they are consequently binding on China".[430] The Tribunal concluded that "a violation of the COLREGS, as 'generally accepted international regulations' concerning measures necessary to ensure maritime safety, constitutes a violation of [UNCLOS] itself".[431] Although the Tribunal did not explain how it came to final conclusion, we consider that it was probably correct on the law. Article 94(5) of UNCLOS provides that "[i]n taking the

424 Award, *supra* note 1, at merits dispositif no. 14.
425 *Id.*
426 *Id.*
427 *Id.* at merits dispositif no. 15.
428 *Id.*
429 *Id.* at para. 1063.
430 *Id.* at para. 1083.
431 *Id.*

measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance". This Article "effectively incorporates by reference obligations found in other treaties or non-binding instruments, and gives them the force of a treaty obligation under UNCLOS (so-called 'rules of references')".[432] Furthermore, "[c]ommentators generally agree that … the [COLREGS] qualify" as such "generally accepted international regulations".[433]

Some commentators have nevertheless raised the question of the applicability of the COLREGS in the circumstances of the South China Sea arbitration. For example, the Tribunal observed that the dispute related "principally to events that occurred in the *territorial sea*" of Scarborough Shoal.[434] However, as noted by Whomersley and the Chinese Society of International Law, Article 94 is contained in Part VII of UNCLOS which is entitled "High Seas".[435] Whomersley considers that "the presumption must [therefore] be that [Article 94] only applies on the high seas".[436] We consider this to be a sound argument. After all, Article 86 (which introduces Part VII of UNCLOS) provides in pertinent part that:

> The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.

This criticism of the Award is also supported by commentators to UNCLOS, who note that "Article 94 sets out the duties of the flag State with regard to ships flying its flag … [i]n that context, it provides for flag State investigation

---

432 Alexander Proelss (eds.), *Commentary under Article 94,* UNITED CONVENTION ON THE LAW OF THE SEA, A COMMENTARY (2017), at para. 11.

433 *Id.* (referring to J. HARRISON, MAKING THE LAW OF THE SEA: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW 161–62 (2011)); Robin R. Churchill & Alan V. Lowe, THE LAW OF THE SEA 265–72 (3rd ed. 1999); Donald R. Rothwell & Tim Stephens, THE INTERNATIONAL LAW OF THE SEA 359–62 (2d ed. 2016). *See also* International Maritime Organization, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, Doc. LEG/MISC.8, 30 January 2014, in which the IMO lists the COLREGS as regulations that "on account of their worldwide acceptance, [may] be deemed to fulfil the general acceptance requirement".

434 Award, *supra* note 1, at para. 1045.

435 Whomersley, *supra* note 354, at para. 65; *see also Critical Study*, *supra* note 84, at para. 836.

436 *Id.*

where proper jurisdiction and control have not been exercised, and for inquiry into every marine casualty or incident of navigation on the high seas".[437] It is also supported by the fact that Article 21(4) of UNCLOS separately addresses the question of the application of the COLREGS to foreign ships exercising the right of innocent passage through the territorial sea.[438] In parallel, Article 25(1) of UNCLOS safeguards the coastal State's right to "take the necessary steps in its territorial sea to prevent passage which is not innocent".

Whomersley also raises the question as to whether the COLREGS should have applied in circumstances where "the vessels involved were Chinese law enforcement vessels engaged in official activities in what China considers, and the Tribunal assumed, to be within Chinese jurisdiction".[439] He argues that, in such circumstances, "the normal rules of navigation cannot apply".[440] This is another credible line of argument. Whomersley considers that "one would naturally look to other rules of international law to regulate the activities of vessels engaged in law enforcement activities" and that ITLOS' *MV Saiga* (*No. 2*) case "ought to have been the yardstick against which the Tribunal should have measured the acceptability of the actions of the Chinese vessels".[441]

In *MV Saiga* (*No. 2*), ITLOS stated that "[a]lthough [UNCLOS] does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."[442]

ITLOS recalled that "[t]hese principles have been followed over the years in law enforcement operations at sea".[443] It further explained that:

> The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate

437 Myron H. Nordquist et al. (eds.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY Article 94, para. 94.1.

438 Article 21(4) UNCLOS provides that "[f]oreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea".

439 Whomersley, *supra* note 354, at para. 62.

440 *Id.*

441 *Id.*

442 *The M/V "Saiga", supra* note 63, at para. 155.

443 *Id.* at para. 156.

> actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. "I'm Alone" cas*e (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609; *The Red Crusader case* (Commission of Enquiry, Denmark – United Kingdom, 1962), I.L.R., Vol. 35, p. 485).[444]

ITLOS concluded that:

> [t]he basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea [...]: (1) The inspecting State shall ensure that its duly authorized inspectors: ... (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.[445]

Whomersley finally raises the question as to whether "China was under an obligation under UNCLOS to apply the COLREGS to Chinese flag vessels in the territorial sea of a feature which is assumed to be under its sovereignty".[446] Based on the above analysis of Article 94 and on the fact that Article 21(4) UNCLOS only applies to "foreign ships exercising the right of innocent passage", he considers that "there is nothing in UNCLOS to place an obligation on a State to apply the COLREGS to its own flag vessels in its own territorial sea".[447] Again, this seems to us a sound argument. Moreover, the Tribunal would have had no jurisdiction to consider whether or not Chinese activities violated Article 21(4) or 25(1) of UNCLOS, as to do so would have required an assessment of sovereignty over Scarborough Shoal.

4.7.2 The Tribunal's Finding of a Breach of COLREGS

The Tribunal's factual understanding and account of events were based on two documents submitted by the Philippines: (i) a report from the Philippines Coast Guard (SARV Coastguard Report of 28 April 2012); and (ii) a report from the Bureau of Fisheries and Aquatic Resources of the Republic of Philippines

444 *Id.*
445 *Id.*
446 Whomersley, *supra* note 354, at para. 63.
447 *Id.* at para. 66; *see also Critical Study*, *supra* note 84, at para. 844.

(Arunco Report of 28 May 2012).[448] The Tribunal noted that "China has not made specific statements with respect to the incidents of 28 April and 26 May 2012" and that it did "not have explicit Chinese statements concerning the incidents alleged by the Philippines" in this submission.[449]

Similarly, the Philippines' expert report (the Allen Report) and the Tribunal-appointed expert report (the Singhota Report) both relied on the facts described in those two documents, leading the Tribunal to conclude that China had "repeatedly violated the Rules of the COLREGS over the course of the interactions described by the crew of the Philippines vessels and as credibly assessed in the two expert reports".[450]

In the absence of Chinese statements on these incidents, or evidence to the contrary, we consider that the experts and the Tribunal had no choice but to rely on these documents. Once more, however, the Tribunal's finding of a breach of Article 94 of UNCLOS was legally questionable, based on sparse evidence and related to singular isolated incidents.

5 Procedural and Evidentiary Issues Arising from the Tribunal's Handling of the Merits Phase of the Arbitration

5.1 *Introduction*

Like any international court or tribunal, the *South China Sea* Tribunal had to operate within the bounds of the Parties' consent and in accordance with applicable rules of procedure. One such fundamental rule of procedure is that each Party shall have the burden of proving the facts relied on to support its claim or defence. That fundamental obligation does not change simply because the respondent Party, China, did not appear in the proceedings. The unusual circumstance in which the Tribunal found itself meant that the Tribunal not only had to ensure that the Philippines carried its burden of proof, but that, additional, the Tribunal was satisfied that it has jurisdiction over the dispute and that the claim is well founded in fact and law.

448 Award, *supra* note 1, at paras. 1047–57 (referring to Report from the Commanding Officer, SARV-003, Philippine Coast Guard, to Commander, Coast Guard District Northwestern Luzon, Philippine Coast Guard (28 April 2012) (Annex 78), and Report from A.A. Arunco, et al., FRPLEU-QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to the Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (28 May 2012) (Annex 82)).

449 *Id.* at para. 1080.

450 *Id.* at para. 1105.

The Tribunal had to navigate a course that was consistent with these fundamental rules of procedure. Furthermore, the Tribunal also was bound to consider and implement applicable rules of international law, including with respect to due process and the principles espoused in the *Monetary Gold* case. As explained in this Section, aspects of the merits phase of the arbitration and the Tribunal's Merits Award are plagued by the Tribunal's failure properly to implement these rules of procedure and other rules of international law.

This section is set out as follows: Section 5.2 sets out a few striking anomalies in the Tribunal's assessment and application of evidence; Section 5.3 analyses whether the Tribunal provided the Parties with sufficient opportunities to examine its appointed experts; Section 5.4 analyses the Tribunal's exposition and application of the *Monetary Gold* principle; and Section 5.5 analyses whether the Merits Award satisfies the well-established principle that an award must state the reasons on which it is based.

5.2 *The Tribunal Relieved the Philippines of Its Burden of Proof*

This Section sets out a few striking anomalies in the Tribunal's assessment and application of evidence. Sub-section (i) explains important aspects of the Parties' burden of proof and the Tribunal's obligation to ensure that the claim is well founded in fact and law; Sub-section (ii) examines whether the Tribunal improperly relieved the Philippines of its burden of proof with respect to its Submissions No. 4 and 6; Sub-section (iii) examines whether the Tribunal afforded the Parties sufficient opportunity to examine the Tribunal-appointed experts and their reports; and Sub-section (iv) examines the Tribunal's conclusions in relation to China's failure to have due regard to the rights and duties of the Philippines in the vicinity of Mischief Reef.

5.2.1 Rules in Relation to the Parties' Burden of Proof and the Tribunal's Obligation to Ensure that the Claim is Well Founded in Fact and Law

It is a well-established rule of law and principle of international adjudication that each party has the burden of proving its case.[451] Ordinarily, international courts and tribunals are limited to assessing the evidence produced before them by the parties.[452]

---

451 *See* UNCITRAL Arbitration Rules, Article 24.1; ICDR International Arbitration Rules, Article 19.1.

452 *See* UNCITRAL Arbitration Rules, Article 25.6; ICDR International Arbitration Rules, Article 20.6; ICSID Arbitration Rules, Rule 34(1).

Against the backdrop of these fundamental tenets of international dispute resolution, one would expect that, if the moving party's evidence is not reliable, the court or tribunal would decide that the moving party had not met its burden of proof. For example, the ICJ has usually exercised caution when faced with circumstances that would require it to engage proactively in fact-finding exercises involving issues and questions of a technical nature. In the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the Court recognised that:

> [a] situation of armed conflict is not the only one in which evidence of fact may be difficult to come by [...] ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it.[453]

Similarly, in the Case concerning Pulp Mills on the River Uruguay, the Court concluded that:

> ... it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.[454]

The rules that governed the Arbitration are in line with the principles mentioned above in relation to evidence and burden of proof. Article 22 of the Rules of Procedure states, in relevant part, that:

1. Each Party shall have the burden of proving the facts relied on to support its claim or defence.
2. The Arbitral Tribunal may take all appropriate measures in order to establish the facts [...]

---

453 *Military and Paramilitary Activities*, *supra* note 71, at para. 101. This principle has been consistently upheld by the I.C.J. *See Maritime Delimitation in the Black Sea*, *supra* note 147, at para. 68; *Case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, *supra* note 44, at para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 128, at para. 204 (Feb. 26).

454 *Pulp Mills on the River Uruguay*, *supra* note 416, at para. 168.

4. Pursuant to Article 6 of Annex VII to the Convention, the Arbitral Tribunal may, at any time during the arbitral proceedings, require the Parties to produce documents, exhibits or other evidence within such a period of time as the Arbitral Tribunal shall determine.

Article 6 of Annex VII states that:

> The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall:
> (a) provide it with all relevant documents, facilities and information; and
> (b) enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates.

These rules confirm that the Philippines had the burden of proving its case around, for example, the natural status of features and their capacity to sustain human habitation or economic life of their own.[455]

These fundamental principles are no different in circumstances where one of the parties (here, the respondent party) does not participate in the arbitration. In such circumstances, the claimant party still carries the burden of proving facts relied on to support its claim. At the heart of international dispute resolution is the idea of an adversarial system in which the parties present, investigate, interrogate and argue facts and law. The adversarial system naturally must adapt when one of the parties does not participate in the arbitration. It would make sense therefore that, in such circumstances, e.g., when a respondent party is not present to test the facts and evidence of a claimant party, the tribunal should satisfy itself that it has "jurisdiction" and that the moving party's "claim" is well founded in fact and law.[456] This is precisely what Article 9 of Annex VII requires:

> If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself

455 Rules of Procedure, Article 22(1).

456 *See* Wolfgang Kuhn, *Defaulting Parties and Default Awards in International Arbitration*, *in* Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 412 (Arthur W. Rovine ed., 2014).

> not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.[457]

The fact that under Article 9, the Tribunal has an obligation to ensure that "the claim is well founded", does not in any way change the fact that the Philippines carried the burden of proving its claims. In the words of the tribunal in *Liberian Eastern Timber Corp.* (*Lecto*) *v. Liberia*:

> [T]he failure of the [... respondent] to take part in the present arbitral proceedings does not entitle the claimant to an award in its favour as a matter of right. The onus is still upon the claimant to establish the claim which it has put forward.[458]

In light of these rules of evidence, if the Tribunal determined during the course of the Arbitration that it required further or additional evidence, the Tribunal: (1) "may [...] require the Parties to produce documents, exhibits or other evidence"; (2) may appoint independent experts to assist with the collation of such further or additional evidence;[459] or (3) "take all appropriate measures in order to establish the facts".[460] If the Tribunal decides unilaterally to seek out such additional evidence, however, it cannot do so in order to assist the single appearing party satisfy its overriding burden of proof.

Based on these fundamental principles and the related rules applicable to UNCLOS Annex VII arbitration, in our view, if the Tribunal deemed that Philippines had not produced sufficient evidence to prove its case (for example,

---

457 Similarly, in respect of ITLOS, *see* Article 28 of Annex VI, "When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law"; and in respect of the I.C.J., *see* Article 53 of the Statute of the I.C.J., "Whenever one of the parties does not appear before the Court, [...] [t]he Court must [...] satisfy itself, not only that it has jurisdiction [...], but also that the claim is well founded in fact and law". The common dominator is that in cases of default proceedings, the court or tribunal must satisfy itself that the participating party's claim is well founded in fact and law before rendering its decision. *See* Judith Butchers & Philip Kimbrough, *The Arbitral Tribunal's Role in Default Proceedings*, 22(2) ARBITRATION INTERNATIONAL 233, 238 (2006).

458 *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, ¶ 25 (Mar. 31, 1986).

459 Rules of Procedure, Article 24.

460 Rules of Procedure, Article 22(2).

related to the natural status of features or their incapacity to sustain human habitation or economic life of their own), the Tribunal either should have requested that the Philippines produce additional evidence or, alternatively, determined that the Philippines had not met its burden of proof. Instead, as explained below, the Tribunal unilaterally obtained archival evidence (that the Philippines itself deemed "unnecessary") which assisted the Philippines to meet its burden of proof on Submissions No. 4 and 6.

5.2.2 Did the Tribunal Improperly Relieve the Philippines of Its Burden of Proof?

For the purposes of Submissions No. 4 and 6, the Philippines, "[in attempting to overcome the absence of recent, direct observation of the features in question", "placed heavy reliance on remote sensing through satellite imagery".[461]

The Tribunal did not rely on evidence of satellite imagery that the Philippines provided and, instead, decided to seek out and rely on UKHO and other archival records to determine whether certain maritime features are low-tide elevations.[462]

In a communication to the Parties dated 1 April 2016, the Tribunal explained its rationale for seeking out and relying on evidence that neither Party had produced in the arbitration:

> (a) [...] in furtherance of its mandate to satisfy itself that the Philippines' claims are well founded in fact, the Tribunal considered it appropriate to have reference, to the greatest extent possible, to original records based on the direct observation of the features in question, prior to them having been subjected to significant human modification. It informed the Parties that, as the most extensive hydrographic survey work in the South China Sea prior to 1945 was carried out by the Royal Navy of the United Kingdom, followed closely by the Imperial Japanese Navy, the Tribunal had undertaken to seek records from the archives of the United Kingdom Hydrographic Office (the "UKHO"), which also hold certain Japanese records captured during the Second World War. The Tribunal provided documents and survey materials obtained by the Tribunal from the UKHO archives and invited the Parties' comments by 22 April 2016.[463]

461 Award, *supra* note 1, at para. 322.
462 *Id*. at paras. 89(a), 140.
463 *Id*. at para. 89(a).

On 28 April 2016, the Philippines submitted its response to the documents and survey materials that the Tribunal obtained from the UKHO. According to the Philippines, the UKHO materials confirmed "the Philippines' characterization of each of the relevant features presented in the *Atlas* as a submerged feature, a low-tide elevation, or an Article 121(3) "rock"".[464]

Additionally, by letter of 26 May 2016, the Tribunal informed the Parties that it had decided rely on French Archive Materials from the 1930s "in order to gain a more complete picture as to the natural conditions of the South China Sea features at that time",[465] and provided these documents (26 scientific reports, diplomatic records, and newspaper articles)[466] to the Parties, inviting comments on the same. The documents obtained from the French archives would allow the Tribunal to determine whether Itu Aba and other features in the Spratlys were capable of sustaining human habitation or economic life of its own.[467]

The Philippines filed its response to the French Archive Materials on 3 June 2016, stating that these documents confirmed that:

> Itu Aba and other insular features [...] were never inhabited on a permanent or anything resembling a long-term basis, and that they lack the natural resources, including fertile soil and freshwater, necessary to sustain human habitation or economic life [...] and [that] China has not fulfilled the requirements under general international law for establishing [historic] rights.[468]

As mentioned above, by obtaining these archival records, the Tribunal thought that it was furthering "its mandate to satisfy itself that the Philippines' claims are well founded in fact". We agree with the Tribunal's assessment that it had a duty to ensure that the Philippines' "claim is well founded in fact and law". That obligation, important as it may be, has its limits. As explained above, in seeking to ensure that the claims are well founded, the Tribunal must ensure that it does not relieve the moving party of its burden of proof. Although the Tribunal may "take all appropriate measures in order to establish the facts",[469] it may *not, sua sponte*, seek out evidence that would "establish" the "claim" of the moving party. But, as explained below, that is exactly what the Tribunal

464 The Philippines' Written Responses on UKHO Materials, 28 April 2016, at para. 3.
465 Award, *supra* note 1, at para. 99.
466 The Philippines' Written Responses on French Archive Materials, 3 June 2016, at para. 1.
467 Award, *supra* note 1, at paras. 99, 141.
468 The Philippines' Written Responses, *supra* note 466, at para. 2.
469 Rules of Procedure, Article 22(2).

did here – it obtained evidence (that had been rejected by the Philippines) to establish the Philippines' claims.

The Philippines carried the obligation to prove its claims through documentary and other evidence. Prior to the Merits Hearing, the Tribunal requested that the Philippines confirm "whether it has sought and been able to obtain copies of hydrographic survey plans (fair charts), relating in particular to those surveys undertaken by the United Kingdom in the Nineteenth Century…."[470] The Philippines replied that "it has not and explained that it considered it unnecessary to do so".[471]

This Philippines' response demonstrates that it made a strategic decision not to produce archival materials to support its claims. Moreover, the Philippines refused to produce such evidence even after being prompted by the Tribunal to do so. This was sufficient basis for the Tribunal to conclude that the Philippines' claims, which "placed heavy reliance on remote sensing through satellite imagery", was not well-founded in fact. In our view, the Tribunal erred by, *sua sponte*, finding additional facts and evidence (that the Philippines itself deemed "unnecessary") that, in the Tribunal's view was required prove the Philippines claims.

5.2.3 The Tribunal's Conclusion that China Failed to Have Due Regard to the Rights and Duties of the Philippines in the Vicinity of Mischief Reef

In its Submission no. 9, the Philippines requested that the Tribunal declare that "China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines".[472]

This submission related to "developments at Mischief Reef and Second Thomas Shoal, both of which are low-tide elevations lying within 200 nautical miles of the Philippines' baselines."[473]

The Tribunal found that:

> Mischief Reef and Second Thomas Shoal are not capable of generating entitlements to maritime zones and can only form part of the Philippines' exclusive economic zone. Nevertheless, in light of the fact that China has not accepted these areas as part of the Philippines' exclusive economic zone, the Tribunal considers the similarities in Chinese fishing activities

470 Award, *supra* note 1, at para. 140.
471 *Id.*
472 *Id.* at para. 717.
473 *Id.* at para. 718.

> at all of these features to be a significant indication of what has taken place at Mischief Reef and Second Thomas Shoal.
>
> [...]
>
> The Tribunal expects, from the general positions of the Parties, that Chinese vessels have continued to fish at Mischief Reef and Second Thomas Shoal since May 2013. The Tribunal does not, however, have the direct evidence before it that would enable it to draw such a conclusion for the period subsequent to May 2013.
>
> [...]
>
> Having established that Chinese vessels have been engaged in fishing at Mischief Reef and Second Thomas Shoal in May 2013, the Tribunal considers that China has failed to show the due regard called for by Article 58(3) of the Convention to the Philippines' sovereign rights with respect to fisheries within its exclusive economic zone.[474]

The Tribunal recognised that it had "limited evidence before it" with respect to Chinese fishing at Mischief Reef.[475] It appears that the only evidence of Chinese fishing at Mischief Reef came from a Filipino source, i.e., the Philippines Armed Forces, which had reported that at least 33 Chinese fishing vessels were said to have been fishing at the Chinese-occupied Mischief Reef and nearby features since 08 May 2013, escorted by a PLA Navy ship and CMS vessels. The report of the Armed Forces does not mention the source of this information i.e., the identity of the person who provided this information.

The Philippines initiated arbitration against China on 22 January 2013. The observations contained in this report are of alleged fishing activities in May 2013 i.e., *after* the "dispute" had crystallised and *after* the Philippines had initiated arbitration against China. This raises serious doubts about the reliability of such (hearsay) evidence, which could not be tested under cross-examination (or otherwise tested by the Tribunal).

The Tribunal provided two reasons for accepting the Filipino evidence of Chinese fishing at Mischief Reef in May 2013: (1) the fact that "China has asserted sovereign rights and jurisdiction in the South China Sea generally, and has apparently not accepted these areas as part of the Philippines' exclusive economic zone [...]"; and (2) "the pattern of Chinese fishing activity at Mischief Reef and Second Shoal is consistent with that exhibited at other reef formations for which the Tribunal has information".[476] Both reasons appear

474 *Id.* at paras. 751–53.
475 *Id.* at para. 745.
476 *Id.* at paras. 747–48.

to reference inadequate "evidence" of Chinese fishing at Mischief Reef. The fact that China asserts the right to fish does not mean that Chinese vessels have conducted such fishing activities. The fact that there may be evidence of Chinese fishing in other parts of the South China Sea is, again, not proof of Chinese fishing at Mischief Reef.

Arguably, the Philippines did not meet its burden of proof with respect to its claim that China had failed to show due regard for the Philippines' sovereign rights with respect to fishing in the vicinity of Mischief Reef.

5.3 *The Tribunal Denied the Parties Sufficient Opportunity to Examine Its Appointed Experts*

Clearly, the evidence of technical experts was likely to be probative given a number of the issues raised by the Philippines in the South China Sea arbitration. Even during the jurisdictional phase, the Tribunal invited the Parties to "take steps already to ascertain the availability of potential technical experts".[477] Separately, the Tribunal appointed its own experts in the arbitration. For example, on 7 August 2015, the Tribunal proposed Mr Grant Boyes as its expert hydrographer, who was subsequently appointed after the Tribunal invited the Parties to comment on his *curriculum vitae*, declaration of independence and Terms of Reference.[478] There was nothing objectionable with the Tribunal's appointment of Mr Boyes, and the appointment by international courts and tribunals of expert hydrographers is commonplace in law of the sea disputes. Specifically, the appointment appears to have been made in accordance with Article 24 of the Rules of Procedure, which states in relevant part that:

1. After seeking the views of the Parties, the Arbitral Tribunal may appoint one or more independent experts. […]
2. Any expert shall, in principle before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her impartiality and independence. […]
4. If called upon to prepare an expert's report, the Arbitral Tribunal shall, upon receipt of the report, communicate a copy of it to the Parties, who shall be given the opportunity to express, in writing, their respective opinions on the report. A Party shall be entitled to examine any document on which the expert relied in his or her report.
5. If a Party so requests or if the Arbitral Tribunal considers it necessary, the expert shall, after delivery of the report, participate in a hearing where

477 *Id*. at para. 56.
478 *Id*. at para. 58.

> the Parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points at issue. The provisions of Article 23 shall be applicable to such proceedings.

Following the November 2015 Merits Hearing, on 5 February 2016, the Tribunal considered it necessary to obtain "further evidence and clarifications from the Parties, and from the views of independent experts".[479] At that stage, the Tribunal decided to appoint additional experts to opine on: (1) whether Chinese construction activities in the Spratly Islands have a detrimental effect on the coral reef systems; and (2) navigational safety issues.

The Tribunal sought the views of the Parties and, around mid-March 2016, proceeded to appoint Dr Sebastian Ferse and Captain Gurpreet Singh Singhota, to provide expert opinions on these issues.[480] On 12 April 2016, the Tribunal decided to appoint two additional coral reef experts, Professor Peter Mumby and Dr Selina Ward, to contribute to the expert opinion that at the time was being prepared by Dr Ferse.[481]

The four new Tribunal-appointed experts issued their expert reports on 15 April and 26 April 2016 (i.e., only three months before the Tribunal rendered its 500-page Merits Award).[482] The Tribunal provided the reports to the Parties and, in accordance with the Rules of Procedure, invited comments in writing on 18 and 29 April 2016, respectively.[483] It is not clear from the public record whether, in accordance with Article 24(4), the Tribunal provided the Parties with an opportunity to "examine any document on which the expert relied in his or her report".

These tribunal-appointed experts were not cross-examined by the Parties. Strictly, the Rules of Procedure did not require that tribunal-appointed experts be cross-examined on their reports – as mentioned above, they provided only that if "a Party so requests or if the Arbitral Tribunal considers it necessary, the expert shall, after delivery of the report, participate in a hearing where the Parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points at issue." It appears that the Parties were effectively denied the opportunity to cross-examine these experts due to the experts' very late appointment by the Tribunal in the proceeding (after the Merits hearing), the fact that the Tribunal only invited comments

479 *Id.* at para. 84.
480 *Id.* at paras. 84–85.
481 *Id.* at para. 90.
482 *Id.* at paras. 91, 95.
483 *Id.*

in writing and did not contemplate the possibility of any hearing to examine their evidence prior to issuing its Merits Award.

The failure to provide any opportunity to the Parties to cross-examine the four experts is particularly notable given the findings subsequently made in the Merits Award with reference to their evidence. For example, the Tribunal relied on Dr Ferse's conclusion that the Chinese navy and coast guard had "tolerated or condoned" the practice of "chopping reefs" by Tanmen fishermen and his views on the impact of construction and dredging activities on reef systems.[484] It also relied on Captain Singhota's evidence that "Chinese manoeuvres [...] 'demonstrated a complete disregard for the observance and practice of good seamanship [...] but most importantly, a total disregard for the observance of the collision regulations.[485] Given that the Tribunal extensively relied on the evidence of these experts, in our view, the Parties should have been afforded an opportunity to cross-examine these experts on their evidence.

5.4 *The Tribunal Misapplied the Monetary Gold Principle with Respect to Third State Rights and Interests*

Disputes in the Spratly Islands involve both islands and maritime claims among several sovereign states within the region, namely Brunei, China (including Taiwan), Malaysia, the Philippines, and Vietnam. These states all laid claims and occupied part of the islands in the South China Sea.

This Section will analyse whether the Tribunal should have accepted jurisdiction over determining the legal classification (and thus maritime entitlements) of maritime features in the South China Sea (including but not limited to Itu Aba) that are the subject of sovereignty and maritime claims by third States (in particular, Brunei, Malaysia, and Vietnam). We have focussed on the claims (or potential claims) of Malaysia, Vietnam and Taiwan with respect to those features and the potential application of the ICJ's judgment in the *Monetary Gold* case.

Sub-section (i) explains the scope of the principle espoused in *Monetary Gold*, which has been clarified and developed through the jurisprudence of international courts and tribunals; Sub-section (ii) explains that there are other important principles of international law that suggest that the Tribunal should have adopted a more cautious approach to the exercise of jurisdiction when third party rights are at issue; Sub-section (iii) analyses whether the

484 *Id.* at paras. 848, 851, 857, 978, 983.
485 *Id.* at para. 1089.

Tribunal determined correctly that the "legal interests of Malaysia do not form 'the very subject-matter of the dispute' and are not implicated by the Tribunal's conclusions"; and Sub-section (iv) analyses whether Vietnam's and Taiwan's legal interests in the South China Sea form "the very subject-matter of the dispute" that was the subject of the Merits Award.

5.4.1 The Scope of the Principle Espoused in Monetary Gold with Respect to Third Party Rights

The Tribunal explained in the Merits Award the scope of the *Monetary Gold* principle. The Tribunal stated that:

> [r]ead correctly, Monetary Gold calls for a court or tribunal to refrain from exercising its jurisdiction where the 'legal interests [of a third State] would not only be affected by a decision, but would form the very subject-matter of the decision'. The circumstances of Monetary Gold, however, 'represent the limit of the power of the Court to refuse to exercise its jurisdiction,' and any more expansive reading would impermissibly constrain the practical ability of courts and tribunals to carry out their function.[486]

The Tribunal's exposition of the *Monetary Gold* principle is correct as a matter of international law. The Monetary Gold case arose out of the discovery in Germany of certain quantities of monetary gold belonging to Albania. The governments of France, the UK and the US were tasked with responsibility for implementing a 1946 Agreement on Reparation which required that monetary gold found in Germany should be pooled for distribution among the countries entitled to receive it. The UK claimed that the Albanian gold should be delivered to the UK in partial satisfaction of the Court's Judgment of 1949 against Albania in the *Corfu Channel* case. Italy claimed that the gold should be delivered to it in partial satisfaction for the damage which it alleged it had suffered as a result of an Albanian law of 13 January 1945. The three countries tasked with implementing the agreement decided that that the gold should be delivered to the United Kingdom unless, within a certain time-limit, Italy or Albania applied to the Court requesting it to adjudicate on their respective rights. Albania took no action, but Italy made an application to the Court. The Court observed:

---

486 *Id.* at para. 640.

> The Court is not merely called upon to say whether the gold should be delivered to Italy or to the United Kingdom. It is requested to determine first certain legal questions upon the solution of which depends the delivery of the gold.
>
> [...]
>
> Albania has not submitted a request to the Court to be permitted to intervene. In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.[487]

As Albania was not present before the Court, and given that its "legal interests [...] would form the very subject matter of the decision", the Court declined jurisdiction over Italy's application.

The Court subsequently adopted the *Monetary Gold* principle in the *East Timor* case, again to decline jurisdiction, this time due to the absence of Indonesia.[488] Overall, however, the ICJ jurisprudence demonstrates that a relatively high threshold is applied in order for the *Monetary Gold* standard to preclude jurisdiction.

The ICJ discussed the scope of the *Monetary Gold* principle in the *Military and Paramilitary Activities in and against Nicaragua* case (*Nicaragua v. United States*). Nicaragua claimed that the US had supported rebels in Nicaragua, Costa Rica and Honduras and had provided logistical support and weapons to the guerrilla forces in El Salvador who were fighting against Nicaragua's interests.[489]

The US claimed that Nicaragua's application to the Court was inadmissible, in part, because third States not present before the Court, including Honduras

---

487 *Case of the Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K. & U.S.), 1954 I.C.J. Rep. 19 (June 15) (Judgment) at 32–33.

488 The Court determined in that case that: "... Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so [...] the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia." *See East Timor* (Port. v. Austl.), 1995 I.C.J. Rep. 91 (June 30) (Judgment), at para. 28.

489 *Military and Paramilitary Activities*, *supra* note 71, at paras. 18–25.

and El Salvador, had an interest in the dispute but were not present before the Court.[490]

The Court rejected this argument, emphasising that its decision had a binding effect for the parties only and that third States that may be affected by the decision could either institute separate proceedings or apply for permission to intervene in the present proceedings.[491] The Court confirmed (as stated also in the Merits Award) that the *Monetary Gold* principle would preclude jurisdiction only when third part rights form the "very subject matter of the decision". The Court's explanation merits quotation in full:

> There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning Monetary Gold Removed from Rome in 1943, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision" (ICJ Reports 1954, p. 32). Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated (paragraph 74, above) other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to [by the USA] can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.[492]

---

490 *Id.* at paras. 437–43.

491 *Id.* at para. 88.

492 *Id. See also Land, Island and Maritime Frontier Dispute*, *supra* note 40, at para. 56. The I.C.J. examined whether the legal interests asserted by Nicaragua in support of an application to intervene in the case formed "the very subject matter of the decision" or whether Nicaragua was only affected by that decision.

The *Monetary Gold* principle also arose in the *Case concerning certain phosphate lands in Nauru* (*Nauru v. Australia*), in respect of a dispute over the rehabilitation of lands in Nauru that previously had been under Australian administration. According to Nauru's submission before the ICJ, Australia had breached its international obligations, including obligations under the Trusteeship Agreement for Nauru.[493]

One of Australia's preliminary objections, focussed on the fact that third States i.e., New Zealand and the United Kingdom (which, together with Australia, formed the Administering Authority for Nauru under the Trusteeship Agreement) were not parties to the ICJ proceeding.[494]

The Court considered Australia's objection in light of the *Monetary Gold* principle and determined that:

> In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the Monetary Gold case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim. [...]
>
> a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia.[495]

The Court therefore focussed on whether it would be required to determine the "responsibility" of a third party as "a prerequisite for a decision to be taken on" the claims before the Court, or whether it would be required to make a finding in respect of the "legal situation" of the third parties. Sub-section (ii) and (iii) below assesses whether the Tribunal necessarily had to make determinations about the "responsibility" of Malaysia, Vietnam and Taiwan, or in

493 *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1992 I.C.J. Rep. 240 (June 26) (Judgment on Preliminary Objections), at para. 5.

494 *Id.* at para. 39.

495 *Id.* at para. 55.

respect of the "legal situation" of those States, in order to determine the merits of the claims submitted by the Philippines.

The principle of due process (from which the *Monetary Gold* principle "draws its strengths") also suggests that tribunals should exercise caution when third-party rights are at issue. For example, in *Chevron v. Ecuador* (*Third Interim Award on Jurisdiction and Admissibility*), the tribunal explained that:

> … the Monetary Gold principle draws its strengths from, and implements, a number of distinct and fundamental principles of international law. Most obviously, it gives effect to the principle that no international tribunal may exercise jurisdiction over a State without the consent of that State; and by analogy, no arbitration tribunal has jurisdiction over any person unless they have consented. That may be called the 'consent' principle, and it goes to the question of the tribunal's jurisdiction.
>
> In the Monetary Gold case itself, the International Court of Justice held that, as a corollary of the 'consent' principle, if the very subject-matter of the case that it has to decide is a question of the rights of a State not before it, the International Court cannot proceed to decide the case. In such a case, the Court would not hear full argument on the rights in question. That corollary may be called the 'indispensible [sic.] third party' principle; and it goes to the question of the ability of the tribunal to decide the case justly and according to law.
>
> There is also a concern that the rights of States should not be ruled upon unless they are properly before the Court and are given a full opportunity to present their case. This third aspect may be called the "due process" principle; and it goes to the question of the rights of the absent third party.[496]

This quote from *Chevron* suggests that there are broader concerns, especially around the due process rights of third parties, that should be borne in mind by international courts and tribunals when exercising jurisdiction over a dispute that concerns third party rights. As discussed below, it appears to us that the Tribunal applied the *Monetary Gold* principle (only with reference to Malaysia) without consideration of these broader due process principles.

496 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, at paras. 4.61–63.

5.4.2 The Tribunal's Conclusion that the "Legal Interests of Malaysia Do Not Form 'the Very Subject-Matter of the Dispute' and are Not Implicated by the Tribunal's Conclusions"

The Merits Award refers to a communication from Malaysia to the Tribunal, dated 23 June 2016, in which:

> Malaysia recalls that it claims sovereignty over a number of features in the South China Sea and 'may also have overlapping maritime entitlements (including an extended continental shelf) in the area of some of the relevant features that the Arbitral Tribunal has been asked to classify.[497]

Malaysia's communication is not publicly-available. According to the Tribunal, in its communication, Malaysia invokes the *Monetary Gold* principle and "argues" that:

> The Arbitral Tribunal must ensure that, in determining whether certain maritime features in the South China Sea are entitled to specific maritime zones under UNCLOS 1982, it does not express any position that might directly or indirectly affect the rights and interests of Malaysia. The Arbitral Tribunal thus cannot purport to decide upon the maritime entitlements pursuant to Articles 13 and 121 of UNCLOS 1982 of any features within the EEZ and Continental Shelf of Malaysia as published in Malaysia's Map of 1979.[498]

The Tribunal concluded that "to the extent it has examined certain features claimed by China (which are also claimed by Malaysia) for the purposes of assessing the possible entitlements of China in areas to which Malaysia makes no claim, the legal interests of Malaysia do not form 'the very subject-matter of the dispute' and are not implicated by the Tribunal's conclusions."[499] Consequently, in the Tribunal's view, Malaysia's rights and interests were protected, and did not engage the rule in *Monetary Gold*.[500]

The Tribunal was probably correct in concluding that Malaysia's communication "overstates the *Monetary Gold* principle when it argues expansively that the Tribunal must "avoid deciding any question that requires it to adopt a

497 Award, *supra* note 1, at para. 635.
498 *Id*.
499 *Id*. at para. 640.
500 *Id*. at paras. 640–41.

view that, directly or indirectly, may affect Malaysia's rights and interests"".[501] As explained above, in order to demonstrate that the Tribunal's award on the merits would violate the *Monetary Gold* principle, Malaysia would need to have demonstrated that its legal interests formed the very subject-matter of the dispute before the Tribunal.

Although the extract of Malaysia's communication set out in the Award does not accurately reflect the test under *Monetary Gold*, in our view, the Tribunal did not investigate adequately whether Malaysia's claims in the South China Sea form the "very subject matter" of the Tribunal's decision with respect to the classification of certain features in the Spratlys. The Tribunal found that:

> [w]ith respect to the Philippines' Submission No. 5, the Tribunal notes that Mischief Reef and Second Thomas Shoal do lie within 200 nautical miles of features claimed by Malaysia, although Malaysia itself has not claimed an exclusive economic zone or continental shelf in the area of either Mischief Reef or Second Thomas Shoal.[502]

It appears that the Tribunal did not consider that Malaysia's interests in the South China Sea relate not only to Mischief Reef and Second Thomas Shoal but also to a number of additional features. We understand from publicly-available materials that Malaysia claims sovereignty over 11 features in the Spratly Islands.[503] These are: (1) Ardasier Reef; (2) Dallas Reef; (3) Mariveles Reef; (4) Royal Charlotte Reef; (5) Swallow Reef; (6) Erica Reef; (7) Investigator Reef; (8) Commodore Reef; (9) Amboyna Cay; (10) Barque Canada Reef; and (11) North Luconia and South Luconia Shoals.[504]

The Tribunal determined that Swallow Reef and Amboyna Cay are "rocks" for the purposes of Article 121(3) of the Convention, with the result that they are incapable of generating any EEZ or continental shelf entitlement. This was an essential prerequisite to the Tribunal's jurisdiction over the Philippines' Submission nos. 5 and 7.

It is possible that Malaysia may claim to derive EEZ or continental shelf rights from any one or more of the above-mentioned 11 features in the Spratlys.

501 *Id.* at para. 640.

502 *Id.* at para. 629.

503 *See*, J. Ashely Roach, *Malaysia and Brunei: An analysis of their Claims in the South China Sea*, https://www.cna.org/cna_files/pdf/IOP-2014-U-008434.pdf.

504 *Id.*

The Tribunal's decision that Swallow Reef and Amboyna Cay (and, indeed, that all high tide features in the Spratly Islands) are "rocks",[505] clearly would prejudice any such claims.

5.4.3 Do Vietnam's Legal Interests Form "the Very Subject-Matter of the Dispute"?

The Merits Award does not discuss whether Vietnam's claims in the South China Sea form the very subject matter of certain of the claims submitted by the Philippines. In our view, the Tribunal should have assessed *proprio motu*[506] whether its exercise of jurisdiction might violate the *Monetary Gold* principle with respect to Vietnam's putative legal interests in the South China Sea.[507]

5.4.3.1 *Vietnam's Position with Respect to the Spratlys*

On 12 May 1977 (i.e., before UNCLOS), Vietnam published its Declaration on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, which states, in relevant part, that:

---

505 Award, supra note 1, at para. 646.

506 For example, in the investor-State dispute resolution context, tribunals have found that they are must consider questions of jurisdiction proprio motu in some situations. *See, e.g.*, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award of 15 March 2002, at para. 56: "The Tribunal further observes that the question of jurisdiction of an international instance involving consent of a sovereign State deserves a special attention at the outset of any proceeding against a State Party to an international convention creating the jurisdiction. As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined proprio motu, i.e., without objection being raised by the Party." The obligation is also established in I.C.J. jurisprudence. *See Aegean Sea Continental Shelf* (Greece v. Turk.), 1977 I.C.J. Rep. 3 (Dec. 19) (Judgment), at para. 15:"the Court, in accordance with its Statute and its settled jurisprudence, must examine proprio motu the question of its own jurisdiction to consider the Application of the Greek Government. Furthermore, in the present case the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court. According to this provision, whenever one of the parties does not appear before the Court, or fails to defend its case, the Court, before finding upon the merits, must satisfy itself that it has jurisdiction." *See also United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. Rep. 3 (May 24) (Judgment), at para. 33: "Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, proprio motu, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant's case."

507 The Tribunal's Merits Award may also affect the rights and obligations of other States with interests in the South China Sea, including those of Brunei and Indonesia.

> 1. The territorial sea of the Socialist Republic of Vietnam has a breadth of 12 nautical miles measured from a baseline which links the furthest seaward points of the coast and the outermost points of Vietnamese offshore islands, and which is the low-waterline along the coast.
>
> [...]
>
> 5. The islands and archipelagos, forming an integral part of the Vietnamese territory and beyond the Vietnamese territorial sea mentioned in Paragraph 1, have their own territorial seas, contiguous zones, exclusive economic zones and continental shelves, determined in accordance with the provisions of Paragraphs 1, 2, 3, and 4 of this statement.[508]

Five years later, on 12 November 1982, Vietnam issued its Statement on the Territorial Sea Baseline, which states at paragraphs 4 and 5:

> (4) The baseline for measuring the breadth of the territorial sea of the Hoang Sa [Paracel Islands] and Truong Sa [Spratly Islands] Archipelagos will be determined in a coming instrument in conformity with paragraph 5 of the 12 May 1977 statement of the Government of the Socialist Republic of Viet Nam. [...]
>
> (5) The sea as lying behind the baseline and facing the coast or the islands of Viet Nam constitutes the internal waters of the Socialist Republic of Viet Nam.[509]

This shows that, by the early 1980s, Vietnam had indicated on multiple occasions that it would claim maritime zones, including EEZ and continental shelf entitlements, from the Spratly "archipelago".[510]

In a statement dated 5 December 2014, however, Vietnam informed the Tribunal that, in its view:

---

508 Available in English on the website of the United States Department of State, https://www.state.gov/documents/organization/58573.pdf, last visited 30 August 2018.

509 http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1982_Statement.pdf, last visited 30 August 2018.

510 Note that, on 6 May 2009, Malaysia and Vietnam made a joint submission to the CLCS for a portion of the continental shelf of the two States into the South China Sea. The area of the extended continental shelf is drawn between the 200 nm limits of the two States measured from the baselines along the coasts of Vietnam and the East Malaysian states of Sarawak and Sabah. This would suggest that Vietnam does not (as yet) claim a continental shelf from its Spratly archipelago.

> none of the maritime features mentioned by the Philippines in these proceedings can enjoy their own exclusive economic zone and continental shelf or generate maritime entitlements in excess of 12 nautical miles since they are low-tide elevations or 'rocks which cannot sustain human habitation or economic life of their own' under Article 121(3) of the Convention.[511]

Vietnam's 2014 statement to the Tribunal must be read against the backdrop of its previous position that the Spratlys form an "archipelago", over which Vietnam claims sovereignty. Vietnam reiterated this position in two of the annexes to its the Statement to the Tribunal. Its annex 1, which contains a *Note Verbale* dated 8 May 2009 from the Permanent Mission of Vietnam at the UN to the UN Secretary General, states that:

> The Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagos are parts of Viet Nam's territory. Viet Nam has indisputable sovereignty over these archipelagoes. China's claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map attached with the Notes Verbales CLM/17 /2009 and CLM/18/2009 has no legal, historical or factual basis, therefore is null and void.[512]

Moreover, Annex 6, which contains a letter, dated 19 November 2014, from the Permanent Representative of Vietnam to the United Nations Secretary General,[513] implicitly confirms that Vietnam claims that the Spratly "archipelago" generates maritime entitlements, including with respect to the EEZ and the continental shelf:

> Viet Nam possesses full legal basis and historical evidence to affirm its sovereignty over the Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagos, as well as its sovereign rights and jurisdiction over the exclusive

511 Award, *supra* note 1, at para. 36. Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam Transmitted to the Arbitral Tribunal in the Proceedings between the Republic of the Philippines and the People's Republic of China', 5 December 2014.

512 *Note Verbale* from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009 (8 May 2009), Annex 193.

513 Annex to the letter dated 19 November 2014 of the Permanent Representative of the Socialist Republic of Viet Nam addressed to the Secretary-General of the United Nations,' in Supplemental Written Submission of the Philippines, Volume III, Annexes 466–99, 16 March 2015, at 65–67.

> economic zone and the continental shelf established in accordance with [UNCLOS].[514]

Although Vietnam officially has not drawn EEZs from the Spratly or Paracel "archipelagos", the above statements indicate that it has been Vietnam's position that the Paracel and Spratly Island groups are "archipelagos" that generate maritime entitlements beyond 12nm, even if the individual features within those archipelagos do not generate such entitlements.

5.4.3.2 *How Did Vietnam Respond to the Arbitration?*

Although it appears that Vietnam was generally supportive of the Tribunal taking jurisdiction, on 14 December 2014 Vietnam wrote to the Tribunal informing it that:

> After reading the written pleadings of the Philippines, the Ministry of Foreign Affairs of Viet Nam is of the view that some of Viet Nam's rights and interests of a legal nature in the South China Sea may be involved, and even affected in this arbitration. By transmitting the present Statement to the Arbitral Tribunal, the Ministry of Foreign Affairs of Viet Nam wishes to preserve its rights and interests of a legal nature, including (but not necessarily limited to):
>
> (i) Viet Nam's rights in connection with geographical features of the Paracel Islands (quần đảo Hoàng Sa in Vietnamese) and the Spratly Islands (quần đảo Trường Sa in Vietnamese);
>
> (ii) The rights and interests of Viet Nam in its exclusive economic zone and continental shelf;
>
> (iii) The rights and interests of Viet Nam relating to the legal status and maritime entitlement of geographical features in the South China Sea, which are located within the 'nine-dash line';
>
> (iv) The rights and interests of Viet Nam in common maritime areas located within the "nine-dash line"; and
>
> (v) The other legal rights and interests of Viet Nam in the South China Sea.[515]

---

514 Annex to the letter dated 19 November 2014 from the Permanent Representative of Viet Nam addressed to the Secretary-General of the United Nations, Annex 468; *see also*, *Note Verbale* No. 771/HC-98 dated 6 August 1998 of the Permanent Mission of the Socialist Republic of Viet Nam to the United Nations addressed to the United Nations Secretary-General, Annex 468.

515 Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam transmitted to the Arbitral Tribunal in the Proceedings between The Republic of the Philippines and The People's Republic of China, 14 December 2014, Annex 468, 44.

As discussed above, the mere risk that third-party interests may be "affected" by the Tribunal's Award is not sufficient to preclude jurisdiction. In order to rely on the *Monetary Gold* principle, Vietnam would have needed to show that its legal interests in the South China Sea formed the "very subject matter" of the claims submitted to the Tribunal. Although Vietnam explicitly did not request that the Tribunal apply the *Monetary Gold* principle, in our view, the Tribunal should have *proprio motu* assessed whether any of the claims before it went to the very subject matter of Vietnam's claims in the South China Sea.

5.4.3.3 *The Tribunal's Conclusions with Respect to Vietnam*

The Tribunal in its Award on Jurisdiction applied the *Monetary Gold* principle with respect to Vietnam. The Tribunal concluded that:

> the determination of the nature of and entitlements generated by the maritime features in the South China Sea does not require a decision on issues of territorial sovereignty. The legal rights and obligations of Viet Nam therefore do not need to be determined as a prerequisite to the determination of the merits of the case.[516]

In its Merits Award the Tribunal referred to its earlier finding in the jurisdictional phase that "the legal rights and obligations of Viet Nam do not need to be determined as a prerequisite to the determination of the merits of the case"[517]

In our view, the Tribunal's decision that Vietnam's claims in the South China Sea do not form the "very subject matter of the decision" is arguably wrong. On this basis, the Tribunal arguably erred in accepting jurisdiction over a number of the Philippines' Submissions.

In its Merits Award, the Tribunal clearly made determinations with respect to the "legal status and maritime entitlement of geographical features in the South China Sea", in respect of which Vietnam had explicitly stated that it enjoys "rights and interests". The Tribunal also rejected the notion that "the Spratly Islands should be enclosed within a system of archipelagic or straight baselines, surrounding the high-tide features of the group, and accorded an entitlement to maritime zones as a single unit".[518]

In reaching these findings, the Tribunal arguably made findings with respect to the "legal situation" of Vietnam. In the words of the Tribunal (with respect to

516 Award on Jurisdiction and Admissibility, *supra* note 2, at para. 180.

517 Award, *supra* note 1, at para. 157.

518 *Id*. at para. 573.

the application of the *Monetary Gold* principle to Malaysia), the legal interests of Vietnam were clearly "implicated" by its findings with respect to the legal classification (whether as "rocks", low-tide elevations or otherwise) of certain features claimed by Vietnam. In this sense, the Award clearly prejudice the "rights and interests of a legal nature" cited by the Vietnamese Foreign Ministries in its letter to the Tribunal dated 22 January 2013.[519]

Vietnam's legal interests were further "implicated" by the Tribunal's apparent dismissal of any notion that the Spratlys could generate archipelagic entitlements at international law. Although Vietnam officially has not drawn any straight baselines around the Spratly Islands, as described above there are indications that Vietnam claims rights and interests based upon its assessment that the Spratly Islands form an "archipelago". The Tribunal's decision that China cannot enjoy any maritime entitlements or "historic rights" based upon the Spratlys as an archipelago appears to prejudice such Vietnamese claims.

For these reasons, there is a credible argument that the Merits Award violates the *Monetary Gold* principle at least with respect to Vietnam's claims in the South China Sea.

5.4.4 Taiwan's Concern on TaiPing Dao (Itu Aba)

5.4.4.1 *Taiwan Authority of China* (*Hereafter Referred to as Taiwan*)*'s Position*

Taiwan claims that Itu Aba is a fully-entitled island the purposes of Article 121(1) of UNCLOS. Moreover, it explicitly does so with reference to UNCLOS. Taiwan's position is that:

> Taiping Island (Itu Aba, the largest (0.43 square km) of the naturally formed Nansha (Spratly) Islands, has been garrisoned by ROC troops since 1956. [...] For the past six decades, ROC military and civilian personnel have dwelled on Taiping Island (Itu Aba), conducting their respective missions while making use of and developing its natural resources. Taiping Island (Itu Aba) has groundwater wells, natural vegetation, and phosphate ore and fishery resources. Moreover, personnel stationed on the island cultivate vegetables and fruit and rear livestock. [...] From legal, economic, and geographic perspectives, Taiping Island (Itu Aba) indisputably qualifies as an 'island' according to the specifications of Article 121 of the United Nations Convention on the Law of the Sea

519 Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam transmitted to the Arbitral Tribunal in the Proceedings between The Republic of the Philippines and The People's Republic of China, 22 January 2013, Annex 468, 44.

> (UNCLOS), and can sustain human habitation and economic life of its own; it is thus categorically not a 'rock'. The ROC government will firmly defend this fact. Any claims by other countries which aim to deny this fact will not impair the legal status of Taiping Island (Itu Aba) and its maritime rights based on UNCLOS.[520]

This statement suggests that Taiwan claims the maritime entitlements that flow from it classifying Itu Aba as a fully-fledged island under UNCLOS. The Tribunal did not invite Taiwan to participate in its proceedings, nor did it solicit Taiwan's views.

5.4.4.2 *Application of the Monetary Gold Principle with Respect to Taiwan*

The Tribunal's decision more than just "affects" Taiwan's putative legal rights and interests in relation to Itu Aba. Clearly, the Tribunal had to determine that Itu Aba is not a fully-fledged "island", and that no State can therefore claim EEZ or continental shelf rights with reference to it, before it could determine that Itu Aba is just a "rock". In other words, the Tribunal's determination that Itu Aba is not a fully-fledged island (as Taiwan claims) was "a prerequisite for a decision to be taken on" whether Itu Aba is a "rock".[521] The only reasonable conclusion is that the Tribunal's decision on this point goes to the "very subject matter" of Taiwan's claim that Itu Aba is an island.

This begs the obvious question: could the Tribunal's – purported – disregard of Taiwan's legal interests with respect to Itu Aba be attributed to the disputed status of Taiwan as a subject of international law? Clearly (and correctly), the Tribunal did not view Taiwan as a separate "State" under international law, referring to it repeatedly as the "Taiwan Authority of China".[522] The Tribunal

---

520 See the official publication of Taiwan's position on the website of the Ministry of Foreign Affairs at https://www.mofa.gov.uk.tw.en/News_Content.aspz?n=0E7B91A8FBEC4A94&s=EDEBCA08C7F51C98. Taiwan's claims go beyond Itu Aba: "Whether from the perspectives of history, geography, or international law, the Nansha (Spratly) Islands, Shisha (Paracel) Islands, Chungsha Islands (Macclesfield Bank), and Tungsha (Pratas) Islands, as well as their surrounding waters, are an inherent part of ROC territory and waters. As the ROC enjoys all rights to these island groups and their surrounding waters in accordance with international law, the ROC government does not recognize any claim to sovereignty over, or occupation of, these areas by other countries, irrespective of the reasons put forward or methods used for such claim or occupation."

521 *Certain Phosphate Iands in Nauru*, *supra* note 493, at para. 55.

522 Award on the Merits, para. 139. The ROC claims that being called the "Taiwan Authority of China" is an "inappropriate designation [and] is demeaning to the status of the ROC as a sovereign state". Furthermore, we have seen (unconfirmed) reports that "Taiwan was keen to send representatives to observe the hearings held at The Hague [...]. Unfortunately,

does not explicitly say that it did not apply the *Monetary Gold* principle because Taiwan is not a separate State under international law. In light of the Tribunal's silence on this point, the better reading of the Merits Award is that the Tribunal failed to consider whether it should apply the *Monetary Gold* principle at all with respect to Taiwan.

Irrespective of the *Monetary Gold* principle, in light of the Tribunal's "special responsibility" to satisfy itself that the claim was well-founded in fact and law, including as regards issues of jurisdiction, it would not have been improper for the Tribunal to have contacted Taiwan to request evidence (and perhaps even its views) as regards to the status of Itu Aba under Article 121(3) of UNCLOS. This is particularly the case given that the Tribunal reviewed and accepted a communication from the Chinese (Taiwan) Society of International Law, and given that Taiwanese authorities have occupied and administered TaiPing Dao (Itu Aba) for many years. Such an approach would have been a logical application of the Tribunal's power to "take all appropriate measures in order to establish the facts"

5.5 *The Tribunal Failed to State Adequate Reasons*

Article 10 of Annex VII to the Convention requires that the Award shall "state the reasons on which it is based". It is a fundamental principle of international law and a standard feature in contemporary international adjudication that any court or tribunal must give reasons for its decisions, *a fortiori* any decisions that are fundamental to its jurisdiction.[523]

---

due to the sensitive political and sovereignty issues involved, Taiwan's request to send a delegation was not granted by the Tribunal." See Taiwan's position on the website of the Ministry of Foreign Affairs at https://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=5B5A9134709EB875.

523 The I.C.J. has endorsed the requirement that an international judicial decision must be accompanied by a statement of reasons since its early judgments. For instance, in the Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), Nicaragua contested the validity of an arbitral award, inter alia, for it failing to state reasons. In examining Nicaragua's allegations, the Court acknowledged the requirement to provide reasons, albeit it ultimately found that the decision "deal[t] in logical order and in some detail with all relevant consideration and (…) it contain[ed] ample reasoning and explanations in support of the conclusions arrived at by the arbitrator"; Judgment, 18 November 1960, I.C.J. Reports 196 at 2016. *See also* Article 56(1), Statute of the International Court of Justice, "The judgment shall state the reasons on which it is based"; Article 29, Model Rules on Arbitral Procedure, International Law Commission, "The award shall, in respect of every point on which it rules, state the reasons on which it is based"; Article 32(2), International Chamber of Commerce, Arbitration Rules, 2017, "The award shall state the reasons upon which it is based"; Article 48(3) ICSID Convention, "The award shall deal with every question submitted to the Tribunal, and shall state the

In the investor-State dispute resolution context, an ICSID *ad hoc* committee has explained that statement of reasons "does not mean just any reasons, purely formal or apparent, but rather reasons having some substance, allowing the reader to follow the arbitral tribunal's reasoning, on facts and on law".[524] The committee further explained that "apparently relevant" reasoning would not suffice as reasons are required to be "sufficiently relevant", that is, "reasonably sustainable and capable of providing a basis for the decision".[525]

In our view, the Tribunal arguably failed to provide in its Merits Award "sufficiently relevant" reasons for its conclusions as regards the status of the Secondary High Tide Features under Article 121 (*i.e.*, Amboyna Cay, Flat Island, Loaita Island, Namyit Island, Nanshan Island, Sand Cay, Sin Cowe Island and Swallow Reef).

Before it turned to classifying the Secondary High Tide Features, the Tribunal set out factors that it would consider for the purposes of classifying the features in the South China Sea. The Tribunal observed, in particular, that "the capacity of a feature to sustain human habitation or an economic life of its own must be assessed on a case-by-case basis"[526] and that the "negotiating history clearly demonstrates the difficulty in setting, in the abstract, bright-line rules for all cases".[527] The Tribunal also made the important observation that features could not be categorised as islands or rocks by reference to their "size" alone:

> The Tribunal considers that the travaux make clear that – although size may correlate to the availability of water, food, living space, and resources for an economic life – size cannot be dispositive of a feature's status as a fully entitled island or rock and is not, on its own, a relevant factor. As noted by the International Court of Justice in Territorial and Maritime Dispute (Nicaragua v. Colombia), 'international law does not prescribe any minimum size which a feature must possess in order to be considered an island.[528]

---

reasons upon which it is based"; Article 47(i), ICSID Arbitration Rules, "The award shall be in writing and shall contain: (…) (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based".

524 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, para. 119.

525 *Id.* at para. 120.

526 Award, *supra* note 1, at para. 546.

527 *Id.* at para. 537.

528 *Id.* at para. 538.

Having made these observations, the Tribunal turned to classifying the Secondary High Time Features. The Tribunal determined that:

> Other high-tide features claimed by China atop coral reefs in the Spratly Islands are smaller in size than the above-described features, with surface areas of less than 0.14 square kilometres, but present similar characteristics. The Tribunal has examined Amboyna Cay, Flat Island, Loaita Island, Namyit Island, Nanshan Island, Sand Cay, Sin Cowe Island, and Swallow Reef for evidence of human habitation or economic life, but does not consider it necessary to discuss them individually. The Tribunal considers that if the six largest features described above are all to be classified as rocks for purposes of Article 121(3) of the Convention, the same conclusion would also hold true for all other high-tide features in the Spratly Islands.[529]

It is well-established that a tribunal "fails to give reasons" when the reader cannot:

> follow the reasoning of the Tribunal on points of fact and law [...] the requirement to state reasons is satisfied as long as the award enables one to follow how the Tribunal proceeds from Point A to Point B and eventually to its conclusion, even if it made an error of fact or law.[530]

The Tribunal arguably failed to state reasons for its conclusion that the Secondary High Tide Features. It is not possible to follow the Tribunal's reasoning in at least two respects: (1) by "not consider[ing] it necessary to discuss them individually", the Tribunal did precisely the opposite of what it said it would do i.e., it did not classify the Secondary High Tide Features on a "case-by-case" basis; and (2) the Tribunal drew a "bright-line rule for all cases" on the basis of size alone. Contrary to its conclusions on the relevant aspects of the test under UNCLOS, the Tribunal took a shortcut determining that, merely because the Secondary High Tide Features were smaller than the six largest features (which the Tribunal deemed were rocks), it would "hold true" that all other hide-tide features in the Spratly Islands would also be "rocks". The contradictions in the Tribunal's approach are, in any event, manifest with respect to its findings as regards the Secondary High Tide Features.

---

529 *Id.* at para. 407.

530 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the *ad hoc* committee, 6 January 1988, paras. 5.08–09.

6 ANNEX 1

TABLE 1 Small features mutually recognised as being fully entitled under Article 121(2) of UNCLOS

Feature	Location	Size (Area)	Population	Presence of potable water	Vegetation and biology	Soil and agricultural potential
Itu Aba (Taiping Dao/Ligaw Island)	South China Sea	0.43 km²	Approx. 600 military and technical personnel Multiple buildings, lighthouse, and runway	Yes Fresh/mix water wells	Yes Heavily forested	Yes Limited cultivation
Isla Aves (Birds Island)	Caribbean Sea	0.032 km² Storm surges may submerge the entire islet, changing its size and reshaping its topography During hurricanes, the island can be completely submerged	Uninhabited Permanently staffed scientific station and naval contingent	No	Nesting site to green sea turtles and birds	No Mostly sandy and scarce vegetation (scrubby bushes)
Clipperton	Pacific Ocean	6 km²	Uninhabited since 1945 Visited by French Patrol and scientific researchers	Yes Stagnant Fresh-water lagoon	Scattered grasses and coconut palms	No

Presence of fishermen	Commercial operations	Effective control	Maritime claims	Legal/Political developments
Yes Small groups	Yes Scarce mining and port facilities	Taiwan	EEZ and CS	The disputing States are China (including Taiwan), Philippines and Vietnam.
Yes Fishing is the main economic activity	No	Venezuela	TS, EEZ, CS	An arbitration Award of 1865, by the Queen of Spain, established the Venezuelan sovereignty over the island. Venezuela claims it as an island. It has been given full effect in various delimitation agreements, including United States-Venezuela (1978), the Netherlands (Antilles)-Venezuela (1978) and Venezuela-France Agreement (1980). On 26 July 1978, Venezuela enacted legislation establishing an EEZ along its mainland coasts and islands. Dominica has traditionally claimed sovereignty as it lies within its EEZ. Nevertheless, it dropped its claims in 2006, soon after joining the ALBA alliance. Venezuela's position on maritime claims is complex as it is not signatory of UNCLOS. As such, its claims to an EEZ around Isla Aves have not been formalised.
Yes Tuna fishing	Mining settlement and Guano deposits	France	EEZ, CS	Currently a Minor Oversea Territory of France. Mexico and France signed a compromise in 1909, agreeing to submit the dispute over Clipperton to arbitration and appointed King Victor Emanuel of Italy as the sole arbitrator. In 1931, the King rendered an arbitral award declaring French sovereignty over the island. After some fishermen incidents, Mexico claimed the feature should be qualified as a rock in the sense of Article 121(3) of UNCLOS. Consequently, in 2017, Mexico and France concluded an agreement on fishing activities of Mexican vessels within 200 nautical miles surrounding Clipperton, which interestingly avoided the expression EEZ. In 2010, France deposited a list of geographical coordinates of points defining the outer limits of the EEZ and CS of the island.

TABLE 1 Small features mutually recognised as being fully entitled under Article 121(2) of UNCLOS (*cont.*)

Feature	Location	Size (Area)	Population	Presence of potable water	Vegetation and biology	Soil and agricultural potential
Jan Mayen	Arctic Ocean	373 km²	No settled population Military, scientific and radio personnel. Presence landing field	No	Important bird area	Volcanic island

TABLE 2 Small features unilaterally claimed as fully-entitled islands under Article 121(2) of UNCLOS

Feature	Location	Size (Area)	Population	Presence of potable water	Vegetation and biology	Soil and agricultural potential
Itu Aba (Taiping Dao/ Ligaw Island)	South China Sea	0.43 km²	Approx. 600 military and technical personnel Multiple buildings, lighthouse, and runway	Yes Fresh/mix water wells	Yes Heavily forested	Yes Limited cultivation

Presence of fishermen	Commercial operations	Effective control	Maritime claims	Legal/Political developments
Yes	Yes Whaling station	Norway	TS, EEZ, CS	In 1976, The Norwegian Parliament enacted legislation establishing 200-mile around its coasts. Then, by Royal Decree taking effect on 29 May 1980, the Norwegian Government established a 200-mile fishery zone specifically around Jan Mayen. The Decree provided that the fishery zone should not extend beyond the median line in relation to Greenland. On 28 May 1980, Iceland and Norway concluded an Agreement concerning fishery and continental shelf. In the agreement, the Parties agreed to refer outer continental shelf claims to a Conciliation Commission. In referring to the legal status of Jan Mayen, the Commission concluded that Jan Mayen must be considered as an island, thus entitled to a territorial sea, an economic zone and a continental shelf. In its Judgment of 14 June 1993 concerning the Maritime Delimitation in the area between Greenland and Jan Mayen, the ICJ fixed a delimitation line for both the continental shelf and the fishery zones of Denmark and Norway.

Presence of fishermen	Commercial operations	Effective control	Maritime claims	Legal/Political developments
Yes Small groups	Yes Scarce mining and port facilities	Taiwan	EEZ and CS	The disputing States are China, Taiwan, Philippines and Vietnam.

TABLE 2 Small features unilaterally claimed as fully-entitled islands under Article 121(2) of UNCLOS (*cont.*)

Feature	Location	Size (Area)	Population	Presence of potable water	Vegetation and biology	Soil and agricultural potential
Tromelin	Indian Ocean	0.80 km²	Uninhabited No continuous human presence There is no harbour nor anchorages on the island, but a 1,200-metre airstrip	No	Limited Significant numbers of seabirds	No
Bassas da India	Mozambique Channel	0.2 km²	Uninhabited	No	No	No
Juan de Nova	Mozambique Channel	4.4 km²	Uninhabited	No	Identified as an important Bird Area	No

Presence of fishermen	Commercial operations	Effective control	Maritime claims	Legal/Political developments
No	No	France	TS, EEZ by France. Basepoint in measuring the maritime areas by Mauritius	In 1968, France placed it under the administration of a commissioner residing on the island of Réunion. In 1978, France issued the Decree No. 78-146 (Article 1, pp. 16–21) unilaterally establishing sovereignty and an EEZ of 188 nautical miles from the outer limit of the French Republic off the coasts the scattered islands, subject to delimitation agreements with neighboring countries. In contrast, the Constitution of Mauritius included Tromelin as a part of the Mauritian territory. Also, in 2008, Mauritius deposited with the UN Department for Ocean Affairs and the Law of the Sea, the charts and lists of geographical coordinates of basepoints and baselines for the maritime zones, including Tromelin, representing the basepoints and defining the baselines from which the maritime zones of Mauritius shall be measured (see p. 1). The controversy over Tromelin has led to the postponing of the ratification by the French Parliament of a Framework Agreement entered into by France and Mauritius in June 2010, providing for joint economic, scientific and environmental management (cogestion) of the island and of surrounding maritime areas.
No	No	France since 1897	TS, EEZ	In 1968, France placed it under the administration of a commissioner residing on the island of Réunion. In 1978, France issued the Decree No. 78-146 (Article 1, pp. 16–21) establishing unilaterally sovereignty and an EEZ of 188 nautical miles from the outer limit of the French Republic off the coasts the scattered islands, subject to delimitation agreements with neighbouring countries.
No	Guano deposits were exploited from the start of the XX century until 1970	France since 1972	TS, EEZ	In 1968, France placed it under the administration of a commissioner residing on the island of Réunion. In 1978, France issued the Decree No. 78-146 (Article 1, pp. 16–21) establishing unilaterally sovereignty and an EEZ of 188 nautical miles from the outer limit of the French Republic off the coasts the scattered islands, subject to delimitation agreements with neighboring countries.

TABLE 2 Small features unilaterally claimed as fully-entitled islands under Article 121(2) of UNCLOS (*cont.*)

Feature	Location	Size (Area)	Population	Presence of potable water	Vegetation and biology	Soil and agricultural potential
Glorioso Islands	Indian Ocean Southern Africa, Northwest of Madagascar)	5 km² Includes: Ile Glorieuse, Ile du Lys, Verte Rocks, Wreck Rock, and South Rock	Small Military and scientific (weather station) personnel	No	Yes Guano and coconuts (Glorieuse, Ile du Lys, Verte)	No
Victoria Island	Arctic Ocean	10.8 Km²	Uninhabited	No	No	Almost entirely covered by an ice cap
Henrietta and Jeannette	Arctic Ocean	12 Km²	Uninhabited A polar station was established in 1937 but closed in 1963	No	No	Almost entirely covered by an ice cap Composed of Volcanic rock
Europa Island	Mozambique Channel	28 Km²	Small military and scientific (weather station) personnel	No	Abundance of wood and wildlife sanctuary	No
Johnston Atoll (Johnston Island, Sand Island, Akau and Hikina)	North Pacific Ocean	2.63 km²	Uninhabited In previous years, average of 1,100 US military and contractors present; all had left by 2005	No	Yes Terrestrial and aquatic wildlife	Yes Limited cultivation
Trindade	Southern Atlantic Ocean	10.1 km²	32 Brazilian Navy personnel	Limited Natural springs have largely dried up	Yes	No

Presence of fishermen	Commercial operations	Effective control	Maritime claims	Legal/Political developments
No	No economic activity	France since 1892	TS and EEZ	In 1978, France issued the Decree No. 78–146 (see Article 1, pp. 16–21) establishing unilaterally sovereignty and an EEZ of 188 nautical miles from the outer limit of the French Republic off the coasts the scattered islands, subject to delimitation agreements with neighboring countries.
No	No	Russia	CS	Administered as part of Franz Josef Land and belongs to the Arkhangelsk Oblast administrative division of the Russian Federation.
No	No	Russia	CS	Not included in the US purchased of Alaska from Russia in 1867, neither have them been claimed by the US.
No	No	France	EEZ	In 1978, France issued the Decree No. 78–146 (Article 1, pp. 16–21) establishing unilaterally sovereignty and an EEZ of 188 nautical miles from the outer limit of the French Republic off the coasts the scattered islands, subject to delimitation agreements with neighbouring countries.
No	No Previously used for mining and nuclear testing	United States (since 1858)	EEZ and TS	Annexed by the US and the Kingdom of Hawaii in 1858 It was designated as a wildlife refuge in 1926, and then taken over by the US Navy in 1934, and then the US Air Force in 1948. The atoll was used for high-altitude nuclear tests in the 1950s and 1960s and was used as a storage and disposal site for chemical weapons until the 2000s. The weapons facility on the atoll was closed in May 2005.
No	No	Brazil (since 1822)	[EEZ and TS]	

TABLE 2 Small features unilaterally claimed as fully-entitled islands under Article 121(2) of UNCLOS (*cont.*)

Feature	Location	Size (Area)	Population	Presence of potable water	Vegetation and biology	Soil and agricultural potential
Heard Island and McDonald Islands	Indian Ocean	412 km²	Uninhabited	No	No	No
Howland Island	North Pacific Ocean	1.6 km²	Uninhabited	No	Yes	[No]
Jarvis Island	South Pacific Ocean	4.5 km²	Uninhabited	No	Yes	[No]
Wake Island	North Pacific Ocean	6.5 km²	No indigenous inhabitants (there are approximately 100 military personnel and civilian contractors)	Yes	No	No

Presence of fishermen	Commercial operations	Effective control	Maritime claims	Legal/Political developments
No	No Limited fishing in surrounding waters	Australia (since 1947)	EEZ and TS	The UK transferred these islands to Australia in 1947. There are no disputes regarding the islands.
No	No	United States (since 1857)	EEZ and TS	
No	No	United States (since 1935)	EEZ and TS	Discovered by the British in 1821. Annexed by the US in 1858 but abandoned in 1879. The UK then annexed the island in 1889. The US occupied and reclaimed the island in 1935. The island was abandoned after World War II.
No	Yes Provides services to military personnel and contractors. All foods and manufactured goods are imported	United States	EEZ and TS	Annexed in 1899 for a cable station. Air and naval base constructed in 1940. In 1941, the island was captured by the Japanese and held until the end of World War II. Since 1974, the island's airstrip has been used by the US military.

Prosecuting Crimes against Humanity before International Crimes Tribunal in Bangladesh: A Nexus with an Armed Conflict

*Yudan Tan**

1 Introduction

The International Crimes Tribunal in Bangladesh was created in 2010 under the amended *International Crimes* (*Tribunals*) *Act* 1973 (1973 Act) to deal with international crimes, including crimes against humanity committed during the liberation war of 1971. Scholars and the international community have voiced legitimacy concerns that the Tribunal's trial will not be fair, transparent or impartial for its inconsistency with international standards concerning the definitions of crimes, evidentiary rules, death penalty, compensation to victims, and the selection of judges.[1] Instead of analysing the legitimacy issues, this article mainly aims to examine the issue of a nexus with an armed conflict for crimes against humanity from Third World Approaches to International Law (TWAIL)[2] perspective.

According to TWAIL, as Antony Anghie wrote, international law has been used to discipline and subordinate non-European peoples. "[T]hese doctrines

* Postdoc at the International Academy of the Red Cross and Red Crescent in Soochow University, China.

1 Zakia Afrin, *The International War Crimes* (*Tribunal*) *Act, 1973 of Bangladesh*, Indian Yearbook of International Law and Policy 341 (2009); Bianca Karim & Tirza Theunissen, *Bangladesh*, *in* International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion 114 (Dinah Shelton ed., 2011); *Bangladesh: Upgrade War Crimes Law*, Human Rights Watch (July 8, 2009), https://www.hrw.org/news/2009/07/08/bangladesh-upgrade-war-crimes-law; *Letter to Prime Minister Sheikh Hasina Re: International Crimes* (*Tribunals*) *Act*, Human Rights Watch (July 8, 2009), https://www.hrw.org/news/2009/07/08/letter-prime-minister-sheikh-hasina-re-international-crimes-tribunals-act; Human Rights Watch, Ignoring Executions and Torture: Impunity for Bangladesh's Security Forces (2009), https://www.hrw.org/sites/default/files/reports/bangladesh0509webwcover.pdf; Abdur Razzaq, *The Tribunals in Bangladesh: Falling Short of International Standards*, *in* Trials for International Crimes in Asia 346 (Kirsten Sellars ed., 2015).

2 Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 Chinese Journal of International Law 77 (2003).

[of international law] were created for the explicit purpose of excluding the colonial world, or else, are based on an exclusion … as when positivist jurists dismiss the state practice of the uncivilized Eastern states as irrelevant to the formulation of international law".[3] The field of international criminal law is not an exception. The Third World's participation is less concerned for the formation of norms in this field. The design of crime definitions, attribution doctrines, and procedural norms in international criminal law are not neutral.[4] In addition to this, scholars noted that due to the human rights movement, norms of international criminal law also concern the interest of ordinary people from the post-colonial world. Rules and institutions of international criminal law sometimes unequally facilitate Third World governments to prosecute international crimes committed by opposing non-State entities of Third World States.[5] The practice of international criminal justice is criticised for its selectivity[6] and double standards.[7]

It is less controversial that the notion of crimes against humanity is considered as an international crime. It is also generally asserted that the crime against humanity is disassociated with a nexus with an armed conflict under customary law now. However, it is not clear as to whether the crime was disassociated with the nexus before or in the liberation war of 1971. This question is less concerned by European-colonial States, while it still plays a crucial role in prosecuting crimes against humanity committed in Bangladesh. When the amended 1973 Act, applied to prosecuting crimes committed in 1971, was adopted or approved (*ex post facto* law), an observation on these crimes under customary law at the material time is of importance. This article analyses the issue of the nexus with an armed conflict for crimes against humanity in the Bangladeshi Tribunals at the material time. The central question here is whether the notion of crimes against humanity required a nexus with an armed conflict before or in 1971.

---

3 Antony Anghie, Imperialism, Sovereignty and the Making of International Law 315 (2005).

4 Sergey Vasiliev, *The Crises and Critiques of International Criminal Justice*, *in* The Oxford Handbook of International Criminal Law 25 (Kevin Heller et al. eds., forthcoming 2020).

5 Asad G. Kiyani, *Third World Approaches to International Criminal Law*, 109 American Journal of International Law Unbound 255 (2015).

6 Kiyani, *supra* note 5; Asad Kiyani, *Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity*, 14 Journal of International Criminal Justice 939 (2016); John Reynolds & Sujith Xavier, *'The Dark Corners of the World': TWAIL and International Criminal Justice*, 14 Journal of International Criminal Justice 959 (2016).

7 Wolfgang Kaleck, Double Standards: International Criminal Law and the West 109–17 (2015).

This article consists of five sections including this introduction and conclusion. Section II analyses the 1973 Act and the practice of Bangladeshi Tribunals in relation to prosecuting crimes against humanity. Section III analyses the issue of whether the notion of crimes against humanity required a nexus with an armed conflict as a legal element in customary law. This section involves a historical survey on how the powerful States have shaped the notion of crimes against humanity and defined a nexus with an armed conflict under customary law. Section IV discusses the disappearance of a nexus with an armed conflict for crimes against humanity under customary law. In closing, Section V highlights final conclusions.

2 Crimes against Humanity before the International Crimes Tribunal in Bangladesh

In order to better understand the background of prosecution of international crimes in Bangladesh, this section firstly examines the establishment of the International Crimes Tribunals, and then briefly analyses the nexus issue for crimes against humanity.

The establishment of the International Crimes Tribunals in Bangladesh is pertinent to the Bangladesh Liberation War, which lasted for about nine months from 26 March to 16 December in 1971. It has been reported that crimes under international law, including large-scale killing, torture, rape, and persecution, were committed during the war.[8] Accordingly, the Bangladesh Government passed the 1973 Act. The 1973 Act provides "for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law".[9] There existed investigations of war crimes committed by members of the Pakistan Army, but no one was convicted under this Act due to a tripartite agreement among Pakistan, Bangladesh, and India. Some collaborators of the Pakistan Army were tried in a separate process under the 1972 *Bangladesh Collaborators* (*Special Tribunals*) *Order*, but most of them were released according to the 1973 governmental clemency.[10] The 1973 Act laid dormant for almost four decades, and no

8 Rounaq Jahan, *Genocide in Bangladesh*, *in* Century of Genocide: Critical Essays and Eyewitness Accounts 245–53 (Samuel Totten & William S. Parsons eds., 3rd ed. 2009).

9 The International Crimes (Tribunals) Act 1973 (Act No. XIX of 1973) (Bangl.).

10 Human Rights Watch, *supra* note 1, at 12.

proceeding took off to bring perpetrators of these crimes to justice until the Bangladesh Government decided to try war criminals in 2009.[11] The 1973 Act was slightly amended by the International Crimes (Tribunals) (Amendment) Act 2009.[12] According to the 1973 Act, as amended in 2009, an International Crimes Tribunal was created to deal with crimes committed since the 1971 Liberation War. As a result, the International Crimes Tribunal-1 (ICT-1) and International Crimes Tribunal-2 (ICT-2) were established in 2010 and 2012 respectively. The Appellate Division of the Bangladesh Supreme Court has jurisdiction to hear and determine appeals from judgments of the two ICTs.[13]

With regard to the jurisdiction of the two ICTs, according to Section 3(1) of the 1973 Act, the two ICTs have:

> [T]he power to try and punish any individual or group of individuals, or organizations, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2).[14]

The crimes mentioned in sub-section (2) covers crimes against humanity, crimes against peace, genocide, war crimes, violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949, any other crimes under international law, attempt, abetment or conspiracy to commit any such crimes, and complicity in or failure to prevent commission of any such crimes. The notion of crimes against humanity under this Act is defined as follows:

> Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or

---

11 International Commission of Jurists, The Events in East Pakistan, 1971 (1972); For a short history of the events and impunity, *see* Human Rights Watch, *supra* note 1, at 9–17; *War Criminal Trial under Int'l Crime Act*, Daily Star, (Mar. 26, 2009), http://www.thedailystar.net/story.php?nid=81408 (the Tribunal's jurisdiction is limited to "crimes committed within the territory of Bangladesh"; thus, crimes committed by Bangladeshi collaborators in Pakistan is not covered under the 1973 Act).

12 The International Crimes (Tribunals) (Amendment) Act 2009 (Act No. LV of 2009) (Bangl.).

13 The International Crimes (Tribunals) Act 1973 (Act No. XIX of 1973), § 21(1) (Bangl.).

14 *Id.* § 3(1).

> persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated.[15]

Obviously, a nexus with an armed conflict is not mentioned in this Act. A literal reading of the definition that the notion of crimes against humanity did not require a nexus with an armed conflict is less convincing. The following paragraphs resort to case law for clarification.

In practice, as of December 2019, the ICT-1 in Bangladesh has delivered 30 judgments. The ICT-2 has also delivered 11 judgments from 2012 to 2015, but it has not been functioning since September 2015.[16] Until now, 97 individuals have been convicted for charges of crimes against humanity, genocide, or war crimes by the two ICTs.[17] Nearly all of the accused have been charged and convicted for crimes against humanity.

When clarifying its applicable law, the two ICTs first stressed that their applicable law 1973 Act is *ex-post facto* legislation. The tribunals added that *ex-post facto* legislation is permitted because international tribunals, for example, the two UN *ad hoc* tribunals, were constituted under retrospective statutes.[18] The ICTs seem to ignore that the two *ad hoc* tribunals' jurisdiction over crimes is limited to crimes existent under customary international law.[19] The main issue of *ex-post facto* legislation is not that the tribunal must be founded prospectively, but instead that the tribunal shall not apply law retrospectively so as to avoid violating the principle of legality. In the absence of relevant treaty or national criminal prohibitions in Bangladesh at the material time before or in 1971, how can its tribunals prosecute crimes against humanity without violating the principle of non-retroactivity, which prohibits domestic authorities interpreting a crime and its elements to convict persons retrospectively? The existing customary international rules play a vital role in this circumstance.

---

15 *Id.* § 3(2)(a).

16 It is said that the ICT-2 was founded to speed up the work of the ICT-1.

17 Nearly half of the accused have been tried *in absentia*.

18 *See* Prosecutor v. Khan, Case No. 01 of 2013, Judgment, ¶¶ 71–72 (Int'l Crim. Trib. for Bangladesh Nov. 3, 2013); Prosecutor v. Qaiser, Case No. 04 of 2013, Judgment, ¶ 363 (Int'l Crim. Trib. for Bangladesh Dec. 23, 2014); Mollah v. Government of Bangladesh, Case No. 24–25 of 2013, Judgment (Supreme Court of Bangladesh Sept. 17, 2013); Prosecutor v. Sattar, Case No. 05 of 2018, Judgment, ¶ 6 (Int'l Crim. Trib. for Bangladesh Dec. 11, 2019). This is not the place to discuss in detail whether customary international law is applicable at the two domestic tribunals.

19 Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (Tadić Appeals Chamber decision on jurisdiction).

An appropriate understanding for applying the *ex-post facto* 1973 Act should be that these crimes enacted in the domestic law contain similar rules as those under customary law. Other scholars' observation also supports such an understanding, that courts in Bangladesh tend not to apply customary international law but instead give effect to domestic law containing similar norms.[20] The two ICTs also reiterated the importance of customary international law. The ICTs clarified that they are domestic mechanisms set up to try crimes against humanity committed in violation of laws of war and customary law. They pointed out that "[t]here is nothing repugnant to CIL [customary international law] in the Act of 1973, [...] [rather it] is consonant with the provisions of CIL".[21] Thus, although customary law is not its applicable law, the ICTs have tried to construe legal elements of crimes against humanity in the 1973 Act to be consistent with that under customary law.

With regard to the nexus issue for crimes against humanity, the ICT-1 adopted two approaches in their judgments. Firstly, the ICT-1 in its early judgments repeatedly construed that:

> Crime against humanity can be committed even in peacetime; the existence of armed conflict is, by definition, not mandatory. Neither in the preamble nor in the jurisdiction sections of the Act was it mentioned that crime against humanity requires the existence of an armed conflict.... However [,] no one denies the fact that there was an armed conflict in 1971.[22]

---

20 Karim & Theunissen, *supra* note 1, at 106.

21 Mollah v. Government of Bangladesh, Case No. 24–25 of 2013, Judgment, at 132 (Supreme Court of Bangladesh Sept. 17, 2013).

22 Prosecutor v. Sayeedi, Case No. 01 of 2011, Judgment, ¶ 32(1) (Int'l Crim. Trib. for Bangladesh Feb. 28, 2013); Prosecutor v. Azam, Case No. 06 of 2011, Judgment, ¶ 32(1) (Int'l Crim. Trib. for Bangladesh July 15, 2013); Prosecutor v. Chowdhury, Case No. 02 of 2011, Judgment, ¶ 33(1) (Int'l Crim. Trib. for Bangladesh Oct. 1, 2013); Prosecutor v. Nizami, Case No. 03 of 2011, ¶ 40 (Int'l Crim. Trib. for Bangladesh Oct. 29, 2014); Prosecutor v. Khokon, Case No. 04 of 2013, Judgment, ¶ 29 (Int'l Crim. Trib. for Bangladesh Nov. 13 2014); Prosecutor v. Hossain, Case No. 01 of 2013, Judgment, ¶ 30 (Int'l Crim. Trib. for Bangladesh Nov. 24, 2014); Prosecutor v. Islam, Case No. 05 of 2013, Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh Dec. 30 2014); Prosecutor v. Engineer, ICT-BD 01 of 2014, Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh Feb. 24, 2015); Prosecutor v. Hachhan, Case No. 02 of 2014, Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh June 9 2015); Prosecutor v. Haque, Case No. 03 of 2014, Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh Aug. 11 2015); Prosecutor v. Haque, Case No. 04 of 2014, Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh Feb. 2, 2016); Prosecutor v. Ahmd, Case No. 01 of 2015, Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh May 3, 2016); Prosecutor v. Rahman, Case No. 03 of 2015, Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh June 1, 2016); Prosecutor v. Haque, Case No. 02 of 2015, Judgment, ¶ 4 (Int'l Crim. Trib. of Bangladesh July 18, 2016); Prosecutor v. Hossain, Case No. 04 of 2015,

Accordingly, the ICT-1 confirmed that crimes against humanity require no nexus with an (international) armed conflict in 1971. There is no nexus of an armed conflict for crimes against humanity in 1971 under customary law. However, it is unclear whether the ICT-1 considered that the nexus was required before but that it disappeared in 1971. Secondly, the ICT-1 in its later judgments pointed out that the offences of crimes against humanity for which these accused are indicted are "recognized as international crimes as happened in war time situation".[23] The tribunal did not mention the nexus issue for crimes against humanity under customary law in 1971 but simply referred to the fact of the existence of the war. It appears that the tribunals intentionally avoided to clarify the legal issue. If a nexus was required, a conviction of the crimes is consistent with the principle of legality because the nexus element was satisfied by the fact of the Liberation War; if a nexus was not required, the existence of the war was only a factual background. In this way, their convictions of crimes against humanity would not be challenged for the lack of a nexus with an armed conflict. Thus, the ICT-1 did not touch on the issue of whether crimes against humanity required an armed conflict nexus under customary law at the material time in 1971.

Unlike the ICT-1, the ICT-2 held that "[i]t is the 'context' [of the 1971 war of liberation] that transforms an individual's act or conduct into a crime

---

Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh Aug. 10, 2016); Prosecutor v. Sardar, Case No. 06 of 2015, Judgment, ¶ 4 (Int'l Crim. Trib. for Bangladesh Dec. 5, 2016). *See also* Prosecutor v. Prodhan, ICT-BD 01 of 2016, Judgment, ¶¶ 635, 639–40 (Int'l Crim. Trib. for Bangladesh Apr. 19, 2017).

23 Prosecutor v. Miah, Case No. 03 of 2016, Judgment, ¶ 8 (Int'l Crim. Trib. for Bangladesh Nov. 2017); Prosecutor v. Tarafdar, Case No. 06 of 2016, Judgment, ¶ 9 (Int'l Crim. Trib. for Bangladesh Jan. 10 2018); Prosecutor v. Ahmed, Case No. 05 of 2015, Judgment, ¶ 9 (Int'l Crim. Trib. for Bangladesh Mar. 13 2018); Prosecutor v. Fakir, Case No. 04 of 2016, Judgment, ¶ 9 (Int'l Crim. Trib. for Bangladesh May 10, 2018); Prosecutor v. Talukder, Case No. 08 of 2016, Judgment, ¶ 9 (Int'l Crim. Trib. for Bangladesh July 17, 2018); Prosecutor v. Shikder, Case No. 10 of 2016, Judgment, ¶ 10, 12 (Int'l Crim. Trib. for Bangladesh Aug. 13, 2018); Prosecutor v. Ali, Case No. 05 of 2016, Judgment, ¶ 9 (Int'l Crim. Trib. for Bangladesh Nov. 5, 2018); Prosecutor v. Majid, Case No. 07 of 2016, Judgment, ¶ 10 (Int'l Crim. Trib. for Bangladesh Mar. 28, 2019); Prosecutor v. Hidaetulla, Case No. 01 of 2017, Judgment, ¶ 9 (Int'l Crim. Trib. for Bangladesh Apr. 24, 2019); Prosecutor v. Rahman, Case No. 01 of 2018, Judgment, ¶ 12 (Int'l Crim. Trib. for Bangladesh June 27, 2019); Prosecutor v. Samad, Case No. 04 of 2018, Judgment, ¶¶ 7, 9 (Int'l Crim. Trib. for Bangladesh Aug. 27, 2019); Prosecutor v. Mondol, Case No. 02 of 2017, Judgment, ¶ 9 (Int'l Crim. Trib. for Bangladesh Oct. 15, 2019); Prosecutor v. Sattar, Case No. 05 of 2018, Judgment, ¶ 198 (Int'l Crim. Trib. for Bangladesh Dec. 11, 2019).

against humanity".[24] The ICT-2 considered the armed conflict not only as a factual background but also as a legal context. The Appellate Division of the Bangladesh Supreme Court had once discussed the origin of crimes against humanity but did not analyse the nexus issue in detail.[25]

As observed above, the 1973 Act provides no answer to the question of whether crimes against humanity require a nexus with an armed conflict. Case law of the ICTs also did not assist in understanding the nexus issue. Judgments of the ICT-1 did not clarify but confused the nexus issue. The 1973 Act and the two ICTs' practice, therefore, are less valuable in clarifying the nexus issue. The following parts turn to other authorities and jurisprudence of international tribunals.

3 The Nexus with an Armed Conflict for Crimes against Humanity in Customary Law

After World War II, there were various definitions of crimes against humanity as international crimes.[26] Scholars' opinions also differ on whether a nexus

24 *See* Prosecutor v. Alim, Case No. 01 of 2012, Judgment, ¶ 118 (Int'l Crim. Trib. for Bangladesh Oct. 9, 2013); *See also* Prosecutor v. Azad, Case No. 05 of 2012, Judgment, ¶ 78 (Int'l Crim. Trib. for Bangladesh 21 Jan. 2013); Prosecutor v. Molla, Case No. 02 of 2012, Judgment, ¶ 79 (Int'l Crim. Trib. for Bangladesh Feb. 5, 2013); Prosecutor v. Kamaruzzaman, Case No. 03 of 2012, Judgment, ¶ 133 (Int'l Crim. Trib. for Bangladesh May 9, 2013); Prosecutor v. Mujahid, Case No. 04 of 2012, Judgment, ¶ 123 (Int'l Crim. Trib. for Bangladesh July, 17 2013); Prosecutor v. Uddin, Case No. 01 of 2013, Judgment, ¶ 405 (Int'l Crim. Trib. for Bangladesh Nov. 3, 2013); Prosecutor v. Ali, Case No. 03 of 2013, Judgment, ¶ 109 (Int'l Crim. Trib. for Bangladesh Nov. 2, 2014); Prosecutor v. Qaiser, Case No. 04 of 2013, Judgment, ¶¶ 925, 930 (Int'l Crim. Trib. for Bangladesh Dec. 23, 2014); Prosecutor v. Sobhan, Case No. 01 of 2014, Judgment, ¶¶ 532, 539 (Int'l Crim. Trib. for Bangladesh Feb. 18, 2015); Prosecutor v. Rahman, Case No. 02 of 2014, Judgment, ¶¶ 5, 30, 262 (Int'l Crim. Trib. for Bangladesh May 20, 2015); Prosecutor v. Mallik, Case No. 03 of 2014, Judgment, ¶¶ 93, 273 (Int'l Crim. Trib. for Bangladesh July 16, 2015).

25 *See* Mollah v. Government of Bangladesh, Case No. 24–25 of 2013, Judgment, ¶¶ 152–58 (Supreme Court of Bangladesh Sept. 17, 2013).

26 *See* Charter of the International Military Tribunal art. 6(c), opened for signature Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (entered into force Aug. 8, 1945) [hereinafter *Nuremberg Charter*]; International Military Tribunal for the Far East Charter art. 5(c), opened for signature Jan. 19, 1946, T.I.A.S. 1589; Allied Control Council Law No. 10 art. II(1)(a), Dec. 20, 1945; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, May 25, 1993 (amended 2002); Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994 (amended 2006); Rome Statute of the International Criminal Court art. 7, opened for signature July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1,

with an armed conflict is a legal requirement for this crime. This section mainly addresses the notion of crimes against humanity and the existence of a nexus with an armed conflict as a legal element for crimes against humanity from an historical perspective.

3.1 *The Notions of Crimes against Humanity in International Law*

Definitions of crimes against humanity are different concerning the issue of the nexus with an armed conflict. According to the Nuremberg and Tokyo Charters as well as the 1950 International Law Commission (ILC) Nuremberg Principles, a nexus with an armed conflict was a legal requirement. By contrast, this nexus was omitted in the 1945 Control Council Law No. 10 and was abandoned in the 1998 Rome Statute of the International Criminal Court (Rome Statute). Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), 1993 also explicitly referred to a link with an armed conflict; however, Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), 1994 did not refer to armed conflict despite all offences being committed in the context of a civil war. The 1950, 1991, and 1996 versions of the Draft Code of Offences (Crimes) do not refer to a connection with an armed conflict.[27]

These definitions show a lack of uniformity of the text of crimes against humanity. The existence of different definitions would not inherently undermine the claim that there is a consensus on crimes against humanity as an

---

2002) (amended 2010) [hereinafter *Rome Statute*]; Statute of the Special Court for Sierra Leone art. 6(1), Jan. 16, 2002; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 5, Oct. 27, 2004; Statute of the Iraqi Special Tribunal art. 12, 43 I.L.M. 231 (2004); Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences § 5, June 6, 2000; Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990 arts. 4(b), 6, Jan. 30, 2013, 52 I.L.M. 1028 (2013).

27 In fact, the 1950 and 1991 drafts of the ILC's Draft Code of Offences (Crimes) avoided using the term "crimes against humanity". See Text of a Draft Code of Offences against the Peace and Security of Mankind suggested as a Working Paper for the International Law Commission, [1950] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 277, U.N. Doc. A/CN.4/SER.A/1950/Add.1; *Report of the International Law Commission on the work of its forty-third session*, 46 U.N. GAOR Supp. No. 10, ¶176, U.N. Doc A/46/10 (1991), *reprinted in* [1991] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 96, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) (Article 21. Systematic or mass violations of human rights); Draft Code of Crimes against the Peace and Security of Mankind, 51 U.N. GAOR Supp. No. 10, ¶ 50, U.N. Doc A/51/10 (1996), *reprinted in* [1996] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 47, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

international crime under customary law. However, the various definitions indicate different understandings of nexus element of these crimes in customary law. These understandings are related to the issue of what makes an inhumane act a crime against humanity. Competing views exist in academia on this question.[28] One viewpoint is that, from a historically descriptive perspective, most of the crimes were planned and committed by State actors, who are generally not the physical perpetrators who committed the crimes. It is likely that they would go unpunished without the availability of international jurisdiction.[29] After examining the establishment of the International Military Tribunal (IMT) in Nuremberg and the International Military Tribunal of Far East (IMTFE) in Tokyo and the historic experience of mass crimes in Cambodia, in the former Yugoslavia, and in Rwanda, Judge Kaul of the International Criminal Court (ICC) concluded that "historic origins are decisive in understanding the specific nature and fundamental rationale of the category of international crime".[30] He added that "a demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation".[31] The historical experience is vital to understanding what the fundamental rationale of crimes against humanity is and how the nexus element of the crimes against humanity has come and changed.

3.2 *A Nexus with an Armed Conflict: Two Theories*

Currently, it is generally agreed that the notion of crimes against humanity does not require a nexus with an armed conflict. To date, national legislation of almost 60 States, including the UK, the US, Canada, Germany, Australia, New Zealand, the Philippines, and Vietnam as well as some African States, do not

28 Margaret M. deGuzman, *Crimes Against Humanity*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 121–38 (W.A. Schabas & N. Bernaz eds., 2011); KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME 1: FOUNDATIONS AND GENERAL PART 55–56 (2013); Situation in the Republic of Kenya, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, at 29 n. 62 (Mar. 31, 2010).

29 As thoroughly demonstrated by Margaret deGuzman, there are four approaches, and each approach has its merits and flaws to some extent. None of the four approaches could provide an entirely rational argument as regards every specific issue. *See* deGuzman, *supra* note 28.

30 Situation in the Republic of Kenya, ICC-01/09, Dissenting Opinion of Judge Hans-Peter Kaul, ¶¶ 58–65 (Mar. 31, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_02409.pdf.

31 *Id.* ¶ 65.

require a link with an armed conflict for crimes against humanity.[32] The ILC also endorsed the view of no nexus with an armed conflict in its recent draft convention on crimes against humanity.[33] However, scholars' opinions differ with respect to a nexus with an armed conflict as a legal element for crimes against humanity in the past and the disappearance of such a nexus.

Two theories exist about this issue. The Steady State theory argues that the link with an armed conflict was never a legal but a jurisdictional requirement since the 1945 IMT in Nuremberg. Thus, it is not necessary to discuss when this link has disappeared as it never existed. The Big Bang theory claims that the nexus with an armed conflict was a legal requirement before the IMT, while it disappeared at some time. If the Big Bang theory is justified, a further question is whether that link has disappeared under customary law before the material time in 1971.

According to Article 6(c) of the Nuremberg Charter, the definition of crimes against humanity was linked to "any crime within the jurisdiction of the Tribunal".[34] It is understood that the phrase "any crime within the jurisdiction of the Tribunal" refers to crimes against peace and war crimes.[35] In practice, ill-treatment and murder of non-German civilians in concentration camps committed by Germans during the war were charged mostly as both crimes against humanity and war crimes.[36] In addition, as Robert Jackson addressed at the London International Conference on Military Trials (London Conference) in 1945:

> The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection

32 PENAL CODE art. 342 (Viet.); ICC, NATIONAL IMPLEMENTING LEGISLATION DATABASE, https://iccdb.hrlc.net/data/.

33 Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10, at 25–28 (2017); Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at 59 (2015).

34 *Nuremberg Charter*, *supra* note 26, art. 6(c).

35 U.N. Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General*, at 68–69, U.N. Doc. A/CN.4/5 (Mar. 3, 1949).

36 Nuremberg Military Tribunal, THE FLICK CASE, *reprinted in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS (TWC) 1, 1187–212 (1952) [hereinafter *The Flick Case*]; Nuremberg Military Tribunal, THE HOSTAGE CASE, *reprinted in* 11 TWC 757 (1950); U.N. WAR CRIMES COMM'N, THE ZYKLON B CASE, *reprinted in* 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS (LRTWC) 93 (1947); U.N. WAR CRIMES COMM'N, THE BELSEN CASE, *reprinted in* 2 LRTWC 1 (1947).

> as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[37]

Indeed, Streicher and von Schirach were found guilty only of crimes against humanity by the IMT. But the IMT judgment also established that the two defendants' conducts were associated with war crimes committed by others.[38] Thus, Article 6(c) of the Nuremberg Charter required a link with crimes against peace or war crimes.

One may note that the reference to the phrase "before or during the war" in Article 6(c) of the Nuremberg Charter permits prosecutions of crimes against humanity before the war.[39] The IMT in some specific instances also referred to some acts before the war. Nevertheless, the IMT in practice only considered atrocities committed "during the war" in connection with the aggressive wars as crimes against humanity.[40] For example, von Schirach was largely found guilty of crimes against humanity for acts after the beginning of the war, which were in connection with Austria's occupation.[41] According to the IMT, "[t]o constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal".[42] In addition, the IMT also held that since many actions committed before the war were not proved in connection with

---

37 Minutes of Conference Session (July 23, 1945), *in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS: LONDON, 1945, 331 (1949).

38 NUREMBERG INT'L MILITARY TRIBUNAL, The *INTERNATIONAL MILITARY TRIBUNAL* [*FRANCE V. GÖRING*], *reprinted in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (TMWC) 171, 302–04, 318–20 (1947) [hereinafter *France v. Göring*].

39 Egon Schwelb, *Crimes Against Humanity*, 23 BRITISH YEARBOOK OF INTERNATIONAL LAW 178, 188, 193–95, 204 (1946).

40 *France v. Göring*, *supra* note 38, at 254; *The Flick Case*, *supra* note 36, at 1212; Anatole Goldstein, *Crimes Against Humanity: Some Jewish Aspects*, 1 JEWISH YEARBOOK OF INTERNATIONAL LAW 206, 221 (1948).

41 *France v. Göring*, *supra* note 38, at 302–04, 318–20; Schwelb, *supra* note 39, at 205; *see* NUREMBERG INT'L MILITARY TRIBUNAL, THE INTERNATIONAL MILITARY TRIBUNAL, *reprinted in* 22 TMWC 1, 549 (1948), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf (noting that "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity").

42 *France v. Göring*, *supra* note 38, at 254.

any crime, it could not "make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter".[43] In the IMT, the essence of the linkage with war crimes or crimes against peace, in fact, was a connection with aggressive wars.[44] Therefore, it was potentially possible for the IMT to prosecute crimes against humanity before the war, but only if a nexus existed between the acts and aggressive wars.[45] These observations indicate that acts committed in peacetime without any connection to the subsequent wars would not constitute crimes against humanity at that time. Only concrete acts committed in connection with an armed conflict would constitute crimes against humanity, regardless of whether they occurred before or during the war.

Nevertheless, some commentators consider that the nexus with aggressive wars was intentionally inserted by the Four Powers to limit the jurisdiction of the IMT over individuals of Axis countries.[46] Egon Schwelb and Roger Clark argued that the armed conflict linkage requirement in the Nuremberg Charter was a jurisdictional limit rather than an inherent substantive element of crimes against humanity.[47] In addition, the definition of crimes against humanity in the Nuremberg Charter was almost replicated in Article 5(c) of the Tokyo Charter. According to the former Judge Röling of the IMTFE, "the connection did not restrict *the scope of the crime*, but only *the scope of* [*the court's*] *jurisdiction*".[48] Furthermore, the US and the Extraordinary Chambers in the Courts of Cambodia (ECCC) also once argued that the nexus never existed. By citing the work of the UN War Crimes Commission, the US delegation in 1996 stated that "[t]he record of the development of the Nuremberg and Tokyo Charters does not [...] indicate that the drafters believed that the nexus was required as a matter of law".[49] A Chamber of the ECCC in the *Duch*

43 *Id.*; Goldstein, *supra* note 40.

44 Schwelb, *supra* note 39, at 204; Yoram Dinstein, *Case Analysis: Crimes Against Humanity After Tadić*, 13 Leiden Journal of International Law 373, 383–84 (2000).

45 Int'l Law Comm'n, Rep. on the Work of Its Second Session, U.N. Doc. A/1316, ¶ 122 (1950).

46 Roger S. Clark, *History of Efforts to Codify Crimes against Humanity*, *in* Forging a Convention for Crimes against Humanity 11 (Leila Nadya Sadat ed., 2010); United States Delegation, *Crimes against Humanity, Lack of a Requirement for a Nexus to Armed Conflict* (ICC Preparatory Works, Mar. 25, 1996), *available at* https://www.legal-tools.org/doc/1163fc/pdf/.

47 Clark, *supra* note 46; Schwelb, *supra* note 39, at 188, 194–95.

48 Antonio Cassese & B.V.A. Röling, The Tokyo Trial and Beyond: Reflections of a Peacemonger 56 (1993).

49 United States Delegation, *supra* note 46, at 2, n. 4.

case referred to the ICTY's *Tadić* Appeals Chamber decision on jurisdiction to justify an argument that a nexus never existed.[50]

Clark first pointed out that in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, a nexus with aggressive wars was not required for the crime of genocide, which is closely related to the persecution type of crimes against humanity in the Nuremberg Charter.[51] In addition, he noted that the connection to the "initiation of war and war crimes" was omitted in Control Council Law No. 10. Last, Clark clarified that in the original English and French texts of Article 6(c) of the Nuremberg Charter adopted in August 1945, a semi-colon existed between "before or during the war" and "or persecutions". However, in the original Russian text, a comma was used.[52] This semi-colon in the English and French texts was later amended to a comma in the "Semi-colon Protocol" in October 1945.[53] Given the modification of this semi-colon, Clark concluded that the phrase "in execution of or in connection with any crime within the jurisdiction of the Tribunal" was only a requirement for persecutions.[54] With regard to crimes against humanity, acts of "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population" are not required to be linked with the war.[55] As for acts of persecution, the "crimes" mentioned in the phrase "in connection with any crime" refer to the murder type of underlying offences, such as "murder, extermination or enslavement", instead of "crimes against peace" and "war crimes" or aggressive wars.[56] In his view, a link with these underlying offences is confirmed by the Rome Statute, which requires

50 Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 292 (Extraordinary Chambers in the Courts of Cambodia July 26, 2010) (Cambodia).

51 Clark, *supra* note 46, at 12; Roger S. Clark, *Crimes Against Humanity at Nuremberg*, *in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 190–92 (George Ginsburgs & V.N. Kudrîavtsev eds., 1990).

52 *See Nuremberg Charter*, *supra* note 26 ("Crimes against humanity[:] namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"); *see also* Clark, *supra* note 46, at 11.

53 Protocol to Agreement and Charter (Oct. 6, 1945), *in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS: LONDON, 1945, 429 (1949) (protocol rectifying discrepancy in the text of the Charter, drawn up by the Governments that concluded the Agreement of August 8, 1945).

54 *Nuremberg Charter*, *supra* note 26.

55 *Id.*

56 *Id.*

persecution to be "in connection with any act referred to in this paragraph".[57] Accordingly, Clark argued that the Nuremberg Charter did not acknowledge a substantive link with aggressive wars or an armed conflict for crimes against humanity in international law.[58]

A different argument, however, is also tenable by reference to these same sources.[59] It is argued that the nexus with an armed conflict in the Nuremberg Charter was a substantive legal element rather than a jurisdictional limit for the following reasons. Firstly, it is the wording "trial and punishment of the major war criminals of the European Axis" in Article 1 and in the chapeau of Article 6 of the Nuremberg Charter, rather than the nexus with war, that was inserted to limit the jurisdiction of the IMT.[60] Secondly, the semi-colon in the English and French texts has not been found in preceding drafts and where it came from is a puzzle. The Semi-colon Protocol amended the semi-colon two months later. This slight revision has a high impact on the definition of crimes against humanity, which required all prohibited murder-type acts to be linked to war. It is not persuasive to argue that the reviewers changed it mistakenly and failed to consider the impact of the revision. Thirdly, persecution as a crime against humanity requires a link with the underlying murder-type acts. Such a link for persecution does not exclusively exclude an alternative requirement of a link with any crime within the jurisdiction of the ICC (war crimes, genocide, and aggression). This link builds a relationship between murder type offences and persecution type offences. But the link between the two types of offences cannot justify the view that the concept of crimes against humanity in the Nuremberg Charter substantively required no link with war.

Fourthly, the US delegation might have mixed "the context" of war or peace with "the nexus" with aggressive wars.[61] The Legal Committee of the UN War Crimes Commission once declared that "[i]t was irrelevant whether a crime against humanity had been committed before or during the war".[62] By referring to the Nuremberg and Tokyo Charters,[63] the UN War Crimes Commission confirmed this clarification.[64] Nevertheless, the Legal Committee concluded that "the inhumane acts committed against any civilian population before the war

57 *Rome Statute*, *supra* note 26, art. 7(1)(h).
58 Clark, *supra* note 46, at 11.
59 Schwelb, *supra* note 39, at 195.
60 *Nuremberg Charter*, *supra* note 26.
61 United States Delegation, *supra* note 46, at 1, 4.
62 U.N. War Crimes Comm'n, History of the United Nations War Crimes Commission and the Development of the Laws of War 178–79 (1948).
63 *Id.* at 522–24.
64 *Id.* at 192–93.

[…] fall under crimes against humanity" because the purpose of these clashes was in connection with the contemplated invasion of Czechoslovakia.[65] Thus, acts committed before the war (in peacetime) would be considered as crimes against humanity only if these acts were connected with the later aggressions of war. In fact, the ILC in its 1950 Nuremberg Principles deleted the phrase "before or during the war" in defining crimes against humanity, while it specifically referred to the connection with war crimes and aggressive wars. In its commentary to Principle VI(c), the ILC emphasised that crimes against humanity "need not be committed during a war", but it maintained that "such crimes may take place also before a war in [connection] with crimes against peace".[66] This is the correct reading of the Nuremberg Charter and the IMT judgment.[67] On the other hand, the text of Control Council Law No. 10 did not refer to the nexus with war.[68] In practice, except for the *Justice* and the *Einsatzgruppen* cases, subsequent tribunals applying that law required a connection with the aggressive wars for acts committed before and during the war.[69] Suspects in the *Flick* and *Ministries* cases were charged with crimes against humanity committed in peacetime.[70] However, the tribunals in the two cases held that it would not contemplate offences committed before the war and having no connection with the war.[71] As shown above, the fact that crimes against humanity might be committed before the war does not indicate that the nexus with aggressive wars was not required. The US delegation went too far to argue that there was no nexus with an armed conflict in the Nuremberg Charter.[72]

---

65 *Id.* at 178–79.

66 U.N. Doc. A/1316, *supra* note 45, ¶ 123.

67 Dinstein, *supra* note 44, at 384.

68 Nuremberg Military Tribunal, THE JUSTICE CASE, *reprinted in* 3 TWC 1, 972–73 (1951); Nuremberg Military Tribunal, THE EINSATZGRUPPEN CASE, *reprinted in* 4 TWC 1, 499 (1950).

69 *The Flick Case*, *supra* note 36, at 1212–13; Nuremberg Military Tribunal, THE KRUPP CASE, *reprinted in* 9 TWC 1 (1948); Nuremberg Military Tribunal, THE POHL CASE, *reprinted in* 5 TWC 193, 991–92 (1950); Nuremberg Military Tribunal, THE MINISTRIES CASE, *reprinted in* 13 TWC 1 (1952); *see also* KEVIN J. HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 236–42 (2011).

70 U.S. v. Flick, Case No. 5, Indictment, ¶ 13 (Nuremberg Mil. Trib. 1947), https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1000&context=nmt5; U.S. v. The Ministries, Case No. 11, Indictment, ¶ 30 (Nuremberg Mil. Trib. 1947), https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1000&context=nmt11.

71 *The Flick Case*, *supra* note 36, at 1212; *The Ministries Case*, *supra* note 69, at 116; NUREMBERG MILITARY TRIBUNAL, THE MINISTRIES CASE, *reprinted in* 14 TWC 1, 557 (1952); HELLER, *supra* note 69, at 236–42.

72 William A. Schabas, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 170 (2nd ed. 2016).

Fifthly, the *Tadić* Appeals Chamber of the ICTY, in fact, supported a reading that a nexus with an armed conflict was a legal requirement in the Nuremberg Charter. Article 5 of the ICTY Statute provides a notion of crimes against humanity committed in "armed conflict".[73] In the *Tadić* Appeals Chamber decision on jurisdiction, the Chamber held that:

> [T]he nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945.[74]
>
> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.... [C]ustomary international law may not require a connection between crimes against humanity and any conflict at all.... [T]he Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.[75]

The literal meaning of the first paragraph is a bit ambiguous. By referring to "peculiar to the jurisdiction of the Nuremberg Tribunal", the Chamber seems to imply that a nexus with an armed conflict for crimes against humanity was not a substantive but a jurisdictional requirement in the IMT.[76] At the same time, the Appeals Chamber said that the nexus requirement had been "abandoned in subsequent state practice" and referred to Control Council Law No. 10 to indicate that the notion of crimes against humanity began to change on

73 ICTY Statute art. 5 states that the Tribunal "shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population".

74 Prosecutor v. Tadić, Case No. IT-94-1, ¶ 140.

75 *Id.* ¶ 141; For an analysis of the case concerning the nexus requirement, *see* Dinstein, *supra* note 44, at 386–87.

76 Prosecutor v. Tadić, Case No. IT-94-1, ¶ 140.

20 December 1945.[77] If the nexus with an armed conflict was not a substantive requirement, how could it be "abandoned in subsequent State practice"?[78]

In the second paragraph cited above, with reference to "[no] connection to international armed conflict" as "a settled" customary rule, on the one hand, the Appeals Chamber held that the nexus with an armed conflict was expanded to include a nexus with non-international armed conflict.[79] On the other hand, the Appeals Chamber held that the text of crimes against humanity with a nexus in Article 5 of the ICTY Statute was narrower than what customary law required. The Appeals Chamber acknowledged that a nexus requirement existed, but it said it was "obsolescent".[80] There is a cross-reference to the two paragraphs cited, confirming the relationship between them. The Appeals Chamber stated that "customary international law no longer requires any nexus between crimes against humanity and armed conflict [...] Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal".[81] The expressions of "no longer" and of "reintroduce" further discredit the idea that a nexus with an armed conflict was never a requirement. The clarification of the *Tadić* Appeals Chamber decision demonstrates that a link with an armed conflict was a legal element. This clarification also indicates that the chamber of the ECCC in *Duch* misunderstood the *Tadić* case. Therefore, the ECCC decision in *Duch* is also less valuable on the interpretation of the nexus issue.

As the Secretary-General summarised, the nexus with war is a compromise between two ideas.[82] One is the traditional principle that the treatment of nationals is a matter of domestic jurisdiction. The competing principle is that inhumane treatment of human beings is wrong even if it is tolerated or practised by their States, in peace and war, and that this wrong should be penalised in the interest of the international community. Without abandoning the traditional principle, the latter idea of guaranteeing a minimum standard of fundamental rights to all human beings was qualified by the nexus requirement at that time.[83] In other words, since aggressive wars affect the rights of other States, the nexus with an armed conflict justifies international prosecution. A construction of no nexus at that time means that acts of their governmental leaders against their citizens in peacetime might be charged

77 *Id.*
78 *Id.*
79 *Id.* ¶ 142.
80 *Id.* ¶ 140.
81 *Id.* ¶ 78.
82 U.N. Doc A/CN.4/5, *supra* note 35, ¶¶ 70–72.
83 *Id.*

with crimes against humanity. It would be going too far to conclude that States aimed to create the notion of crimes against humanity without any association with war.

The Four Powers knew that they were creating a new regime that would be binding on all States in the future. The American delegate Jackson stated that:

> If certain acts and violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.[84] [...] [O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[85]

These statements demonstrate that without a link with aggressive wars, the leaders of those countries that created the IMT might be at a real risk for murder or persecution of their own civilian populations. The UK Chief Prosecutor Hartley Shawcross shared this view of the nexus with war. The prosecutor believed that acts, not associated with aggressive wars and committed by a government against their civilian populations, should not constitute crimes against humanity as a distinct international crime.[86]

A short survey of the drafting history of Article 7 of the 1998 Rome Statute is also helpful in clarifying the nexus issue. The *Ad Hoc* Committee in 1995 reported that "in light of Nuremberg precedent and the two UN *ad hoc* tribunals, there were different views as to whether crimes against humanity

84 Minutes of Conference Session, *supra* note 37, at 330.

85 *Id.* at 333.

86 Nuremberg Int'l Military Tribunal, One Hundred and Eighty-seventh Day: Afternoon Session, *reprinted in* 19 TMWC 433, 470–71 (1948) (Sir Hartley Shawcross making Final Speech on behalf of Prosecution). In his view, "the Charter merely develops a pre-existing principle" and the crimes against humanity in the jurisdiction of the IMT "are limited to this extent-they must be crimes the commission of which was in some way connected with, in anticipation of or in furtherance of the crimes against the peace or the war crimes *stricto sensu* with which the defendants are indicted".

could be committed in peace time".[87] Australia said that there is no longer any requirement of such a nexus between an armed conflict and crimes against humanity in customary law.[88] In the Preparatory Committee, there were debates about the nexus with an armed conflict.[89] It was generally agreed that the crime need not be limited to acts during international armed conflict.[90] The US strongly argued for removing a nexus with an armed conflict.[91] By contrast, China and Russia argued for retaining the nexus with an armed conflict.[92] There were proposals to incorporate the wording "in time of peace or in time of war" in the chapeau of the provision about crimes against humanity. This proposal, however, did not survive in the 1998 Draft Statute adopted by the Preparatory Committee.[93] In the Draft Statute, one alternative of the definition of crimes against humanity retains the phrase "in armed conflict" in a bracket.[94] At the 1998 Rome Conference, the majority of States supported the

87 Rep. of the *Ad Hoc* Comm. on the Establishment of an Int'l Crim. Ct., 50 U.N. GAOR Supp. No. 22, at 79, U.N. Doc. A/50/22 (Sept. 6, 1995); Press Release, General Assembly, Sixth Committee Hears Differing Views on Code of Crimes Against International Peace and Security, U.N. Press Release GA/L/2866 (Oct. 16, 1995) (Argentina supported crimes against humanity in peacetime; while India opposed this idea); Summary of Interventions by the Australian Delegation on the Specification of Crimes (Aug. 17, 1995).

88 Summary of Interventions by the Australian Delegation on the Specification of Crimes (Aug. 17, 1995).

89 Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Ct., 51 U.N. GAOR Supp. No. 22, ¶¶ 88–90, U.N. Doc. A/51/22 (Vol. I) (Sept. 13, 1996); Press Release, Preparatory Committee on International Criminal Court Concludes First Session, U.N. Press Release L/2787 (Apr. 12, 1996). For States supporting no armed conflict nexus, *see* Press Release, Preparatory Committee on Establishment of International Criminal Court Begins First Session, U.N. Press Release L/2761 (Mar. 25, 1996) (Australia & the Netherlands); Japan, "Proposal by Japan on Crimes against Humanity" (Mar. 25, 1996); the UK, "Proposal by the United Kingdom on Crimes against Humanity: Article 20 *quarter*" (Mar. 25, 1996); The Netherlands, "Crimes Against Humanity" (Mar., 1996); Denmark, "Crime Against Humanity: Chapeau and residual clause" (Mar. 27, 1996).

90 Press Release, Preparatory Committee for Establishment of International Criminal Court Discusses Definitions of 'Genocide', 'Crimes Against Humanity', U.N. Press Release L/2762 (Mar. 25, 1996).

91 United States Delegation, *supra* note 46.

92 Press Release, 'Crimes Against Humanity' Must be Precisely Defined Say Speakers in Preparatory Committee for International Court, U.N. Press Release L/2763.Rev.1* (Mar. 26, 1996).

93 Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Ct., 51 U.N. GAOR Supp. No. 22A, at 66, U.N. Doc. A/51/22 (Vol. II) (Sept. 13, 1996).

94 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Draft Statute for the International Criminal Court*, at 20–21, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998); For a detailed analysis of the Preparatory Committee's drafts, *see* Schabas, *supra* note 72, at 170.

view that crimes against humanity can be committed both in wartime and in peacetime.[95] A large number of States expressed their satisfaction with the omission of an armed conflict.[96] States widely accepted the absence of the nexus with an armed conflict at the Rome Conference. The drafting history also indirectly support the Big Bang theory that a nexus was required, at the very least, in the IMT.[97]

As shown above, the nexus with aggressive wars was required for crimes against humanity in the Nuremberg Charter and IMT. This nexus was not a jurisdictional link but a substantive element of crimes against humanity.[98] The

95 U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶¶ 6–7, U.N. Doc. A/CONF.183/SR.1 (Nov. 20, 1998) (Italy); U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶ 62, U.N. Doc. A/CONF.183/SR.8 (June 18, 1998) (Ecuador); U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶¶ 21, 36, 40, 51, 55, 58, 77, 81, 84, 87, 89, 92, 95, 101, 108, 109, 112, 114, 117, 120, 124, 133, 136, 138, 147, 149, 152, 154, 158, 162, 167, U.N. Doc. A/CONF.183/C.1/SR.3 (June 17, 1998) (21 (Germany), 36 (Czech Republic), 40 (Malta), 51 (Brazil), 55 (Denmark), 58 (Lesotho), 77 (Republic of Korea), 81 (Poland), 84 (Trinidad and Tobago), 87 (Australia), 89 (UK), 92 (Argentina), 95 (France), 101 (Cuba), 108 (Thailand), 109 (Slovenia), 112 (Norway), 114 (Côte d'Ivoire), 117 (South Africa), 120 (Egypt), 124 (Mexico), 133 (Colombia), 136 (Iran), 138 (US), 147 (Spain), 149 (Romania), 152 (Senegal), 154 (Sri Lanka), 158 (Venezuela), 162 (Italy), 167 (Ireland)); U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶¶ 2, 4, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25, 27, 29, U.N. Doc. A/CONF.183/C.1/SR.4 (June 17, 1998) (2 (Canada), 4 (Guinea), 7 (Switzerland), 8 (Sweden), 11 (Portugal), 12 (Yemen), 13 (Vietnam), 14 (Netherlands), 15 (Bahrain), 16 (Benin), 17 (Japan), 18 (Bangladesh), 19 (Niger), 20 (Austria), 21 (Uruguay), 23 (Sierra Leone), 25 (Israel), 27 (Chile), 29 (Kenya)); U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶ 51, U.N. Doc. A/CONF.183/C.1/SR.5, (Nov. 20, 1998) (51 (Venezuela)); U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶ 15, U.N. Doc. A/CONF.183/C.1/SR.34 (Nov. 20, 1998) (15 (Jamaica)).

96 U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶¶ 8, 39, 41, 74, 76, 78–79, U.N. Doc. A/CONF.183/C.1/SR.25 (Nov. 20, 1998) (8 (South Africa), 39 (Mozambique), 41 (Sweden), 74 (Botswana), 76 (Croatia), 78 (Australia), 79 (Senegal)); U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶¶ 34–35, 48, 63, U.N. Doc. A/CONF.183/C.1/SR.26 (Nov. 20, 1998) (34 (Uruguay), 35 (Turkey), 48 (Brazil), 63 (Ghana)); U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶¶ 19, 74, U.N. Doc. A/CONF.183/C.1/SR.27 (Nov. 20, 1998) (19 (Nicaragua), 74 (Sri Lanka)); U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶ 15, U.N. Doc. A/CONF.183/C.1/SR.34 (Nov. 20, 1998) (15 (Jamaica)).

97 SCHABAS, *supra* note 72, at 148.

98 WILLIAM A. SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 60 (2012); Editors, *Jurisdiction: Universal Jurisdiction – War Crimes and Crimes against Humanity*, 13 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 239, 246 (1991).

IMT focused on the need to show a connection to aggressive wars.[99] This idea was confirmed by the ILC in its 1950 Nuremberg Principles and its 1950 Draft Code of Offenses.[100] The drafting history of Article 7 also demonstrates that a nexus with an armed conflict was a legal requirement for the crimes against humanity. These observations show that the Big Bang theory is justified that the notion of crimes against humanity required a nexus with an armed conflict.

4 The Disappearance of the Nexus with an Armed Conflict

As for commentators arguing for the nexus as a jurisdictional requirement in the Nuremberg Charter, it is not necessary to assess when this link disappeared, since it never existed. For other commentators deeming the nexus a substantive legal element, the nexus with an armed conflict disappeared at some time. As observed above, the second viewpoint is the appropriate understanding. Schabas wrote: "[T]he nexus between armed conflict and crimes against humanity that existed at Nuremberg was part of the original understanding, and was only removed at some point subsequent to 1945".[101] Scholars also differ with respect to the disappearance of a nexus with an armed conflict as a legal element at the material time. The sub-question in this section is whether that link with an armed conflict disappeared under customary law before or in 1971. The following paragraphs survey post-Nuremberg instruments, jurisprudence and the attitude of the UN organs to show the existing confusion about determining the moment of the disappearance of the nexus.

As shown above, the text of Control Council Law No. 10 did not refer to the nexus with war. However, in the application of Control Council Law No. 10, the Subsequent Proceedings required a link with an armed conflict. Additionally, the 1950 ILC Nuremberg Principles also upheld the requirement that the underlying acts of crimes against humanity, before or during the war, be connected to aggressive wars. The formulation of crimes against humanity in the 1951 Draft Code of Offences required that "inhuman acts [...] are committed in execution of or in [connection] with other offences defined in this

99 *France v. Göring*, *supra* note 38, at 184.

100 Jean Spiropoulos (Special Rapporteur), *Formulation of the Nürnberg Principles*, at 187, U.N. Doc. A/CN.4/22 (Apr. 12, 1950), *reprinted in* [1957] 2 Yearbook of the International Law Commission 181, U.N. Doc. A/CN.4/SER.A/1950/Add.1; *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. A/CN.4/19 (1950), *reprinted in* [1957] 2 Yearbook of the International Law Commission 249, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

101 Schabas, *supra* note 98, at 59.

article".[102] This formulation did not substantively remove the armed conflict nexus requirement.[103] The definition in the 1954 Draft Code of Offences, however, did not follow the essence of the 1951 version on the nexus issue but enlarged the scope of crimes against humanity to cover acts not committed in connection with other offences.[104] Article 1(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations referred to "[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the Nuremberg International Military Tribunal".[105] Given its very ratification by States, Article 1(b) of the Convention is less significant evidence to justify that a nexus was not required under customary law in 1968.

Jurisprudence of international and internationalised tribunals also does not show consistency on when the armed conflict nexus disappeared for crimes against humanity. The 2006 *Kolk and Kislyiy v Estonia* case before the European Court of Human Rights (ECtHR) concerned the punishment against two individuals by Estonia based on the 1994 Estonia *Penal Code* for crimes against humanity committed in peacetime in 1949. The ECtHR rejected the two individuals' applications because Article 7(1) of the European Convention on Human Rights prohibiting retroactive application of crimes under national or international law was not violated. The Chamber of the ECtHR implicitly upheld that by virtue of international law, the prosecution of deportation as a crime against humanity committed in peacetime in 1949 was not a violation

102 *Report of the International Law Commission to the General Assembly*, at 136, U.N. Doc. A/1858 (1951), *reprinted in* [1957] 2 Yearbook of the International Law Commission 123, U.N. Doc. A/CN.4/SER.A/1951/Add.1 (art. 2(10) reads: "Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article").

103 *Id.* at 59, 136.

104 *Draft Code of Offences Against the Peace and Security of Mankind*, at 150, U.N. Doc. A/CN.4/85 (1954), *reprinted in* [1957] 2 Yearbook of the International Law Commission 112, U.N. Doc. A/CN.4/SER.A/1954/Add.1. Art. 2(11) reads: 'Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities".

105 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, opened for signature Nov. 26, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970).

of non-retroactive application of the law. In its logic, international law in 1949 did not require a nexus with an armed conflict for crimes against humanity.[106]

Antonio Cassese criticised the decision in the *Kolk and Kislyiy v Estonia* case and argued that the link with war was an indispensable element for prohibited acts of crimes against humanity before 1949. In his view, it is "only later, in the late 1960s, that a general rule gradually began to evolve, prohibiting crimes against humanity even when committed in time of peace".[107] By contrast, the Grand Chamber of the ECtHR in the 2008 *Korbely v Hungary* case held that the link with an armed conflict "may no longer have been relevant by 1956".[108] Also, a Chamber of the ECCC found that "customary international law between 1975 and 1979 required that crimes against humanity be committed in the context of an armed conflict".[109] The observation on case law shows that different views exist about when the nexus with an armed conflict was or was not relevant.

The UN Secretary-General and the UN Security Council considered that the nexus with an armed conflict was not required for crimes against humanity under customary law in 1993. In 1993, the Report of the Secretary-General on the establishment of the ICTY stated that:

> Crimes against humanity were first recognised in the Charter and the Judgement of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.[110]

A plain reading indicates no nexus with an armed conflict. The Secretary-General held that the nexus with an armed conflict is not required for punishable acts constituting crimes against humanity under customary law.[111] The Secretary-General, however, proposed interpreting Article 5 of the draft statute of the ICTY by restricting the crime "when committed in armed conflict,

106 *Kolk v. Estonia*, 2006-I Eur. Ct. H.R. 399 (2006) (Decision).

107 Antonio Cassese, *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy V. Estonia Case before the ECHR*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 410, 413 (2006).

108 *Korbely v. Hungary*, 2008-IX Eur. Ct. H.R. 299, 348 (2008) (Grand Chamber).

109 Co-Prosecutors v. Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by Nuon Chea and Ieng Thir[tie]th against the Closing Order, ¶ 144 (Extraordinary Chambers in the Courts of Cambodia Feb. 15, 2011) (Cambodia).

110 Rep. of the S.C., ¶ 47, U.N. Doc. S/25704 (1993).

111 *Id.* at 34.

whether international or internal in character". The Secretary-General may have intentionally "defined the crime in Article 5 more narrowly than necessary under customary international law".[112] The UN Security Council adopted the draft statute of the ICTY without modification.[113] In its interpretative clarification of the ICTY Statute, the UK delegation also stated that:

> Articles 2 to 5 of the draft [ICTY] Statute describe the crimes within the jurisdiction of the Tribunal. The Statute does not, of course, create new law, but reflects existing international law in this field.... Article 5 covers acts committed in time of armed conflict.[114]

This statement demonstrates that a notion of crimes against humanity in non-international and international armed conflict reflects part of "existing international law".[115] In addition, the possibility that acts committed in peacetime constitute crimes against humanity under customary law at that time is not excluded.[116] The Security Council then implicitly confirms the absence of the nexus requirement in adopting the 1994 ICTR Statute.[117]

The 1995 *Tadić* Appeals Chamber decision has a significant impact on the clarification of the absence of nexus in custom. As mentioned above, the Appeals Chamber in the *Tadić* decision on jurisdiction observed that the practice of States began to abandon the nexus requirement. The Appeals Chamber was confident in claiming no connection to an armed conflict under customary law in 1993. In its view, offences with no connection to an armed conflict constituted crimes against humanity in 1993, whereas the ICTY only has jurisdiction over crimes against humanity committed in armed conflicts or linked geographically and temporally with an armed conflict.[118] Subsequent ICTY

---

112 Prosecutor v. Tadić, Case No. IT-94-1, at 141.

113 S.C. Res. 827 (May 25, 1993).

114 U.N. SCOR, 3217th mtg. at 19, U.N. Doc. S/PV.3217 (May 25, 1993).

115 *Id.*

116 *See also* U.N. Secretary-General, 13 n. 9, U.N. Doc. S/25704 (May 3, 1993) ("In this context, it is to be noted that the International Court of Justice has recognised that the prohibitions contained in common article 3 of the 1949 Geneva Convention are based on 'elementary considerations of humanity' and cannot be breached in an armed conflict, regardless of whether it is international or internal in character").

117 *But see* SCHABAS, *supra* note 72, at 169.

118 Prosecutor v. Kunarać, Case No. IT-96-23-A, Judgement, ¶ 83 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002); Prosecutor v. Šešelj, Case No. IT-03-67-AR72.1, Decision on Interlocutory Appeal concerning Jurisdiction, ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 31, 2004); Prosecutor v. Šešelj, Case No. IT-03-67-AR72.1, Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal concerning

cases upheld the view that there was no nexus with an armed conflict under customary law, at least at the material time in 1993.[119] The preparatory works of Article 7 of the Rome Statute also demonstrate that States generally recognised the definition of crimes against humanity committed without association with an armed conflict at the 1998 Rome Conference.[120]

To sum up, instruments and jurisprudence after World War II and the view of the UN organs leave the moment of its disappearance more confusing in 1949, 1951, 1956, the 1960s, 1968, or later in 1993.

5 Conclusion

The International Crimes Tribunals in Bangladesh seek to prosecute crimes against humanity that occurred decades ago in 1971. This article discussed the question of whether the notion of crimes against humanity did require a nexus with an armed conflict under customary law in 1971 from TWAIL perspective. Section II discussed the notion of crimes against humanity in the *International Crimes* (*Tribunals*) *Act* 1973 and analysed the approaches adopted by the Bangladeshi Tribunals in dealing with the nexus issue for crimes against humanity. The 1973 Act did not refer to an armed conflict. In practice, the Bangladesh ICT-1 adopted two methods in dealing with the nexus issue. In the early stage, the ICT-1 construed that crimes against humanity in the amended 1973 Act do not require a nexus with an armed conflict, which is consonant

Jurisdiction" Dated 31 August 2004, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia June 15, 2006).

119 Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶ 59 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 249, 251 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Kunarać, Case No. IT-96-23-A, Judgement, ¶¶ 82–83 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002); Prosecutor v. Šešelj, Case No. IT-03-67-AR72.1, Decision on Interlocutory Appeal concerning Jurisdiction, ¶ 13 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 31, 2004); Prosecutor v. Šešelj, Case No. IT-03-67-AR72.1, Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal concerning Jurisdiction" Dated 31 August 2004, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia June 15, 2006); Prosecutor v. Stanišić, Case No. IT-03-69-T, Judgement, ¶ 960 (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2013).

120 SCHABAS, *supra* note 72, at 147–52; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION (2011); Christopher K. Hall & Carsten Stahn, *Article 7 Crimes Against Humanity*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 144, ¶¶ 3–29 (Otto Triffterer & Kai Ambos eds., 2nd ed. 2008).

with customary law. Later on, the ICT-1 simply stressed the fact of war as a background for the prosecution and punishment, leaving the nexus legal issue untouched. However, given the fact that the 1971 liberation war existed as a background, the practice of the ICT-1 would not violate the principle of non-retroactivity. This also assists in understanding why the ICT-1 in its recent judgments do not touch on the nexus issue. By contrast, the ICT-2 held that a nexus with an armed conflict was required in customary law and this element is satisfied in its cases.

Section 3 illustrated how the histories have shaped the concept of crimes against humanity and why it was connected with an armed conflict. In theory, scholars' opinions differ concerning whether a nexus with an armed conflict was a legal element. The Steady State theory argues that the link with an armed conflict was never a legal but rather a jurisdictional requirement imposed by the Nuremberg Charter for the purpose of the IMT. However, the Big Bang theory holds that the nexus with an armed conflict was a legal requirement before the IMT but disappeared later on. After analysing the jurisprudence of international criminal tribunals and international authorities, this article argues that the armed conflict nexus was a requirement for crimes against humanity. The Big Bang theory seems to be the appropriate interpretation of the nexus issue. As shown above in Section 4, it remains unclear when this nexus had disappeared, in the 1960s, 1971, or later on in customary law. Thus, it is uncertain whether the notion of crimes against humanity required a nexus with an armed conflict in 1971.

The background after World War II might account for the disappearance of the nexus for crimes against humanity and why it is unclear when such a nexus had disappeared. On the one hand, the Allies Powers in 1945 introduced crimes against humanity to prosecute crimes committed inside Germany by Germans against its citizens. As observed above, for fear of prosecuting act committed by their government against civilians, a nexus between the crimes with the aggressive war, an international armed conflict, was required. After World War II, these Allied powers tried to reshape the post-war system through the UN. The 1948 Universal Declaration of Human Rights was passed, while the establishment of an international criminal tribunal was delayed for decades until the end of the 1980s. At that time, the issue of extending crimes against humanity to cover crimes committed in civil war or in peace time was less concerned and discussed by these Allied powers. During the last four decades, there were few prosecutions of crimes against humanity in the world. Most prosecution of the crimes committed in the past were brought in recent years.

On the other hand, during the independence movements and the decolonisation period after World War II, many States became independent or

declared their independence. In addition, the process of decolonisation sometimes involves violence and liberation wars. According to Article 1(4) of 1977 Additional Protocol I to the 1949 Geneva Conventions, the conflicts between the colonial domination and non-State entities in exercising self-determination are characterised as international armed conflicts. In this circumstance, European-colonial States are not in the interest of expanding the scope of crimes against humanity by removing the nexus with an international armed conflict. Disassociating the armed conflict nexus was only in the interest of non-State entities in these colonial States and of peoples in new States, in particular those States without political democracy. Over the previous decades, however, there have been few reported cases where domestic courts have prosecuted crimes against humanity committed in conflicts or in peace time. For lack of practice in prosecuting crimes against humanity and *opinio juris*, it is inappropriate to conclude at what moment the customary rule of crimes against humanity was modified by dismissing the armed conflict nexus. Therefore, it is less agreed that the nexus requirement was removed before or in 1971.

Certain term or norm in European thought is the starting point for the TWAIL analysis. A nexus with an armed conflict for the notion of crimes against humanity was a European-centric idea. However, the issue when this nexus disappeared remains unclear. Practice of post-colonial States may assist in clarifying this issue. It is an opportunity for the Bangladeshi Tribunals to contribute to the clarification of the nexus issue for crimes against humanity. This article concludes that the Bangladeshi Tribunals failed to clarify the nexus issue for crimes against humanity at the material time and that the Tribunals missed the chance to contribute to the clarification of a customary rule. The view of some judgments of the Bangladesh Tribunals is less supported that a nexus of an armed conflict was not required under customary law in 1971. The Bangladeshi Tribunals should be cautious to this legal element as well as the background and considerations of these Allies Powers observed above. Such an analysis in their judgments would improve the soundness of their reasoning and better qualify themselves as relevant State practice for the identification of customary international law.

Legal Materials

∵

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 2018. New data are preceded by a reference to the most recent previous entry in the multilateral treaties section of the *Asian Yearbook of International Law*. In case no new data are available, the title of the treaty is listed with a reference to the last Volume containing data on the treaty involved. For the purpose of this section, states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.

Note

- Where no other reference to specific sources is made, data were derived from *Multilateral Treaties Deposited with the Secretary-General*, https://treaties.un.org/pages/participationstatus.aspx 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/Pages/TreatyCollection.aspx
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from https://www.icrc.org/applic/ihl/ihl.nsf/

* Compiled by Dr. Karin Arts, Professor of International Law and Development, International Institute of Social Studies (ISS), The Hague, The Netherlands, part of Erasmus University Rotterdam.

 | DOI:10.1163/9789004437784_011

- Where reference is made to the International Labour Organization (ILO), data were derived from http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0
- Where reference is made to the International Maritime Organization (IMO), data were derived from http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from http://portal.unesco.org/en/ev.php-URL_ID=12024&URL_DO=DO_TOPIC&URL_SECTION=201.html
- 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 www.worldbank.org/en/about/leadership/members#4 and www.worldbank.org/en/about/leadership/members#5
- 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; Rat. = Ratification or accession

Table of Headings

Antarctica

Antarctic Treaty, Washington, 1959: *see* Vol. 21 p. 237.

Commercial Arbitration

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958: *see* Vol. 20 p. 194.

Cultural Matters

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 1949: *see* Vol. 7 pp. 322–323.
Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950: *see* Vol. 12 p. 234.
Convention concerning the International Exchange of Publications, 1958: *see* Vol. 6 p. 235.
Convention concerning the Exchange of Official Publications and Government Documents between States, 1958: *see* Vol. 6 p. 235.
Regional Convention on the Recognition of Studies, Diploma's and Degrees in Higher Education in Asia and the Pacific, 1983: see Vol. 14 p. 227.
Asia-Pacific Regional Convention on the Recognition of Qualifications in Higher Education, 2011: *see* Vol. 23 p. 177.

International Agreement for the Establishment of the University for Peace, 1980
Continued from Vol. 16 p. 157)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Nepal		27 Sep 2018

Cultural Property

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970: *see* Vol. 22 p. 306.
Convention concerning the Protection of the World Cultural and Natural Heritage, 1972: *see* Vol. 22 p. 306.
Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005: *see* Vol. 22 p. 306.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954
(Continued from Vol. 23 p. 178)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Turkmenistan		22 Jan 2018

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954
(Continued from Vol. 13 p. 263)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Afghanistan		12 Mar 2018
Turkmenistan		22 Jan 2018

Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1999
(Continued from Vol. 19 p. 178)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Afghanistan		12 Mar 2018
Turkmenistan		22 Jan 2018

Convention for the Safeguarding of the Intangible Cultural Heritage, 2003
(Continued from Vol. 22 p. 306)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Singapore		22 Feb 2018

Development Matters

Charter of the Asian and Pacific Development Centre, 1982: *see* Vol. 7 pp. 323–324.
Agreement to Establish the South Centre, 1994: *see* Vol. 7 p. 324.
Amendments to the Charter of the Asian and Pacific Development Centre, 1998: *see* Vol. 10 p. 267.

Multilateral Agreement for the Establishment of an International Think Tank for Landlocked Developing Countries, 2010
(Continued from Vol. 23 p. 178)

State	*Sig.*	*Cons.*
Bhutan		3 Apr 2018

Dispute Settlement

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965: *see* Vol. 11 p. 245.

Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court: *see* Vol. 23, p. 179.

Environment, Fauna and Flora

International Convention for the Prevention of Pollution of the Sea by Oil, as amended, 1954: *see* Vol. 6 p. 238.
International Convention on Civil Liability for Oil Pollution Damage, 1969: *see* Vol. 15 p. 215.
International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969: *see* Vol. 9 p. 284.
Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971: *see* Vol. 18 p. 103.
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971: *see* Vol. 12 p. 237.
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, as amended: *see* Vol. 7 p. 325.
Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil, 1973: *see* Vol. 6 p. 239.
Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1976: *see* Vol. 10 p. 269.
Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships 1978, as amended: *see* Vol. 15 p. 225.
Protocol to amend the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1982: *see* Vol. 13 p. 265.
Convention for the Protection of the Ozone Layer, 1985: *see* Vol. 15 p. 215.
Protocol on Substances that Deplete the Ozone Layer, 1987: *see* Vol. 16 p. 161.
Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987: *see* Vol. 13 p. 266.
Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989: *see* Vol. 22 p. 309.
International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990: *see* Vol. 23 p. 181.
Amendment to the Montreal Protocol, 1990: *see* Vol. 15 p. 216.
Amendment to the Montreal Protocol, 1992: *see* Vol. 18 p. 103.
Framework Convention on Climate Change, 1992: *see* Vol. 13 p. 266.
Convention on Biological Diversity, 1992: *see* Vol. 14 p. 229.

UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994: *see* Vol. 11 p. 247.
Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995: see Vol. 23 p. 181.
Amendment to the Montreal Protocol, 1997: *see* Vol. 19 p. 182.
Protocol to the Framework Convention on Climate Change, 1997: *see* Vol. 19 p. 182.
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998: *see* Vol. 19 p. 182.
Amendment to the Montreal Protocol, 1999: *see* Vol. 19 p. 182.
Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000: *see* Vol. 19 p. 183.
Stockholm Convention on Persistent Organic Pollutants, 2001: *see* Vol. 19 pp. 183.
Amendment to Annex B of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2006: see Vol. 23 p. 182.
Doha Amendment to the Kyoto Protocol, 2012: see Vol. 23 p. 183.

Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1971
(Continued from Vol. 18 p. 103)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Korea (DPR)		16 Jan 2018

Protocol to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1992
(Continued from Vol. 23 p. 181)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
Thailand	7 Jul 2017	7 Jul 2018

Protocol to Amend the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992
(Continued from Vol. 23 p. 181)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
Thailand	7 Jul 2017	7 Jul 2018

International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001
(Continued from: Vol. 22 p. 309)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
Bangladesh	7 Jun 2018	7 Sep 2018
Philippines	6 Jun 2018	6 Sep 2018

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
(Continued from: Vol. 20 p. 199)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
Myanmar	19 Jan 2018	19 Apr 2018

International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004
(Continued from Vol. 23 p. 182)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
Bangladesh	7 Jun 2018	7 Sep 2018
China	22 Oct 2018	
Philippines	6 Jun 2018	6 Sep 2018

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, 2010
(Continued from Vol. 23 pp. 182–183)

State	*Sig.*	*Rat.*
Afghanistan		6 Jun 2018
Malaysia		5 Nov 2018
Nepal		28 Dec 2018

Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 2010
(Continued from Vol. 23 p. 183)
Entry into force: 5 March 2018

Minamata Convention on Mercury, 2013
(Continued from Vol. 22 p. 310)

State	*Sig.*	*Rat.*
India	30 Sep 2014	18 Jun 2018

Paris Agreement

Paris, 12 December 2015
Entry into force: 4 November 2016

State	*Sig.*	*Rat.*
Afghanistan	22 Apr 2016	15 Feb 2017
Bangladesh	22 Apr 2016	21 Sep 2016
Bhutan	22 Apr 2016	19 Sep 2017
Brunei	22 Apr 2016	21 Sep 2016
Cambodia	22 Apr 2016	6 Feb 2017
China	22 Apr 2016	3 Sep 2016
India	22 Apr 2016	2 Oct 2016
Indonesia	22 Apr 2016	31 Oct 2016
Iran	22 Apr 2016	
Japan	22 Apr 2016	8 Nov 2016
Kazakhstan	2 Aug 2016	6 Dec 2016
Kyrgyzstan	21 Sep 2016	18 Feb 2020
Laos	22 Apr 2016	7 Sep 2016
Korea (DPR)	22 Apr 2016	1 Aug 2016
Korea (Rep.)	22 Apr 2016	3 Nov 2016
Malaysia	22 Apr 2016	16 Nov 2016
Maldives	22 Apr 2016	22 Apr 2016
Mongolia	22 Apr 2016	21 Sep 2016
Myanmar	22 Apr 2016	19 Sep 2017
Nepal	22 Apr 2016	5 Oct 2016
Pakistan	22 Apr 2016	10 Nov 2016
Papua New Guinea	22 Apr 2016	21 Sep 2016
Philippines	22 Apr 2016	23 Mar 2017
Singapore	22 Apr 2016	21 Sep 2016
Sri Lanka	22 Apr 2016	21 Sep 2016
Tajikistan	22 Apr 2016	22 Mar 2017
Thailand	22 Apr 2016	21 Sep 2016
Timor Leste	22 Apr 2016	16 Aug 2017
Turkmenistan	23 Sep 2016	20 Oct 2016
Uzbekistan	19 Apr 2017	9 Nov 2018
Vietnam	22 Apr 2016	3 Nov 2016

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 2016
(Continued from Vol. 23 p. 183)
Entry into force: not yet

State	*Sig.*	*Rat.*
Japan		18 Dec 2018
Sri Lanka		28 Sep 2018

Family Matters

Convention on the Recovery Abroad of Maintenance, 1956: *see* Vol. 11 p. 249.
Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: *see* Vol. 6 p. 244.
Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions, 1961: *see* Vol. 7 p. 327.
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962: *see* Vol. 8 p. 178.
Convention on the Law Applicable to Maintenance Obligations, 1973: *see* Vol. 6 p. 244.
Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993: *see* Vol. 22 p. 310.

Finance

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 7 p. 327.
Convention Establishing the Multilateral Investment Guarantee Agency, 1988: *see* Vol. 19 p. 184.

Health

Protocol Concerning the Office International d'Hygiène Publique, 1946: *see* Vol. 6 p. 245.
World Health Organization Framework Convention on Tobacco Control, 2003: *see* Vol. 19 p. 185.

Protocol to Eliminate Illicit Trade in Tobacco Products, 2012
(Continued from Vol. 22 p. 311)
Entry into force: 25 Sep 2018

State	*Sig.*	*Rat.*
India		5 Jun 2018
Iran	7 Jan 2014	27 Aug 2018
Pakistan		29 Jun 2018

Human Rights, Including Women and Children

Convention on the Political Rights of Women, 1953: *see* Vol. 10 p. 273.
Convention on the Nationality of Married Women, 1957: *see* Vol. 10 p. 274.
Convention against Discrimination in Education, 1960: *see* Vol. 22 p. 312.
International Covenant on Civil and Political Rights, 1966: *see* Vol. 16 p. 165.
International Covenant on Economic, Social and Cultural Rights, 1966: *see* Vol. 23 p. 186.
International Convention on the Elimination of All Forms of Racial Discrimination, 1966: *see* Vol. 23 p. 186.
Optional Protocol to the International Covenant on Civil and Political Rights, 1966: *see* Vol. 15 p. 219.
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.
International Convention against Apartheid in Sports, 1985: *see* Vol. 6 p. 248.
Convention on the Rights of the Child, 1989: *see* Vol. 11 p. 251.
Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1989: *see* Vol. 18 p. 106.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990: *see* Vol. 18 p. 106.
Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1992, *see* Vol. 12 p. 242.
Optional Protocol to the Convention on the 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. 22 p. 312.
Convention on the Rights of Persons with Disabilities, 2008: *see* Vol. 22 p. 312.
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 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002
(Continued from Vol. 23 p. 186)

State	*Sig.*	*Cons.*
Afghanistan		17 Apr 2018

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
New York, 19 December 2011
Entry into Force: 14 April 2014

State	*Sig.*	*Rat.*
Maldives	28 Feb 2012	
Mongolia	4 Oct 2013	28 Sep 2015
Thailand	25 Sep 2012	25 Sep 2012

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. 17 p. 171.

Intellectual Property

Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Convention Establishing the World Intellectual Property Organization, 1967: see Vol. 13 p. 188.
Convention for the Protection of Industrial Property, 1883 as amended 1979: see Vol. 23 p. 188.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 18 p. 109.
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. 18 p. 109.
Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.
Trademark Law Treaty, 1994: *see* Vol. 15 p. 222.
Singapore Treaty on the Law of Trademarks, 2006: *see* Vol. 23 p. 189.
Beijing Treaty on Audiovisual Performances, 2012: *see* Vol. 22 p. 315.

Convention for the Protection of Literary and Artistic Works, 1886 as Amended 1979
(Continued from Vol. 22 p. 314)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Afghanistan	2 Mar 2018	2 Jun 2018

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. 23 p. 188)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Afghanistan		26 Jun 2018
Indonesia		2 Jan 2018

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as Amended in 1979
(Continued from Vol. 13 p. 271)
(Status as provided by WIPO)

State	*Party*	*Latest Act to which State is Party*
Iran	12 Jul 2018	Geneva

WIPO Performances and Phonograms Treaty, 1996
(Continued from Vol. 23 p. 189)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
India		25 Dec 2018

WIPO Copyright Treaty, 1996
(Continued from Vol. 23 p. 189)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
India		25 Dec 2018

Patent Law Treaty, 2000
(Continued from Vol. 22 p. 315)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Korea (DPR)		22 Aug 2018

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 2013
(Continued from Vol. 23 p. 189)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Afghanistan	28 Jun 2013	26 Jul 2018
Philippines		18 Dec 2018

International Crimes

Slavery Convention, 1926 as amended in 1953: *see* Vol. 15 p. 223.
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. 16 p. 171.
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. 23 p. 191.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 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. 23 p. 191.
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 2005: *see* Vol. 18 p. 112.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948
(Continued from Vol. 21 p. 249)

State	*Sig.*	*Rat.*
Turkmenistan		26 Dec 2018

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. 21 p. 251.
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. 21 p. 251.

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. 22 p. 319.
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 22 p. 319.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961
(Continued from Vol. 17 p. 176)
(Status as provided by HccH)

State	*Party*	*E.i.f.*
Philippines	12 Sep 2018	

Labour

Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 19 p. 192.
Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): *see* Vol. 22 p. 319.
Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 19 p. 193.
Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 22 p. 320.
Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): *see* Vol. 19 p. 193.
Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111): *see* Vol. 22 p. 320.
Employment Policy Convention, 1964 (ILO Conv. 122): *see* Vol. 8 p. 186.
Minimum Age Convention, 1973 (ILO Conv. 138): *see* Vol. 23 p. 193.
Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182): *see* Vol. 19 p. 194.
Promotional Framework for Occupational Safety and Health Convention, 2006 (ILO Conv. 187): *see* Vol. 22 p. 320.

Narcotic Drugs

Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: *see* Vol. 6 p. 261.
Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: *see* Vol. 6 p. 261.
International Opium Convention, 1925, amended by Protocol 1946: *see* Vol. 7 p. 334.
Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.
Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the Protocol of 1946: *see* Vol. 6 p. 262.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 6 p. 262.
Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: *see* Vol. 6 p. 262.
Single Convention on Narcotic Drugs, 1961: *see* Vol. 13 p. 276.
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.
Amendment to the 1980 Convention on the Physical Protection of Nuclear Material, 2005: *see* Vol. 22 p. 322.
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 Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 16 p. 178.
Protocol to Amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 17 p. 180.

Convention on the Physical Protection of Nuclear Material, 1980
(Continued from Vol. 22 p. 322)
(Status as provided by IAEA)

State	*Cons.* (*deposit*)	*E.i.f.*
Thailand	19 Jun 2018	19 Jul 2018

Convention on Nuclear Safety, 1994
(Continued from Vol. 22 p. 323)
(Status as provided by IAEA)

State	*Cons.* (*deposit*)	*E.i.f.*
Thailand	3 Jul 2018	1 Oct 2018

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997
(Continued from Vol. 19 p. 196)
(Status as provided by IAEA)

State	*Cons.* (*deposit*)	*E.i.f.*
Thailand	3 Jul 2018	1 Oct 2018

Amendment to the Convention on the Physical Protection of Nuclear Material
Vienna, 8 July 2005
Entry into force: 8 May 2016
(Status as provided by IAEA)

State	*Cons.* (*deposit*)	*E.i.f.*
Bangladesh	4 Jul 2017	4 Jul 2017
China	14 Sep 2009	8 May 2016
India	19 Sep 2007	8 May 2016
Indonesia	27 May 2010	8 May 2016
Japan	27 Jun 2014	8 May 2016
Kazakhstan	26 Apr 2011	8 May 2016
Korea (Rep.)	29 May 2014	8 May 2016
Kyrgyzstan	26 Sep 2016	26 Sep 2016
Myanmar	6 Dec 2016	5 Jan 2017
Pakistan	24 Mar 2016	8 May 2016
Singapore	22 Oct 2014	8 May 2016
Tajikistan	10 Jul 2014	8 May 2016
Thailand	19 Jun 2018	19 Jul 2018
Turkmenistan	22 Sep 2005	8 May 2016
Uzbekistan	7 Feb 2013	8 May 2016
Vietnam	3 Nov 2012	8 May 2016

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. 12 p. 254.
Convention on Road Signs and Signals, 1968: *see* Vol. 20 p. 213.

Sea

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.
Convention on the High Seas, 1958: *see* Vol. 7 p. 339.
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.
Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.
United Nations Convention on the Law of the Sea, 1982: *see* Vol. 19 p. 198.
Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 19 p. 199.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (...) Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995
(Continued from Vol. 23 p. 197)

State	*Sig.*	*Rat.*
Vietnam		18 Dec 2018

Sea Traffic and Transport

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 6 p. 273.
International Convention for the Safety of Life at Sea, 1960: *see* Vol. 6 p. 273.
Convention on Facilitation of International Maritime Traffic, 1965 as amended: *see* Vol. 12 p. 255.
International Convention on Load Lines, 1966: *see* Vol. 15 p. 230.
International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 15 p. 231.
Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.

Convention on the International Regulations for Preventing Collisions at Sea, 1972 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 1978: *see* Vol. 19 p. 200.
Nairobi International Convention on the Removal of Wrecks, 2007: *see* Vol 23 p. 198.

Protocol Relating to the International Convention on Load Lines, 1988
(Continued from Vol. 23 p. 198)
(Status as provided by IMO)

State	*Cons.* (*dep.*)	*E.i.f.*
Indonesia	28 Nov 2017	28 Feb 2018
Philippines	24 Apr 2018	24 Jul 2018

Protocol Relating to the International Convention for the Safety of Life at Sea, 1988
(Continued from Vol. 23 p. 198)
(Status as provided by IMO)

State	*Cons.* (*dep.*)	*E.i.f.*
Indonesia	28 Nov 2017	28 Feb 2018
Philippines	6 Jun 2018	6 Sept 2018

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. 23 p. 198.

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. 6 p. 281.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: *see* Vol. 6 p. 281.
Treaty on the Non-Proliferation of Nuclear Weapons, 1968: *see* Vol. 11 p. 262.
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: *see* Vol. 6 p. 282.
Convention on the Prohibition of 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, and Protocols, 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.
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.
Arms Trade Treaty, 2013: *see* Vol. 23 p. 201.

Comprehensive Nuclear Test Ban Treaty, 1996
(Continued from Vol. 22 p. 328)

State	*Sig.*	*Cons.*
Thailand	12 Nov 1996	25 Sep 2018

Convention on Cluster Munitions, 2008
(Continued from Vol. 19 p. 204)

State	*Sig.*	*Cons.*
Sri Lanka		1 Mar 2018

Treaty on the Prohibition of Nuclear Weapons, 2017
(Continued from Vol. 23 p. 202)

State	*Sig.*	*Cons.*
Myanmar	26 Sep 2018	
Vietnam	22 Sep 2017	17 May 2018

State Practice of Asian Countries in International Law

Bangladesh

*Sumaiya Khair**

Environmental Law – Green Climate Fund

Bilateral Agreement

On 8 March 2018, the Government of the People's Republic of Bangladesh and KfW, Development Bank acting on behalf of the German Federal Government signed a Financing Agreement for the implementation of a Climate Resilient Infrastructure Mainstreaming (CRIM) project. The total cost of the project is 82,75 million USD out of which 40 million USD has been given from the Green Climate Fund (GCF) as a grant to – construct and renovate cyclone shelters and critical access roads to protect lives in the rural coastal areas of Bangladesh; develop urban infrastructure and protect vulnerable city dwellers from climate risks; and establish a national "Center of Excellence for Climate Resilience Infrastructure" to inform and guide infrastructure development throughout the country. The Green Climate Fund (GCF) is a new multilateral, multi-billion-dollar fund which was established by 194 countries as Parties to the UN Framework Convention on Climate Change (UNFCCC) at the Conference of Parties (COP) in 2010. GCF aims to promote the shift towards low-emission and climate-resilient development pathways. The CRIM project is the first project which has been approved by the GCF for Bangladesh.

* Professor, Faculty of Law, University of Dhaka, Bangladesh.

Human Rights – Women's Rights, Violence against Women, Declaration on the Elimination of all Forms of Discrimination against Women, cedaw, Declaration on the Elimination of Violence against Women, udhr, iccpr, crc

Dowry Prohibition Act 2018

Bangladesh witnessed a rise in dowry related violence since its independence from Pakistan in 1971, which assumed alarming proportions in subsequent years. Scores of women and young girls (primarily child brides) faced mental and/or physical torture by their husbands and/or in-laws, some resulting in death or suicide. The first anti-dowry law, titled Dowry Prohibition Act, was passed in 1980 in an attempt to curb the rising incidents of domestic violence against women and young girls on the pre-text of non-payment of dowry. In 2018, the Bangladesh Parliament repealed the 1980 law and passed the Dowry Prohibition Act 2018. While provisions of the earlier law and its subsequent amendments have been given due consideration while drafting the new Act, the new law is said to have been framed to respond to evolving concerns and needs of the day.

Section 2(b) of the Act defines dowry as any direct or indirect demand for money or any other wealth or consent thereto, as precondition to marriage made by one party to the marriage to the other at the time of marriage or before marriage or during the continuation of the marriage as a stipulation to continue the marriage. The definition of dowry in this section excludes dower provided as per Muslim personal laws and gifts from relatives, friends, and well-wishers given to any party to the marriage.

The Act criminalizes the act of demanding dowry and prescribes a maximum of 5 years and a minimum of one year's imprisonment or a fine of maximum BDT 50,000 or both (section 3). The Act prescribes the same penalty for any party to marriage who gives or receives dowry or who facilitates the giving or receiving of dowry or who enters into an agreement to facilitate the same (section 4). Section 5 of the Act regards any agreement related to the giving or receiving dowry as void. The Act of 2018 adds a new provision by way of section 6 that penalizes any person who files or induces another to file a false complaint or case with intent to victimize any person, with a maximum of five year's imprisonment or BDT 50,000 fine or both. Section 7 considers an offence committed under this Act as cognizable and non-bailable but open to out of court settlement.

Critics of the new Act flag several discrepancies. To begin with, the exclusion of gifts from the definition of dowry in section 2(b) creates scope for misrepresenting dowry as gifts, leading to potential misuse of the provision. The Act equally penalizes the act of demanding and payment of dowry but ignores the extenuating circumstances which compel a party to concede to the demand. This will discourage parties who are compelled to pay from reporting the offence, namely, the wives and their families. Out of court settlements primarily pertain to petty crimes; dowry demands predominantly involve physical and mental torture on the wife and by making it a compoundable offence, the law trivializes the impact of the offence. This will also provide the accused and/or his family with an opportunity to force the complainant and/or her family to settle out of court.

Human Rights – UDHR – Rights of Persons with Disabilities – Convention on the Rights of People with Disabilities (CRPD) – ICCPR – UNGA Resolution 46/119 (17 December 1991)

A new law on mental health was adopted by the Bangladesh Parliament by repealing the earlier Lunacy Act of 1912. The new Act has provisions that aim to ensure the overall well-being including the care, dignity, right to property and rehabilitation of people having mental health problems. It did away with terms such as, "lunatics" and "temporary patients", defined inter alia, "mental health" and the criterion for "non-protesting" patient and distinguished between "mental illness" and "mental disorder" (section 2, definitions). The Government has been entrusted with the responsibility of implementing all activities including the expansion, development, regulation and coordination of mental health related issues (section 4).

The law speaks of establishing a Mental Health Review and Monitoring Committee in every district which will include, among others, government representatives and mental health professionals, amongst whom at least one member shall be a woman (section 5). Any guardian or relative, who is dissatisfied with the treatment of a patient with mental health issues, may seek redress from this Committee (section 5[1]). Appeal lies with the government in case the applicant is aggrieved by the decision of the Committee (section 5[4]). All matters relating to the role and functions of this Committee shall be determined by the Rules that would be drafted to help implement this Act (section 5[5]). Section 6 states that people with mental health

problems shall be ensured rights to their health, property, dignity, education and other rights, as appropriate (section 6[1]); all matters pertaining to the rights of these people shall be regulated by the Rules to be drafted (6[2]).

The Act empowers the government to establish hospitals, or medical college hospitals or separate units/departments in district hospitals for the treatment of mental health patients as long as separate arrangements are in place to treat mental health patients who are drug addicts, under-trial or convicted prisoners and minors (section 7 [1]). Private hospitals for treating mental health patients can also be set up after obtaining a license from the government to this end (section 8). The government has the authority to enter and inspect any mental hospital and inspect and seize any register, sample, equipment, or documents related to mental health treatment of patients as deemed appropriate and necessary; however, in case of registers or documents that pertain to the illness of the patient, approval of the patient or his/her guardian must be obtained before seizure or public disclosure (section 9). In the case of private mental hospitals, the government has the authority to suspend their licenses and close their operations in the public interest, if the there is evidence that treatment of patients is not up to the required standard or if the violation of any of the conditions of the licence is such that it would be inappropriate to ask the hospital to show cause (section 9 [b]). Where private hospitals are closed, respective hospital authorities are required to ensure the speedy transfer of under-treatment patients to other hospitals (section 9[c]). Anyone running a mental hospital without a proper licence shall be punishable with a fine of Taka 0.5 million and a further Taka 2 million taka for repeat offences (section 10 [1]). Any practitioner working in any unlicensed metal hospital shall be liable to a fine of taka 100,000 (section 10[3]).

The Act has extensive provisions for the admission of mental health patients for treatment, whether voluntary, involuntary or non-protesting; when admitting minors, the consent of the guardian or relative is mandatory (section 11[1]). Admission of voluntary patients is quite straightforward – the designated medical officer will examine the patient within 24 hours of the application and record the findings in a prescribed form (section 12[2]). A voluntary patient who has been admitted may express unwillingness to receive treatment or request for release at any point of time; however, the medical officer may, if s/he deems it fit to categorize the patient as an involuntary patient, reject the request (section 12[3]). That there can be a change in the admission status or that the request for release can be rejected shall be communicated to the patient (section 12[4]). The rationale for admission of patients and the duration of stay in the hospital shall be re-considered every 15 days and in case of minors, every 7days (section 12[125]).

As for non-protesting patients, they may be admitted with the consent of the guardian or relative (section 13[1]). All other processes relating to change in the admission status, release, review of the rationale for admission and duration of stay, and the right to be informed of the same shall be the same as that applicable in case of voluntary patients (section13 [2,3,4]).

Before admitting an involuntary patient, several factors will have to be considered: the designated medical officer or a mental health specialist or the Mental Health Review and Monitoring Committee shall take into account the nature and degree of the illness, incidents of violence and tendency thereto, unwillingness to take medication, predisposition to suicide, etc., and the fact that non-admission of the patient shall pose imminent threat to his/her health and safety and that of the public (section 14[4]). Subject to these various considerations and based on the consent or application of the guardian or relative of the patient or the on-duty police officer of the concerned jurisdiction or the designated medical officer, steps for admitting the patient shall be undertaken (section 14[1]). The duration of such admission shall vary according to, inter alia, the recommendation of the designated medical officer, assessment of the Mental Health Review and Monitoring Committee, and the importance of the treatment (section 14[2]). A relative, parent or friend can initiate an application for involuntary admission. This is followed by an assessment by a medical officer within 24 hours. A medical officer can authorize emergency admission for up to 72 hours. An assessment by a psychiatrist is required for ongoing involuntary admission. This status is reviewed every 28 days. The maximum duration of admission is 180 days; the Mental Health Review and Monitoring Committee can extend the duration of stay, if necessary.

Patients who are accused of a crime shall be admitted for treatment based on the order of a Magistrate (section 15). Patients devoid of an address or guardian or relatives shall be admitted for treatment by the representative of the local government authority of a given locality (section 17). If any person suffering from mental health problems is considered to be dangerous, s/he shall be taken into police custody and referred to the nearest mental hospital (section 17[2]). The Act directs the rehabilitation of mental health patients by social welfare systems or rehabilitation centers (sections 19–20).

A guardian or relative of a person afflicted by mental health problems may move the court for determination of his/mental status; the court shall order a designated medical officer to determine the mental status of the concerned individual and submit a report (section 20[1–2]). The medical officer may seek attendance of the person for examination by way of a notification; where the concerned person is a woman who practices religious and/or cultural dictates that require seclusion from the public, she may be examined in any convenient place in the court premises (section 20[3])). Upon submission of the report,

the court shall make an order on the mental status of the person and his/her capacity to hold and manage property (section 20[4]).

The Act specifically emphasizes on salient issues pertaining to guardianship of persons afflicted by mental health problems (section 22). When, after admission into a hospital, a mental health patient is found to be incapable of managing his/her property due to mental illness or any other reason, the designated medical officer will inform his/her guardian or relative about the potential damage to property that his/her incapacity is likely to cause. If the guardian or relative is unwilling to take any steps in this regard, the designated medical officer shall request the court to appoint a Manager to look after the said property. If the court is convinced that the patient is incapable of managing his/her property and that his/her parents are not alive, it shall appoint a Manager for a period of three years. On assuming responsibility, the Manager shall prepare and submit to the court an inventory of all moveable and immoveable property of the patient. Thereafter, the Manager shall, on behalf of the patient, undertake the receipt, regulation and management of property, business, partnership and necessary legal actions in this regard; however, the Manager is prohibited from transferring, by way of sale, mortgage, gift, exchange, rent or lease beyond 5 years any of the patient's immoveable property without the permission of the court. Within 3 months of the completion of each financial year, the Manager is required to submit to the court reports on the status of the property in his custody, money received and all expenditures related to the care and treatment of the patient. The guardian or relative of the patient is entitled to seek information from the Manager and in the event of his death from his legal representative, regarding all transactions, expenditure, etc. related to the patient's property; they may also move the court to obtain financial records of the same. With the exception of the costs required for the care and treatment of the patient and management of his/her property, the Manager shall deposit all money to the government treasury; this shall be returned to the patient when it is evident that s/he has recovered fully.

The Act criminalizes the issuance of false certificates regarding the mental status of a patient by mental health practitioners and makes it punishable with a fine not exceeding Taka 3,00,000 or one year's rigorous imprisonment or with both (section 23[1]). If a guardian of a mental health patient or a manager appointed to look after his/her property fails to discharge his/her duties in terms of care and treatment of the patient or management of the property or fails to comply with directive/s of the court in this regard, s/he shall be liable to a fine not exceeding Taka 5,00,000 or rigorous imprisonment of three years or with both (section 23[2]). Anyone contravening any provision of this law or any rules thereto, or any government order or directive or assisting, abetting

or instigating any such contravention shall be liable to a fine not exceeding 1,00,000 or six month's imprisonment or with both (section 23[3]). Offences under this Act are non-cognizable, compoundable and bailable (section 24[2]).

Human Rights – Cyber Security – UDHR – ICCPR – Freedom of Expression

Digital Security Act 2018

Bangladesh enacted the Digital Security Act in September 2018. The purpose of the law, as stated in its preamble, is to "ensure National Digital Security and enact laws regarding Digital Crime Identification, Prevention, Suppression, Trial and other related matters". The Act prescribes measures to deal with defamation, the hurting of religious sentiments, the causing of deterioration of law and order, and the instigation of violence against any person or organization by publishing or transmitting any material on any website or in electronic media. More importantly, this law has extra-territorial application manifest in section 4 which provides that if any person commits any offence within the meaning of this Act from outside of Bangladesh, s/he would be liable to punishment as though the offence was committed in Bangladesh.

The law speaks of establishing a Digital Security Agency with appropriate manpower the terms of reference of which will be prescribed by the government. The role and functions of this Agency shall be formulated in the Rules that will be drafted for implementing the Act (sections 5–7). The law also proposes the creation of a National Digital Security Council to be headed by the Prime Minister (section 12). Primarily an advisory and policy making body, the Council will ensure proper implementation of the Act.

The Act lays down preventive measures in terms of power to remove or block some data-information, having in place an Emergency Response Team, developing a digital forensic lab and ensuring the quality of the lab. The law grants law enforcement authorities wide-ranging powers to remove or block online information (via the Digital Security Agency) that harms the unity of the nation, economic activities, security, defense, religious values or public order or spreads or incites communal hostility and hatred (section 8). The Bangladesh Telecommunications and Regulatory Authority (BTRC) will remove or block the item accordingly. Comprising of digital security experts and if necessary, members of the law enforcement agencies, the Emergency Response Team Working will work round the clock to guard against potential cyber/digital attacks and to take remedial measures, as and when necessary,

either by themselves or by drawing on international expertise (section 9). The digital forensic lab will provide forensic support to the implementation of the Act (section 10); to this end, it will be fully equipped with trained personnel, relevant infrastructure, equipment and instruments in order to maintain a high technical standard (section 11).

The Act has an extensive list of crimes and accompanying punishments (sections 17–36). They include: illegal entrance in Critical Information Infrastructure (section 17); illegal entrance into computers, digital devices, computer systems (section 18); damage to computers, computer systems (section 19); offenses relating to computer source code change (section 20); propaganda or campaign against the liberation war, recognition of the liberation war, the Father of the Nation, the national anthem or national flag (section 21); digital or electronic forgery (section 22); digital or electronic fraud (section 23); identity fraud (section 24); publishing and sending offensive, false or fear-inducing data-information (section 25); collecting and using identity information without permission (section 26); cyber-terrorism (section 27); publication and broadcast of such information on any website or in any electronic form that hampers religious sentiments or values (section 28); publication and broadcast of defamatory information (section 29); e-transactions without legal authority (section 30); deteriorating law and order (section 31); breaching Government secrets (section 32); illegal transfer and saving of data-information (section 33); hacking related offence (34); aiding in the commission of offences under this Act (section 35); offence committed by Company (section 36).

Among these various provisions, the most disputed and debated are the following:

> Section 21
>
> Anyone spreading "propaganda and campaign against liberation war of Bangladesh or spirit of the liberation war or Father of the Nation" using digital devices or instigating such acts, will be punishable with a maximum of fourteen years' imprisonment or a fine of up to Taka 10 million or with both. S/he will be given a life sentence or a fine of Taka 30 million or with both for committing the offence for the second time or recurrently.
>
> Section 25
>
> A person may face up to three years in prison or Taka 0.3 million in fine or with both if s/he is found to have deliberately publishing information on the website or in electronic form that is "aggressive or frightening" or

which can make someone disgruntled; knowingly publish or broadcast false and distorted (fully or partially) information to annoy or humiliate someone; knowingly publish or broadcast false and distorted (fully or partially) information to tarnish the image of the state or to spread rumours. A person will face up to five years in jail or Taka 1 million fine or with both for committing the offence for the second time or recurrently.

Section 28

A person may face up to seven years in jail or Taka 1 million in fine or with both if s/he is found to have deliberately published or broadcast something on the website or in electronic form or get it done to hurt religious sentiments and values. A person will face up to ten years in jail or Taka 2 million in fine or with both for committing the offence for the second time or recurrently.

Section 29

A person may face a maximum of three years in jail or Taka 0.5 million in fine or with both if s/he commits an offence stipulated in section 499 of the Penal Code (defamation) through website or in electronic form. S/he will be punishable with a maximum of five years in jail or a fine of Taka 1 million or with both for committing the offence for the second time or recurrently.

Section 31

This section penalizes the posting of information that "creates animosity, hatred, or antipathy among the various classes and communities" or creates instability or disorder or disturbs or is about to disturb the law and order situation with a maximum of ten years of imprisonment or a fine of Taka 0.5 million or with both. If any person commits the crime for the second time or recurrently, s/he will be punished with imprisonment for a term not exceeding ten years or with a fine not exceeding Taka 1 million or with both.

Section 32

A person may face imprisonment for a maximum of fourteen years or a fine of Taka 2.5 million or with both for gathering, sending, or preserving classified information of any government using a computer or other

digital device. If s/he commits the offence for the second time or recurrently, s/he will be punished with life imprisonment or with fine not exceeding Taka 10 million or with both.

The passage of this law was met with wide criticism from the media and civil society. Termed as draconian and arbitrary, the law was viewed as going beyond its defined scope and venturing into areas that may potentially impede the freedom of expression and freedom of the media. A law that penalizes the expression of opinions about historical facts are incompatible with a country's obligations to respect freedom of opinion and expression. Without sufficiently distinguishing between genuine cyber-crimes and the nature and practice of independent journalism, the law introduces provisions that can easily be used and abused to curb press freedom. Besides, the vagueness in the language poses threats to the freedom of expression as it leaves too much room for interpretation, which can be misused. Indeed, the vagueness, combined with the potentially harsh penalty, increases the likelihood of self-censorship. The Act has also been criticized for giving the police unrestricted powers of search, seizure, and an arrest without warrant, with virtual impunity.

Human Rights – Administrative fairness – Equality before Law – Equal Protection – Non-Discrimination

Dr. A.Y.M. Akramul Hoque Versus Government of the People's Republic of Bangladesh 12 SCOB [2019] High Court Division (Special Original Jurisdiction), Writ Petition No.1852 of 2014, Judgment Delivered on 04 November 2018.

The case of the petitioner, as set out in the Writ Petition, in short, is as follows: The petitioner having qualified in the Bangladesh Civil Service (BCS) Examination of 1982 was recommended by the Public Service Commission (PSC) for appointment to the Administration Cadre and accordingly he joined the Administration Cadre as Assistant Commissioner on 14.12.1983 following which he served in various capacities under the government and was ultimately promoted to the post of Joint Secretary on 05.03.2005. As Joint Secretary to the Government of Bangladesh, he served as Director, Bangladesh Jute Mills Corporation from 15.05.2005 to 15.03.2006 and as Director General, Bureau of Statistics from 30.03.2006 to 15.10.2009. However, he was made an Officer on Special Duty (OSD) under the then Ministry of Establishment (now Ministry of Public Administration) on 16.10.2009 and since then he has been an OSD

thereunder. It may be noted here that while historically the OSD position merited honour and respect, in recent times, this is increasingly being used as a means of penalizing government officers who do not toe the partisan line of the ruling party.

A combined gradation list of the officers of the Administration Cadre of various batches of 1982 was updated on 27.01.2014 by the government. The name of the petitioner appears in serial no. 79 in that combined gradation list. A total of 28 officers who were below the petitioner in the gradation list were promoted to the post of Additional Secretary by superseding him vide a notification issued by the Ministry of Public Administration on 27.01.2009. On 07.09.2009, the Ministry of Public Administration issued another notification thereby promoting another 46 officers of the Administration Cadre to the post of Additional Secretary by superseding the petitioner. Subsequently, on 10.10.2011 the concerned Ministry issued yet another notification whereby 27 officers were promoted to the post of Additional Secretary by superseding the petitioner. Several other notifications followed pursuant to which more officers were promoted to the post of Additional Secretary by superseding the petitioner bringing the total to 302, all of whom were below the petitioner in the gradation list, and who were promoted to the higher post of Additional Secretary bypassing the petitioner without any justifiable reason. At later dates and via various notifications, a total of 21 officers, who were below the petitioner in the combined gradation list, were promoted to the post of Secretary bypassing the petitioner.

The Court issued a Rule Nisi calling upon the respondents to show cause as why the different notifications issued by the government whereby officers were promoted by superseding the petitioner and so far as they relate to the exclusion of the name of the petitioner therefrom, should not be declared to be without lawful authority and of no legal effect and why a direction should not be given upon the respondents to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011 and to pay him all attending benefits and/or such other or further order or orders passed as to this Court may seem fit and proper.

The legal instrument for regulation of the appointment of the civil servants by promotion to the ranks of Deputy Secretary, Joint Secretary, Additional Secretary and Secretary respectively is hereinafter referred to as the Promotion Rules of 2002. Rule 4(1) of the Promotion Rules of 2002 provides merit, efficiency and seniority as the basis of promotion. Rule 4(2) provides that in case of promotion to the rank of Additional Secretary or Secretary, the importance and nature of assignments discharged by a concerned officer in his total

service tenure and his personal reputation and other relevant matters will also be considered. Rule 5 prescribes the procedure for promotion. As per Rule 5(4), the Superior Selection Board (SSB – respondent no. 2 in this case) will make necessary recommendations for promotion which are required to be approved by the Prime Minister.

The court observed that the petitioner had the requisite qualifications as enumerated in the 1st Schedule to the Promotion Rules of 2002 for appointment by promotion to the rank of Additional Secretary on 27.01.2009, when a good number of officers, who were below the petitioner in the gradation list, were promoted to the post of Additional Secretaries. As per the 2nd Schedule to the Promotion Rules of 2002, an officer shall be evaluated based on 100 marks for promotion. The court observed that on 27.01.2009, when other officers who were below the petitioner in the gradation list were considered for promotion, the petitioner, despite being otherwise eligible for promotion and having presumably obtained the qualifying marks, was not promoted to the post of Additional Secretary. The court believed that the additional considerations as contemplated by Rule 4(2) of the Promotion Rules of 2002 were not only redundant but also vague, because these are already covered by the ACRs of concerned officers. The provisions of Rule 4(2) have been constantly used by the authority to pick and choose at will candidates for higher ranks in the Civil Service of Bangladesh. Hence, Rule 4(2) of the Promotion Rules of 2002 was discriminatory. The court held that repeated supersessions of the petitioner by junior officers to the post of Additional Secretary and thereafter to the post of Secretary to the Government of Bangladesh were arbitrary and vitiated by malice in law. The repeated supersessions of the petitioner also violated Article 29(1) of the Constitution of Bangladesh. Against this backdrop, the Rule was liable to be made absolute.

The government contested the Rule by filing an Affidavit-in-Opposition stating that the petitioner was not found eligible for promotion to the post of Additional Secretary and as such, he was not recommended by the SSB. Denying the petitioner's claim that he had the requisite qualifications for promotion, the government contended that Rule 4(2) of the Promotion Rules of 2002 was not vague, redundant or discriminatory as it requires consideration of the nature and importance of the duties performed by an officer concerned throughout his service career and is equally applicable to all incumbents. The officers below the petitioner were found eligible and accordingly they were recommended for promotion by the SSB. The government argued that seniority was not the only basis from promotion – merit and efficiency are equally important, qualities that the petitioner lacked. Therefore, the supersessions of the petitioner were not vitiated by malice in law. No right of the petitioner

was curtailed or infringed nor was he deprived of his legal entitlement. Besides, the petitioner being now retired, there is not scope for promotion to a higher position.

In response to the government's Affidavit-in-Opposition, the court held that the government's argument that the petitioner was not eligible for promotion in the light of Rule 4(2) of the Promotion Rules of 2002, was not tenable given that no specific reason was assigned by the SSB for the supersession of the petitioner. It was evidently clear that the SSB did not objectively assess the worth, efficiency, drive, zeal to work and integrity of the petitioner, particularly when the contents of his ACRs from 1984 to 2013 speak volumes about his spotless, untainted and unblemished service record. What was interesting was that the petitioner scored about 95% marks on an average between 2000 to 2009.

Since he was made an OSD in the Ministry of Public Administration from 2010 to 2013, the petitioner did not incur any liability for the absence of his ACRs for that period (2010 to 2013). Acknowledging that the petitioner's ACRs during his entire service career were excellent and given that no specific reason was assigned for his repeated supersessions, the court held that the SSB did not act fairly in evaluating the suitability of the petitioner for promotion to the post of Additional Secretary to the Government. In this context, the court alluded to decisions in Re Infant H(K) ([1967] 1 All E.R. 226, Council of Civil Service Union Vs Minister for the Civil Service [1984] 3 All E.R. 935, and Swadeshi Cotton Mill Vs India, AIR 1981 SC 818 which maintained that administrative authorities must act fairly and that this rule must not be compromised save in very exceptional circumstances where compulsive necessity so demands.

Drawing on relevant case law from various jurisdictions (Ram Chandra … Vs … Secretary to the Government of W. B, AIR 1964 Cal 265; Punjab … Vs … Khanna, AIR 2001 SC 343; Shearer … Vs … Shield, [1914] AC 808; Associated Provincial Picture … Vs … Wednesbury Corporation [1948] 1 KB 223; State of A.P. and others … Vs … Goverdhanlal Pitti, (2003) 4 SCC 739; Regional Manager … Vs … Pawan Kumar Dubey, AIR 1976 SC 1766; Venkataraman … Vs … India, AIR 1979 SC 49; Maneka Gandhi … Vs … India, AIR 1978 SC 597; Romana Shetly … Vs … International Airport Authority, AIR 1979 SC 1628; Ajay Hashia … Vs … Khalid Mujib, AIR 1981 SC 487; D.S. Nakara … Vs … India, AIR 1983 SC 130; A.L. Kalra … Vs … P and E Corporation of India, AIR 1984 SC 1361 et al.) and legal authorities (Dicey; Rotundy; Sir Ivor Jennings), the court stressed that mala fides or bad faith vitiates everything and a mala fide act is a nullity. In the present case, mala fides applied as the aggrieved party was able to establish that the authority making the impugned supersessions did not apply its mind at all to the matters in question. This is evidenced by the incomprehensible manner in which the SSB brushed aside the spotless, untainted and unblemished

service record of the petitioner throughout his career without furnishing any plausible reason whatsoever. Equally astounding was the SSB's failure to take into consideration the petitioner's ACRs which ought to have been the most dominant and persuasive factors determining his eligibility for the promotion post. However shockingly enough, those evaluations were completely disregarded by the SSB – it was a case of total non-application of the mind. That the SSB had an ulterior motive and that some extraneous factors were definitely taken into account by the SSB were evidently clear from the facts and circumstances of the case. Indeed, the repeated supersessions of the petitioner were classic examples of bad faith or mala fides. The reason for supersession as mentioned in the Affidavit-in-Opposition, appear prima facie, cryptic, vague, unspecific and nebulous and as such, the court believed that the impugned supersessions of the petitioner were arbitrary and unreasonable.

The doctrine of acting fairly requires that the SSB ought to have examined the matter of promotion of the petitioner objectively before arriving at a decision. Disappointingly, however, the SSB did not do so and the court was compelled to conclude that the petitioner was superseded several times in the "colourable exercise of power" and with a purpose for which he became a victim of ex-facie arbitrariness, unreasonableness and bad faith. It was on record that the petitioner submitted a representation dated 13.09.2009 to the Secretary of the Ministry of Public Administration for reconsideration of his case for promotion; instead of responding thereto, the petitioner was made an OSD in the Ministry of Public Administration on 16.10.2009 – this was malice in law – pure and simple.

On the issue of equality before law and equal protection of law, the court stressed that while no employee has any right to claim promotion on the basis of seniority alone, where the promotion post is to be filled up on a seniority-cum-suitability basis as per service rules, the guarantee of Articles 27 and 29(1) of the Bangladesh Constitution require that an employee fulfilling the qualifications for promotion should be duly considered for promotion. Thus, if the junior employee is promoted without considering the case of a senior employee who fulfills the qualification for promotion, the guarantee of equality of opportunity is violated.

Considering the views of different distinguished Judges and scholars on the meaning of the phrase "equality before law and equal protection of law", the court observed that "equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term "equal protection of law" is used to mean that all

persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same.

The Court maintained that the petitioner and others who were in the combined gradation list of officers were a class by themselves. There was no 'intelligible differentia' or 'permissible criteria' between them; as such, the petitioner should not have been discriminated against as regards his promotion.

Having due regard to the discussions and the facts and circumstances of the case, the Rule was made absolute in part. The respondents were directed to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011. He would be deemed to have gone on Post Retirement Leave (PRL) as a Secretary to the Government of Bangladesh on 28.02.2014. Consequentially, he would be entitled to all pensionary benefits of a Secretary to the Government of Bangladesh in view of the then prevalent National Pay Scale of 2009.

Human Rights – Administrative Fairness – Principles of Natural Justice – Due Process of Law

Md. Shamsujjaman and Others – Versus – Bangladesh, Represented by the Secretary, Ministry of Education, Ramna, Dhaka and Others, 13 SCOB [2020] High Court Division (Special Original Jurisdiction), Writ Petition No. 3691 of 2014, Judgement Delivered on 14.11.2018

Relevant facts of the case are that petitioners, the petitioners, being 10 in number, studying in different departments at the Shahjalal University of Science and Technology, Sylhet challenged the order of their expulsion issued by the University on account of an incident that took place on 13.12.2013. On that day, a human chain was formed by the teachers and students of the University condemning the heinous attack on a monument of the University. Some miscreants attacked the teachers and students who formed the human chain, causing injury to some of them. The said incident was published in both national and local dailies. Following the incident, an Inquiry Committee was formed to look into the matter. On 26.12.2013, the Inquiry Committee issued letters only to petitioner nos. 1 and 2, asking them to appear before the Committee on 30.12.2013. The petitioners refrained from appearing before the Committee. The Committee submitted its report to the Proctor, who was

the Member Secretary of the Committee, recommending action against certain students of the University, including the petitioners. Pursuant to the report and recommendation of the Committee, the University authority issued show cause letters, all dated 02.02.2014, upon the petitioners, asking them to respond within 15 days of receiving the said notice, which they did.

On 27.02.2014, at its 183rd Meeting, the Syndicate of the University took a decision approving the temporary suspension order of the petitioners. However, on the very same day, the Syndicate also passed an order of expulsion of the petitioners. Accordingly, pursuant to the decision of the Syndicate, the impugned letters dated 16.03.2014 were issued to all the petitioners, communicating thereby the orders of their expulsion from the University.

The petitioners filed applications before the Vice-Chancellor of the University praying for cancellation of the suspension order. There was no response to the application. The petitioners then issued a Notice Demanding Justice requesting the concerned respondents to cancel the expulsion order. Again, no steps were taken in response to the notice. Being constrained, the petitioners moved the Court and obtained the instant Rule.

After hearing both sides, the court conceded that while the image and sanctity of the University cannot be allowed to be vandalized and perpetrators of such action must be dealt with sternly, even if they were students of the University, in so doing, the University authorities must follow the principles of natural justice and conduct the proceeding in accordance with the law and only in accordance with the law. The court believed that a plain reading of the show cause notice reveals various deficiencies; for example, the show cause merely stated that an incident took place in which some teachers and students came under attack and some motorcycles and bicycles were burnt, without going into relevant details in terms of, for example, the exact place and time of the occurrence, the identities of the teachers and students who were allegedly injured, the extent and nature of the injuries sustained by them, the number of motorcycles and bicycles that were alleged to have been damaged, and so on. In the absence of such relevant information, the court regarded the show cause notice as being based on vague, unspecific and indefinite allegations. Given that the show cause notice was the first step in the entire process that would culminate in the expulsion of the petitioners and that it stated therein that an Inquiry Committee conducted the inquiry and submitted a report, no such report was either annexed with the show cause notice itself or served upon the petitioners, thereby preventing them from giving a proper reply to the allegations brought against them.

On perusal of the impugned order of the University Syndicate dated 16.03.2014, it was apparent to the court, the authority issued the expulsion order

in a very mechanical manner, without affording the petitioners an opportunity of being individually heard. In essence, the petitioners were condemned unheard, which by itself is a gross violation of the principle of natural justice, not to mention the non-observance of the due process of law. The University, more particularly the Syndicate, being in a position of "loco parentis", is obliged not only to observe the well-established principle of natural justice, but also to act in accordance with law. The court observed that, in the instant case, not only did the University authority fail to observe the due process of law, but the impugned orders of expulsion were passed in gross violation of the principles of natural justice. The Syndicate, being the highest administrative body of the University, was also acting as a quasi-judicial body and as such, it was, imperative that it complied with principles of natural justice and acted in the due process.

Drawing on judicial decisions from Indian and domestic jurisdictions, the court elaborated that the concept "administrative fairness" requires that an authority, while taking a decision which affects a person's right prejudicially, must act fairly and in accordance with the law. Unfortunately, the University/ Syndicate in the present case failed to comply with the principles of natural justice resulting in arbitrariness, which in turn, vitiated the impugned order. Therefore, the court held that the impugned order of expulsion of the petitioners was made without lawful authority and was of no legal effect and made the Rule absolute.

State Practice of Asian Countries in International Law

India

*V.G. Hegde**

Human Rights – Legal Justifications for the Practice of Euthanasia – Differentiating Active and Passive Euthanasia – Right to Life as Reflected in International Human Rights Instruments – Guidelines for Allowing Passive or Active Euthanasia – Survey of Indian Jurisprudence on Euthanasia

Common Cause (A Reg. Society) v. Union of India and Another (Supreme Court of India, 9 March 2018)

Petitioner, a registered society, sought a declaration from the court to uphold the right to die with dignity as a fundamental right within the fold of right to live with dignity guaranteed under Article 21 of the Constitution. Petitioners also requested the Court to direct the respondents, the Union of India to outline and notify the procedures and guidelines in this regard in consultation with the State Governments. Petitioners had asserted that every individual was entitled to take his/her decision about the continuance or discontinuance of life when the process of death had already commenced and he/she had reached an irreversible permanent progressive state where death was not far away. The Government of India, as respondents, presented before the Court their concerns about the recognition of this right without adequate assessment. The Government brought to the attention of the Court the serious consideration being given by its agencies in this regard. The Government referred to the work done by the Law Commission of India in this regard and also its 241st report on this aspect. The Government also pointed out that the Law Commission of India had submitted a report on The Medical Treatment of Terminally-ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006. The Government also pointed out that a private member bill on this topic was pending before the Indian Parliament. However, the Government pointed out that the Ministry of Health and

* Professor, Centre for International Legal Studies, School of International Studies, Jawaharlal Nehru University, India.

Family Welfare was not in favour of the enactment due to several implementation and procedural limitations that might need exercise of due caution and discretion.

After surveying its own jurisprudence and the jurisprudence of the courts of United Kingdom, United States, Australia, Canada, Germany, Switzerland, Luxembourg and the European Courts of Human Rights, the Court referred to obligations that would be necessary when discussing voluntary euthanasia. According the Court the following rights in the ICCPR had been considered by the practice of voluntary euthanasia: right to life (Article 6); freedom from cruel, inhuman or degrading treatment (Article 7); right to respect for private life (Article 17); freedom of thought, conscience and religion (Article 18). The Court further noted,

> Right to life under Article 6(1) of the ICCPR provides: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. The second sentence of Article 6(1) imposes a positive obligation on the States to provide legal protection of the right to life. However, the subsequent reference to life not being arbitrarily deprived operates to limit the scope of the right (and therefore the States' duty to ensure the right). Comments from the UN Human Rights Committee suggest that laws allowing for voluntary euthanasia are not necessarily incompatible with the States' obligation to protect the right to life.

The Court further noted that the UN Human Rights Committee had emphasised that laws allowing for euthanasia must provide effective procedural safeguards against abuse if they were to be compatible with the State's obligation to protect the right to life.

According to the Court there was an inherent difference between active euthanasia and passive euthanasia as the former entailed a positive affirmative act, while the latter related to withdrawal of life support measures or withholding of medical treatment meant for artificially prolonging life. Further, the Court noted that in active euthanasia, a specific overt act was done to end the patient's life whereas in passive euthanasia, something was not done which was necessary for preserving a patient's life. It was due to this difference that most of the countries across the world had legalised passive euthanasia either by legislation or by judicial interpretation with certain conditions and safeguards. The Court also decided that the sanctity of life has to be kept on the high pedestal yet in cases of terminally ill persons or Persistent Vegetative State (PVS) patients where there is no hope for revival priority shall be given to the Advance Directive and the right of self-determination. In the absence

of Advance Directive, the procedure provided for the said category hereinbefore shall be applicable. And the Court accordingly laid down the principles relating to the procedure for execution of Advance Directive and provided the guidelines to give effect to passive euthanasia in both circumstances, namely, where there were advance directives and where there were none, in exercise of the power under Article 142 of the Constitution and the law stated by it in its earlier decisions. The Court also decided that its directives and guidelines should remain in place till the Parliament brings in appropriate legislation to this effect.

Human Rights – Constitutional Validity of the Right to Sexuality – Right to Privacy and Human Dignity under International Human Rights Instruments – Definition of Sexual Orientation in Yogyakarta Principles

Navtej Singh Johar and Others v. Union of India (Supreme Court of India, 6 September 2018)

Petitioners sought the intervention of the Court in declaring section 377 of the Indian Penal Code (IPC) as unconstitutional violating Article 21 of the Constitution of India. They also sought the Court to recognize the right to sexuality, right to sexual autonomy and the right to choice of a sexual partner to be part of the right to life guaranteed under Article 21 of Constitution. The present case was filed pursuant to the Supreme Court's observations in the *Puttaswamy* case that had recognized right to privacy as a fundamental right and had also observed that sexual orientation was an essential component of this right. While ruling in the present case, the Court also had to examine its own decision in *Suresh Kumar Koushal and another v. Naz Foundation and others* overturning the judgment of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi and others*.

The Court, while surveying its own jurisprudence on the subject, referred to broader aspects of the `living' and `transformative' nature of the Indian Constitution. While referring to constitutional morality and human dignity, the Court took recourse to international human rights law. It, thus, stated,

> The fundamental idea of dignity is regarded as an inseparable facet of human personality. Dignity has been duly recognized as an important aspect of the right to life under Article 21 of the Constitution. In the

> international sphere, the right to live with dignity had been identified as a human right way back in 1948 with the introduction of the Universal Declaration of Human Rights. The constitutional courts of our country have solemnly dealt with the task of assuring and preserving the right to dignity of each and every individual whenever the occasion arises, for without the right to live with dignity, all other fundamental rights may not realise their complete meaning.

The Court surveyed briefly the jurisprudence on the aspect of `sexual orientation' in the European Court of Justice, the Supreme Court of Canada, the Supreme Court of South Africa and the Supreme Court of the United States. Later, it referred to the Yogyakarta Principles, in particular its definition of the expression "sexual orientation" as understood to refer to "... each person's capacity for profound emotional, affectional and sexual attraction to and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."

Further, referring to the evolution of culture and an affirmative move towards a more inclusive and egalitarian society, the Court pointed out that "... Non-acceptance of the same would tantamount to denial of human rights to people and one cannot be oblivious of the saying of Nelson Mandela – to deny people their human rights is to challenge their very humanity. The Court listed the aspects of right to privacy as incorporated in several of the international human rights instruments such as Article 12 of the Universal Declaration of Human Rights (UDHR), (1948) and Article 17 of the International Covenant on Civil and Political Rights.

The Court while expressing its view regarding the decriminalisaiton of Seciton 377 of IPC, pointed out that "At the very least, it can be said that criminalisation of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bi-sexuals or transgenders, hardly serves any legitimate public purpose or interest. Per contra, we are inclined to believe that if Section 377 remains in its present form in the statute book, it will allow the harassment and exploitation of the LGBT community to prevail. We must make it clear that freedom of choice cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of majoritarian perception."

The Court further observed "The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under

law and, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary. It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature."

The Court held that "… Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional."

Human Rights – Right to Privacy and Human Dignity as a Fundamental Right in the Context of Implementation of Aadhaar Scheme – Survey of Human Rights Jurisprudence Relating to Data Protection within India and in Other Jurisdictions

Justice KS Puttaswamy (Retd) and Another v. Union of India and Others (Supreme Court of India, 26 September 2018)

The present case (along with a batch of several writ petitions) related to the implementation of the Aadhaar card scheme. It shall be recalled that in an earlier judgment in the same case the Indian Supreme Court had held on 24 August 2017 that the privacy was a constitutionally protected right that emerged primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. The Court also had held that elements of privacy also arose in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III (fundamental rights) of the Indian Constitution. However, in the present case petitioners argued that the Aadhaar programme and its formation/structure under the Aadhaar Act were grave risk to the rights and liberties of the citizens of India which were otherwise secured by its Constitution. The Petitioners further argued that the Aadhaar scheme militated against the constitutional abiding values and its foundational morality and had the potential to enable an intrusive state to become surveillance state on the basis of information that was collected in respect of each individual by creation of a joint electronic

mesh. While the petitioners had no dispute with regard to the allotment of Aadhaar number for the purpose of unique identification of the residents, their apprehensions were about the manner in which the Scheme had been rolled out and implemented. According to the petitioners the manner of Aadhaar scheme implementation forced a person to part with his or her core information namely biometric information in the form of fingerprints and its scan. Petitioners further argued that this information were to be given to the enrolment agency in the first instance which was a private body and, thus, there was a risk of misuse of this vital information pertaining to an individual. Petitioners also argued that the provisions of the Aadhaar Act were not only about giving away vital information about the residents of the State in the form biometrics but also about the movement as well as varied kinds of transactions which a resident would enter from time to time. This, according to petitioners, posed a threat in the form of profiling of the citizens by the State and also its potential misuse by non-state actors. The Government of India, while defending the Aadhaar Scheme provided a detailed outline and presentation of how all the safety and other related measures were incorporated in the Aadhaar Act to protect the privacy of the citizens.

Explaining in detail the contours of the right to privacy and its constitutional validity from its earlier judgment delivered in the same case in 2017, the Court noted that the privacy had now been treated as part of fundamental rights. Further, linking right to privacy to the right to human dignity the Court reiterated its decision in the earlier case by noting "… privacy postulates the reservation of a private space for an individual, described as the right to be let alone, as a concept founded on autonomy of the individual. In this way, right to privacy has been treated as a postulate of human dignity itself." Referring to Universal Declaration of Human Rights, the Court further noted,

> The Universal Declaration of Human Rights (UDHR) recorded in the Preamble recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. It included freedom from fear and want as amongst the highest aspirations of the common people. This is of course subject to resources of each State. But the realisation is contemplated through national effort and international cooperation. Evidently, the UDHR adopts a substantive or communitarian concept of human dignity. The realisation of intrinsic worth of every human being, as a member of society through national efforts as an indispensable condition has been recognised as an important human right. Truly speaking, this is directed towards the deprived, downtrodden and have nots.

Referring to the doctrine of proportionality and its own jurisprudence on this aspect, the Court observed that whenever challenge was laid to an action of the State on the ground that it violated the right to privacy, the action of the State was to be tested on the following parameters: (a) the action must be sanctioned by law; (b) the proposed action must be necessary in a democratic society for a legitimate aim; and (c) the extent of such interference must be proportionate to the need for such interference.

Besides its own jurisprudence, the Supreme Court referred to two cases of the European Courts of Human Rights, namely, *Digital Rights Ireland Ltd. v. Minister for Communication, Marine and Natural Resources* (2014) and *S and Marper v. United Kingdom* (2012). While analyzing these two cases, the Court observed,

> In *Digital Ireland*, the European Parliament and the Council of the European Union adopted Directive 2006/24/EC (Directive), which regulated Internet Service Providers' storage of telecommunications data. It could be used to retain data generated or processed in connection with the provision of publicly available electronic communications services or of public communications network for the purpose of fighting serious crime in the European Union (EU). The data included data necessary to trace and identify the source of communication and its destination, to identify the date, time duration, type of communication, IP address, telephone number and other fields. The European Court of Justice (ECJ) evaluated the compatibility of the Directive with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and declared the Directive to be invalid. According to the ECJ, the Directive interfered with the right to respect for private life under Article 7 and with the right to the protection of personal data under Article 8. It allowed very precise conclusion to be drawn concerning the private lives of the persons whose data had been retained, such as habits of everyday life, permanent or temporary places of residence, daily and other movements, activities carried out, social relationships and so on. The invasion of right was not proportionate to the legitimate aim pursued. In *S and Marper*, the storing of DNA profiles and a cellular sample of any person arrested in the United Kingdom was challenged before the ECtHR. Even if the individual was never charged, if criminal proceedings were discontinued, or if the person was later acquitted of any crime, their DNA profile could nevertheless be kept permanently on record. It held that there had

> been a violation of Article 8 of the ECHR. Fingerprints, DNA profiles and cellular samples, constituted personal data and their retention was capable of affecting private life of an individual. Retention of such data without consent, thus, constitutes violation of Article 8 as they relate to identified and identifiable individuals. The Court held that invasion of privacy was not "necessary in a democratic society as it did not fulfill any pressing social need. The blanket and indiscriminate nature of retention of data was excessive and did not strike a balance between private and public interest.

Surveying it own jurisprudence on the privacy issues, the Court also referred to the existing legal regime such as Information Technology Act, 2000 and others that sought to collate and regulate data protection. It also referred to legislative developments that had been taking place within the Indian Parliament with the pending legislation relating to new Data Protection Bill, 2018. The Court also referred to European Union General Data Protection Regulation (EUGDPR), 2016 (which came into force on 25 May 2018) replacing the Data Protection Directive of 1995. The Court also briefly surveyed some of the legislations passed by the States within the United States.

The Court, after examining each of the concerns raised by the petitioners, outlined following guidelines for implementation: (a) Authentication records not to be kept beyond a period of six months, as stipulated in Regulation 27(1) of the Authentication Regulations. This provision which permits records to be archived for a period of five years held to be bad in law; (b) Metabase relating to transaction, as provided in Regulation 26 of the aforesaid Regulations in the present form, held to be impermissible, which needs suitable amendment; (c) Section 33 of the Aadhaar Act is read down by clarifying that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing; (d) Insofar as Section 33(2) of the Act in the present form is concerned, the same is struck down ; (e) That portion of Section 57 of the Aadhaar Act which enables body corporate and individual to seek authentication is held to be unconstitutional; (f) Impressed upon the Government of India to bring out a robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications thereto as may be deemed appropriate.

Criminal Law – Constitutional Validity of the Crime of Adultery – United Nations Working Group on Women's Human Rights on the Effect of Crime of Adultery on Women – Striking down of Crime of Adultery as a Penal Provision in Other Jurisdictions

Joseph Shine v. Union of India (Supreme Court of India, 27 September 2018)

The constitutional validity of the Section 497 of the Indian Penal Code (IPC) dealing with the crime of adultery was challenged in this petition. Surveying its own jurisprudence on the topic the Court, *inter alia*, noted that the impugned provision demonstrably treated woman as subordinate to men inasmuch as it laid down that when there was connivance or consent of the man, there was no offence. The Court further, at the outset, observed that this treated the woman as a chattel; treated her as the property of man and totally subservient to the will of the master; that it was a reflection of the social dominance that was prevalent when the penal provision was drafted. The Court also noted that with the passage of time it had recognized the concept of equality of woman and the essential dignity which she was entitled to.

Besides surveying its own jurisprudence, the Court noted that adultery as a crime did not exist in many countries such as China, Japan, Australia, Brazil and in many western European countries. The court also judicially took note of the diversity of culture in all these countries. Referring to the United Nations Working Group on Women's Human Rights: Report (2012), the Court observed,

> The last few decades have been characterized by numerous countries around the world taking measures to decriminalize the offence of adultery due to the gender discriminatory nature of adultery laws as well as on the ground that they violate the right to privacy. However, progressive action has primarily been taken on the ground that provisions penalising adultery are discriminatory against women either patently on the face of the law or in their implementation. Reform towards achieving a more egalitarian society in practice has also been driven by active measures taken by the United Nations and other international human rights organizations, where it has been emphasized that even seemingly gender neutral provisions criminalising adultery cast an unequal burden on women.

The Court also referred to the South Korean Constitutional Court decision of 2015 by a majority of 7–2 striking down Article 241 of the Criminal Law; a provision which criminalized adultery with a term of imprisonment of two years as unconstitutional. In doing so, the Court noted, South Korea joined a growing list of countries in Asia and indeed around the world that had taken the measure of effacing the offence of adultery from the statute books, considering evolving public values and societal trends. The Court also noted that the South Korean Constitutional Court had deliberated upon the legality of the provision four times previously, but chose to strike it down when it came before it in 2015, with the Court's judgment acknowledging the shifting public perception of individual rights in their private lives.

Further referring to the South Korean Constitutional Court's rationale for the decision in its judgment, the Court observed,

> The Court used the test of least restrictiveness, and began by acknowledging that there no longer existed public consensus on the criminalization of adultery, with the societal structure having changed from holding traditional family values and a typeset role of family members to sexual views driven by liberal thought and individualism. While recognizing that marital infidelity is immoral and unethical, the Court stated that love and sexual life were intimate concerns, and they should not be made subject to criminal law.

The Court also briefly examined similar cases that were dealt with in other jurisdictions such as Uganda, South Africa, Canada, Turkey and the United States.

The Court noted that it had travelled on the path of transformative constitutionalism and, therefore, it was absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law. Examining the evolution of the crime of adultery in different jurisdictions (and in the religious texts) the Court noted that the provision was wholly outdated and had outlived its purpose. Accordingly, as per the the maxim of Roman law, *cessante ratione legis, cessat ipsa lex*, apply to interdict such law, but when such law fell foul of constitutional guarantees, it was this Court's solemn duty not to wait for legislation but to strike down such law.

State Practice of Asian Countries in International Law

Japan

*Kanami Ishibashi**

Human Rights – Civil Code Reform – Recommendations by the UN Committee on the Elimination of Discrimination against Women (CEDAW) – Revision of the Civil Code to Lower the Age of Majority from 20 to 18

On June 13, 2018, the revised Civil Code was enacted to lower the age of majority from 20 to 18. Currently, Article 4 of the Civil Code provided that the age of majority is reached when a person has reached the age of 20. With this change in the age of majority, the government explained the significance of creating an environment in which young people aged 18 and 19 years old can make their own life choices, as well as encouraging their active participation in society and making it more dynamic. The Civil Code defines the age of majority as the age at which a person is able to enter into a contract alone and the age at which a person is no longer subject to parental authority. The age of majority has been set at 20 years since the Civil Code was enacted in 1896 (Meiji 29). It was the first time in 140 years since the proclamation of the Grand Council of State in 1876 that the age of majority was reviewed, and it is scheduled to take effect in April 2022. One of the important changes is that the marriage age of women will be raised from 16 to 18 old years (Article 731 of the Civil Code, "Age for marriage"), and the marriage age of men and women will be unified at 18 for the first time in Japan.

At the beginning of the Meiji period, Japan is said to have constituted its Civil Code order on the premise that the physical and mental maturity of women is earlier than men. There was also the issue of the economic independence of women as it was believed that women achieve economic stability only after they get marriage and the issue of the inadequacy of women's education as it was generally believed that women did not need higher education. In that historical context, the age for marriage for men and women was set differently.

* Associate Professor, Tokyo University of Foreign Studies.

 | DOI:10.1163/9789004437784_014

The Committee on the Elimination of Discrimination against Women (CEDAW) had pointed out that women and men were treated unequally and recommend the Japanese government to respond as follows:

> The Committee reiterates its previous recommendation (CEDAW/C/JPN/CO/6, para. 22) and calls upon the State party to urgently adopt a comprehensive definition of discrimination against women in national legislation in line with article 1 of the Convention, with a view to ensuring that women are protected against both direct and indirect discrimination in all spheres of life.
>
> Discriminatory laws and lack of legal protection
>
> 12. The Committee regrets that its previous recommendations regarding existing discriminatory provisions have not been addressed. The Committee is particularly concerned:
>
> (a) That the Civil Code retains discriminatory provisions since it sets different minimum ages of marriage for women and men at 16 and 18 years of age, respectively;
>
> (b) That the Civil Code continues to prohibit only women from remarrying within a specified period of time after divorce, notwithstanding the decision of the Supreme Court to shorten the period from 6 months to 100 days;
>
> (c) That, on 16 December 2015, the Supreme Court upheld the constitutionality of article 750 of the Civil Code requiring married couples to use the same surname, which in practice often compels women to adopt their husbands' surnames;
>
> (d) That, despite the abolition in December 2013 of the provision that discriminated against children born out of wedlock in inheritance matters, various discriminatory provisions, including the provision in the Family Register Act concerning the discriminatory description during birth notification, have been retained;
>
> (e) That there is no comprehensive anti-discrimination law that covers intersectional discrimination against women belonging to various minority groups who are frequently subjected to harassment, stigmatization, and violence.
>
> 13. The Committee reiterates its previous recommendations (CEDAW/C/JPN/CO/5 and CEDAW/C/JPN/CO/6) and urges the State party to undertake the following without delay:
>
> (a) Amend the Civil Code in order to raise the legal minimum age of marriage for women to 18 years of age in order for it to be equal to that of men; revise legislation regarding the choice of surnames for

married couples in order to enable women to retain their maiden surnames; and abolish any waiting period for women to remarry upon divorce;

(b) Abolish all discriminatory provisions regarding the status of children born out of wedlock and ensure that the law protects them and their mothers from stigma and discrimination in society;

(c) Enact comprehensive anti-discrimination legislation that prohibits multiple/intersectional forms of discrimination against women belonging to various minority groups, and protect them from harassment and violence, in line with general recommendation No. 28 (2010) on the core obligations of States parties under article 2.

Responding to paragraph 12(1) above, Japan already amended its laws to shorten the period of prohibition of women from remarriage, and this amendment can also be positioned as a follow-up to one of the Committee's concerns that remained unaddressed, namely paragraph 12(a) and 13(a). The age limit for smoking, drinking and public competitions (horse racing, bicycle races, auto racing, motorboat racing) will be maintained at 20 years old. These are supposed to maintain the conventional age from the viewpoint of concerns about health and measures against gambling addiction.

Human Rights – Cases of Implementing the Hague Convention on the Civil Aspects of International Child Abduction

On March 15, 2018, the Supreme Court ruled that the failure to comply with the order under the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction that the return of children, established in a lower court case as final was "unlawful detention." In this case, a Japanese couple living in the U.S. had a deteriorating marital relationship, and the wife, in January 2016, returned to Japan with her child without the consent of the husband.

In July 2016, the husband filed a case based on the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction. He filed a petition with the Tokyo Family Court under Article 26 of the Act for Implementation of the Hague Convention Implementation to have the child returned to the United States. Article 26 provides that:

> A person whose rights of custody with respect to a child are breached due to removal to or retention in Japan may file a petition against the person who has the care of the child with a family court to seek an order

> to return the child to the State of habitual residence pursuant to the provisions of this Act.

The court issued a decision in September 2016 ordering the return of the child to the United States, and this decision became final. Based on the above order, the husband filed a petition for execution by substitute of return of a child with the Tokyo Family Court (Article 137 of the Act for Implementation of the Hague Convention) and implementation of the child's return was decided upon (Articles 134(1) and 138 of the Act for Implementation of the Hague Convention). The court execution officer attempted to persuade the wife to release the child at her residence in May 2017, but she refused to open the front door, so the court execution officer entered through an upstairs window. However, the wife fiercely resisted the child's release by placing herself and her child under the same futon and holding him close to her. The child also refused, stating that he wanted to stay in Japan and did not want to go to the United States. Consequently, the court execution officer was not able to release him. The implementation was terminated without the child's release. The husband then requested that the unlawful detention should be resolved under the Act on Protection of Personal Liberty (the Habeas Corpus Act).

In November 2017, the Kanazawa Branch of the Nagoya High Court refused to allow the return of the child to the husband because handing the child over to the husband was against the child's will. However, the Supreme Court ruled that

> [t]he detainee(child) was placed in a situation where it was difficult for him to obtain sufficient multifaceted and objective information necessary to make a decision as to whether or not to remain with the respondent (wife), including information regarding the return order, the significance of the return order and the execution by substitute of return of a child based thereon, and his life after being returned to the United States in accordance with the return order … In making that decision, the respondent (wife) exerted undue psychological influence on the detainee (child).

The Supreme Court further held that

> [t]here are special circumstances in which the detainee cannot be said to have remained under the respondent's control, based on his own free will … The custody of the respondent for detainees should be considered to be a restraint within the meaning of Act on Protection of Personal Liberty (the Habeas Corpus Act) and its regulations.

State Practice of Asian Countries in International Law

Korea

*Buhm-Suk Baek**

Human Rights – Terrorism – Domestic Measures

Decision of Constitutional Court Concerning on 'Constitutionality of Additional Security Screening of Airline Passengers, Constitutional Court Decision 2016Hun–Ma780 (Decided on February 22, 2018)

In this case, the complainant, an airline passenger was subjected to the usual security screening procedure while going through immigration at Incheon Airport on the way to boarding a US-bound flight. He/She, however, was subject to secondary security screening before boarding by the request of the US Transportation Security Administration. The additional screening was conducted by a security screening officer, who took out his/her belongings for visual identification and gave the complainant a pat-down. Then the complainant filed a constitutional complaint claiming that his/her fundamental rights, especially related to the right to personality and the security of person, was infringed by Article 8.1.19 of the National Aviation Security Plan, which is against the constitutional rule prohibiting excessive restriction.

The Republic of Korea is a party to the Convention on International Civil Aviation and Article 2.4.1 of Annex 17 (Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference) to this Convention stipulates that "Each Contracting State shall ensure that requests from other Contracting States for additional security measures in respect of a specific flight(s) by operators of such other States are met, as far as may be practicable." The Aviation Security Act, along with the obligation of air transport operators to observe international conventions, prescribes basic matters concerning the standards and procedures of security screening, and that the Minister of Land, Infrastructure and Transport shall formulate and execute a "national aviation security plan" to perform aviation security-related affairs. In other words, the National Aviation Security Plan was established with the purpose to observe

* Professor, Kyung Hee University, Korea.

international conventions regarding civil aviation security, and to guarantee the safety and security of aircraft. Therefore, the legitimacy of its legislative purpose and its appropriateness of means is justified. Furthermore, the relevant provisions provide specific standards and methods for security screening, with an aim to minimize the infringement of fundamental rights. Thus, *the rule of minimum restriction* is satisfied.

The Court also highlighted that due to the rising number of safety-related accidents or threats of terrorism concerning aircraft in the domestic and international arenas, the public interest of securing the safety of civil aviation is significantly grave, while the restriction on the fundamental rights of passengers incurred by additional security screening is not as large. Therefore, "the National Aviation Security Plan" does not violate *the rule against excessive restriction*.

Overall, the Court held that the provision of the "National Aviation Security Plan," does not violate the constitutional principle against excessive restriction, and therefore does not infringe upon the fundamental rights of the complainant, an airline passenger.

Treaties – Interpretation – Municipal Law

Decision of Supreme Court Concerning on the Petition for Return of a Child (The Hague Convention on the Civil Aspects of International Child Abduction), Supreme Court Order 2017Seu630 (Decided on April 17, 2018)

One of the main issues, in this case, was the interpretation of relevant provisions of the Convention on the Civil Aspects of International Child Abduction. This Convention and its domestic implementation legislation, 'the Act on the Implementation of the Hague Child Abduction Convention' clearly provide that a person whose right to custody under the Convention has been breached as a result of a wrongful removal or retention of a child to or in the Republic of Korea may file with the court a petition seeking the return of the child, and in such case, the court is obliged to act expeditiously with the welfare of the child as its top priority. But, at the same time, the court may dismiss the petition seeking the return of a child even where the right of custody has been breached as a result of a wrongful removal of a child, if "there is a *grave risk* that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." And such an exception to return of the child under this Act is designed to prevent any harm

against welfare of a child, as a result of prompt return of the child. Thus, the Court maintained that it is important to place priority on the rights and interests of a child before the right to custody of either parent or the promptness of the procedure. In the same vein, a *grave risk* means not only the harmful effects on a child's mind and body because of the petitioner's direct violence or abuse against the child, but also the risk of psychological harm due to frequent violence committed against the other parent including cases where the child may suffer severely by deprivation of appropriate protection or care upon his/her return to the State of habitual residence.

The lower court rendered its judgment by considering the facts that first, the petitioner had verbally and physically abused the counterparty multiple times, which caused the psychological suffering of Principal 1 (child in concern) who witnessed such abuse, and second, in a case where only the principals or only Principal 2 (the other child in concern) is returned to Japan, such separation is likely to cause psychological suffering on the principals in the instant case. As a result, the lower court rejected the petition for the return of the principals, and the petitioner re-appealed to the Court.

Similarly, the Supreme Court emphasized the elements that should be examined comprehensively when receiving the petition for the return of a child as below: "the entirety of circumstances, including the degree of the harm and whether there are concerns of a recurrence of the harm, the specifics of the environment in which the child is brought up both before and after his/her return, and the psychological and physical impact of the return on the child."

Overall, the re-appeal is dismissed by the Supreme Court because the lower court did not err in its judgment by misapprehending the legal principle regarding a grave risk.

Human Rights – Refugees – Constitution

Decision of Constitutional Court Concerning on the Right to Counsel of a Refugee Detained for Repatriation, Constitutional Court Decision 2014HunMa346 (Decided on May 31, 2018)

The complainant is a foreigner of Sudanese nationality. Upon arriving at Incheon International Airport on 20 November 2013, the complainant applied for recognition of refugee status and was confined in a repatriation waiting room at Incheon International Airport until the decision to refer the request for refugee recognition review has been made. The respondent, the head of the Incheon Airport Immigration Office, refused to refer the

complainant for refugee status screening and the complainant was continuously confined in the waiting room for repatriation at Incheon International Airport. On 28 November 2013, the complainant filed a lawsuit for the annulment of the decision not to refer to the refugee status screening procedure and filed a writ of habeas corpus petition seeking release from confinement. While these two lawsuits were pending, the complainant's counsel requested the respondent to allow a meeting with the complainant on 25 April 2014, but the respondent refused. The complainant filed this constitutional complaint on 30 April 2014, claiming that the respondent's refusal of visitation by a counsel infringed upon the right to counsel prescribed in Article 12(4) of the Constitution and the right to trial.

The Court decided that "detainment" prescribed in Article 12(4) clearly is not limited only to that of a criminal proceeding but should be read to incorporate measures imposed by administrative procedures. In other words, the right to counsel prescribed in Article 12(4) of the Constitution is should be immediately guaranteed to persons in administrative detention. In the same vein, the repatriation waiting room at Incheon International Airport is a confined space with an iron gate and access to the room is controlled by the Incheon International Airport Airline Operators Committee. Therefore, the complainant could not leave the waiting room to venture into the transit area and had no way of communicating with the outside world aside from via a payphone. The complainant had been detained in the repatriation waiting room for approximately five months by the time the respondent refused visitation by the counsel, and could not have expected to leave the waiting room at his/her discretion until the lawsuit on the revocation of the non-referral decision to refugee recognition review was completed.

Overall, the complainant was being "detained," as prescribed in the main text of Article 12(4) of the Constitution, when disallowed visitation by the counsel. It further restricted the complainant's right to counsel without legal grounds, and thus infringed upon the complainant's right to counsel. Also, it is not likely that allowing the complainant to meet with his/her counsel would interfere with either guaranteeing national security, maintaining order, or seeking public welfare.

There is a concurring opinion of two justices on the issue of the right to trial. They emphasized that the right to a trial, in this case, is an essential human right for effectively guaranteeing physical freedom. Thus, the complainant is a bearer of the right to a trial, despite being a foreigner. The disallowance of visitation by an attorney restricts the complainant's right to counsel, as part of the right to trial.

Human Rights – Municipal Law – Conscientious Objectors

Constitutional Court Decision Concerning on Conscientious Objectors, Constitutional Court Decision 2011HunBa379 and 27 Other Cases (Consolidated), (Decided on June 28, 2018)

Here, the Constitutional Court found the Categories of Military Service Provision nonconforming to the Constitution on the ground that it stipulated only five categories of military service excluding Alternative service. The Categories of Military Service Provision has the purpose of ensuring national security by equally imposing military duty and retaining and efficiently allocating military service resources. Therefore, the provision itself is an adequate means to fulfill a reasonable legislative purpose. Since receiving military training is a precondition for all types of military service stipulated in the Categories of Military Service Provision, it may cause conflict with the conscience of conscientious objectors if such duty is imposed on them. As such, the possibility of Alternative service has long been examined. If the introduction of the Alternative service does not have a significant influence on national defense and not reduce the effectiveness of the military service system, reserving or preventing the introduction of the Alternative service program for reasons of the unique security situation of the nation cannot be justified. Therefore, the Categories of Military Service Provision runs against the minimal impairment rule for categorizing military service that entails military training only and excluding the Alternative service program.

Although public interests like "national security" and "equity or fairness in the allocation of military duties" are significantly important, adding the Alternative service program to the Categories of Military Service Provision would still enable the accomplishment of such interests. By contrast, the Court maintained that if the program is not stipulated in the Provision, "conscientious objectors have to be imprisoned for at least a year and a half and are left to suffer immense disadvantages, such as dismissal and restriction from working as public officials; loss of patent rights, permission, approval, licenses, etc. issued by the Government; disclosure of personal information; implicit and inadvertent bias upon ex-convicts; and difficulties in finding jobs, etc."

Provided that conscientious objectors are assigned to public service work, it will be more beneficial in terms of realizing national security and public interest than just imprisoning the objectors for punishment. Also, by tolerating and incorporating them as members of our community would surely enhance the level of integration and diversity at the national and societal level. Thus, it is

considered that the Categories of Military Service Provision does not fulfill the requirement to balance interests.

As a result, the Court decided that the Categories of Military Service Provision, which failed to stipulate the Alternative service program for conscientious objectors, infringes on objectors' freedom of conscience by violating the anti-over restriction principle.

After the Court's decision, active and heated discussion over introducing an Alternative service program for conscientious objectors has increased. The media reported that setting an objective and fair preliminary examination and a strict post-management procedure regulated by the Government, determining an adequate duration, and the level of difficulty that can ensure equity between active military service and alternative service are the primary concerns of the public.

In the same vein, the Supreme Court has dealt with this issue, regarding conscientious objection and the Military Service Act on November 1, 2018 (Supreme Court Decision 2016D010912, Violation of the Military Service Act). The Court maintained that the refusal to perform the duty of military service on moral or religious grounds (so-called "conscientious objection") refers to an act of refusing to participate in military training or bear arms based on a conscientious judgment established by a religious, ethical, moral, and philosophical motive. And based on Article 88(1) of the Military Service Act providing that any person who fails to enlist in the military shall be punished by imprisonment with labor for not more than three years, the judiciary uniformly sentences a conscientious objector to imprisonment with labor for at least one year and six months in actual trials without considering the individual circumstances of the conscientious objectors. Having materialized the citizen's duty of national defense through the Military Service Act, the duty of military service ought to be faithfully performed, and military administration should be fairly and rigidly executed. Therefore, whether to permit conscientious objection brings about a normative clash, which further requires coordination between constitutional provisions, i.e., Article 19 (provision on basic rights such as the freedom of conscience) and Article 39 (provision on the duty of national defense). Overall, the Court ruled that the lower court had convicted the Defendant without examining whether such conscientious objection constitutes a 'justifiable cause' under Article 88(1) of the Military Service Act, while there was room to deem the act of refusal to enlist by the Defendant(a Jehovah's Witness), grounded on his genuine conscience, as a 'justifiable cause.' In other words, the Court found that the lower court erred by misapprehending the legal doctrine and remanded the case to the lower court.

Jurisdiction – Sovereign Immunity – Treaties

Decision of High Court Concerning on Sovereign Immunity and the Act of U.S. Army Military Government in Korea, Busan High Court Decision 2017Na52583 (Decided November 13, 2018)

After the defeat of Japan in the Second World War, the Commanding General of the United States Army Pacific established a military ruling body known as the United States Army Military Government in Korea (hereafter 'USAMGIK') to govern Korea south to the 38th Parallel North and has been ruling the southern part of Korea under Proclamation No. 1 of 7 September 1945, declaring that the legislative power such as the making of proclamations, ordinances, regulations etc. vests in the USAMGIK; accordingly, the Defendant USAMGIK had been executing its legislative power until it was replaced by the government of the Republic of Korea (co-Defendant). USAMGIK enacted USAMGIK Ordinance No.57 ("the Ordinance") in February 1946. The Ordinance ordered all natural and judicial persons within Korea South of 38th North Latitude to deposit until March 7, 1946 inclusive in one of the financial institutions among the seven designated by the UNAMGIK, all notes of the Bank of Japan. It also prohibited the persons from engaging in any transaction concerning any such currency once the deposit has been made.

At that time, the father of the Plaintiffs deposited banknotes of Japan, a sum of 4,570 Yen, to the designated financial institution. Now, in this case, the Plaintiffs made a claim against the U.S. Government arguing that the Defendant enacting the Ordinance allowed them to confiscate the banknotes of the deceased (Plaintiffs' father) which is a violation of international humanitarian law including the international treaty, Convention Respecting the Laws and Customs of War on Land, (hereafter 'the Hague Convention'), to which the Defendant is a party. And the Plaintiffs who are the inheritors of their father's property demanded compensation since the Defendant is liable under the Hague Convention. However, the Defendant protested that Korean Courts could not exercise jurisdiction over the lawsuit made against the U.S. Government as the enactment of the Ordinance should be guaranteed sovereign immunity as it was a sovereign act of a foreign State.

The Court decided that the lawsuit made against the Defendant should be dismissed due to the following reasons. Firstly, the enactment of the Ordinance by the Defendant through USAMGIK is a sovereign act of a State (*acta jure imperii*) both in nature and purpose since it is a highly public act of the USAMGIK, a ruling body of the southern part of Korea then, intended to abolish the old currency system based on banknotes of Japan and to create

a newly established currency system in Korea. Secondly, whereas customary international law on sovereign immunity has developed from an absolute doctrine granting unconditional jurisdictional immunity to a sovereign State, to a restrictive theory that distinguishes sovereign acts and commercial acts, the disputed sovereign act can be granted immunity even from the currently predominant view of the restrictive approach. Thirdly, even if Foreign Sovereign Immunity Act of the United States may exclude the application of sovereign immunity to such acts as the enactment of the Ordinance by the USAMGIK, the Act is the law of the Defendant's which can only be used as a reference, but not as a generally recognized rules of international law having the same effect as the domestic laws of the Republic of Korea. In other words, it is difficult to decide that the Korean Court can exercise jurisdiction over the lawsuit filed by the Plaintiffs resorting to the provisions of the Foreign Sovereign Immunity Act. Finally, the Plaintiffs appealed to the High Court, but the Court dismissed the appeal on the same grounds.

International Development – Legislation

Framework Act on International Development Cooperation (Partial Amended Dec. 24, 2018., by Act No.16023)

The Framework Act states that its purpose is to ensure policy coherence and to enhance aid effectiveness. It sets out the purposes, definition and basic principles of Korea's development cooperation, and specifies, among other things, the role of the Committee for International Development Cooperation (CIDC) and the framework for implementation of aid. In particular, the law emphasizes the functions of the CIDC as an apparatus intended to create a consolidated ODA delivery system in Korea. The passage of the Framework Act enabled Korea to pursue its goal of enhancing development effectiveness based on a more systematic ODA policy and framework domestically. It at the same time sent a signal to the international community that Korea is committed to continuing its development cooperation.

First, 'youth' is added as the target actor for IDC as the Article 3(1) states: "the basic ideas of international development cooperation is to reduce poverty, improve the human rights of women, children, people with disabilities, and youth achieve gender equality, realize sustainable development and humanitarianism in developing countries, promote economic cooperation relationship with partner countries and pursue peace and prosperity in the international community".

Second, the objectives of international development cooperation is amended as the Article 3(2) para.4–2 states, "Contribution to the achievement of internationally agreed goals related to the sustainable development (referring to 2030 Agenda for Sustainable Development adopted at the United Nations Summit on Sustainable Development in September 2015 and others)."

Lastly, in order to enhance publicity campaigns encouraging public participation, the Article 15(2) newly inserted as below: "To increase public participation under paragraph (1), a supervising agency shall prepare and implement various programs in a comprehensive and systematic manner for the public to have an easier access in their daily lives."

State Practice of Asian Countries in International Law

Malaysia

*Shaun Kang**

Air Law – Montreal Convention – Warsaw Convention – Carriage by Air and Land

Wang Bao'An & Ors v Malaysian Airline System Bhd and Other Cases [2018] 11 MLJ 585, High Court, Kuala Lumpur

This was a suit brought by a group of dependents of those who perished on board Malaysian Airlines flight MH 370 on 8 March 2014, against the carrier, Malaysian Airline System Bhd. Two questions were raised at the hearing. First, whether the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention) and the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (Warsaw Convention) provided exclusive causes of action against a carrier, ousting all common law causes of action. Second, whether the cap on liability for a dependency claim imposed by Section 7 of the Civil Law Act 1956 applied in respect of a claim made under the Montreal Convention. (Note that Malaysia is a party to both Conventions and have incorporated it into domestic law by way of the Civil by Air Act 1974 (amended)).

The Court decided that the Montreal Convention provided an exclusive cause of action and ousted all common law causes of action against the carrier. The similar principle applied with regards to the Warsaw Convention. Article 29 of the Montreal Convention makes clear that the jurisdiction is exclusive and precludes the existence of any other cause of action arising or being maintained against a carrier. There is only a limited exception to this rule, that is when European community law provides for rights to standardised compensation. The High Court was also persuaded in this manner, as the matter had been decided by an apex court, the Court of Appeal in a previous case All Nippon Airways Co Ltd v Tokai Marine & Trading Co. Ltd [2013].

* Special Adviser at the International Committee of the Red Cross. Any views expressed here are solely the author's.

 | DOI:10.1163/9789004437784_016

Criminal Law – Relevance of Treaties in Court

Public Prosecutor v. Farid Bakhtiari Gholam [2018] MLJU 1642, High Court, 28 November 2014

The accused was charged for the offence of distributing the drug – Methamphetamine, an offence under Section 39B(1)(a) Dangerous Drugs Act 1952. The offence was alleged to have been committed at the Kuala Lumpur International Airport on 5 May 2014. During the trial, the chemist testified that he analysed the drug content to ascertain whether it was Methamphetamine without further analysis of the type of Methaphetamine – whether it was constituted by the isomer dextromethaphetamine or levomepthamphetamine, or a combination of both.

The defence argued that it was material to ascertain the type of isomer. This is vital as the Government of Malaysia had ratified numerous international treaties such as the Convention on Psychotropic Substances 1971 and the Vienna Convention on the Law of Treaties 1969 which must be adhered to. According to the 1971 Convention, the isomer levomethamphetamine – (x) N, alpha-dimethylphenethylamine is not found under Schedule II. Accordingly, the defence argued that the drugs found on the accused could possibly be drugs not found under Schedule II of the Convention.

The Court accepted that the chemist had sufficiently analysed the substance and that it was not necessary to determine the active compound of the substance. The Court in considering the applicability of international treaties found that in particular, Chapter VI – Narcotic Drugs and Psychotropic Substances as found in the UN Convention against Illicit Traffic, Narcotic Drugs and Psychotropic Substance which Malaysia had ratified on 11 May 1993 is non-binding. The Court was persuaded by the prosecution's argument that Conventions and International Declarations are non-legally binding instruments and therefore, do not bind the Court and do not form part of the municipal laws of the country.

Human Rights – Convention on the Rights of the Child – Relevance of Treaties in Courts

CAS v MPPL & Anor (2019) 4 MLJ 243, Decision Rendered on 15 October 2018, Court of Appeal

This was an appeal by the plaintiff whose action was dismissed at the outset by the High Court on the basis that the action was without merit and legal

basis. The plaintiff had an intimate relationship with the defendant, who was married. The defendant later had a child whom the plaintiff claimed to be his. The plaintiff asked the Court to grant an order directing the paternity test to be taken on the child, to determine the question at hand. He argued that based on Article 7 of the Convention on the Rights of the Child (CRC) (the right to know and be cared for by his or her parents), the child had the right to know his or her biological parents. Further, the Court also considered if ordering the paternity test would be in line with Article 3 CRC (best interest of the child as primary consideration). The defendant argued that the test should not be ordered by the Court, as, if the test finds that the child's father is the plaintiff, this will render the child as illegitimate and born out of wedlock. The issue was among others, whether the Court could consider the provisions of the CRC (which Malaysia is a party to).

With reference to the applicability of the Convention on the Rights of the Child, the Court held that international treaties and conventions are not directly applicable to domestic law and courts, unless they are incorporated into domestic law. That said, the Court underlined that when the law is ambiguous, Courts are charged with a duty to interpret domestic laws in a manner where their language will be in conformity and not in conflict with international law. The case is remitted to the High Court for determination of the factual matrix which was not earlier considered, given that the action was summarily dismissed.

International Economic Law – Tax Treaty – International Tax Law

Malaysia's Accession to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) (the MLI)

On 23 January 2018, Malaysia signed the multilateral BEPS Convention (MLI). The treaty implements a series of tax measures to update bilateral tax treaties, with the aim of reducing opportunities for tax avoidance; an action point under the OECD BEPS Action Plan. Upon signing, Malaysia submitted 73 treaties entered into by Malaysia and other jurisdictions which it intended to designate as Covered Tax Agreements, which are tax treaties to be amended through the MLI.

International Labour Organisation – Labour Law – ILO Convention

Inter Heritage (M) Sdn. Bhd. (Sheraton Imperial Kuala Lumpur Hotel) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2018] ILJU 119

The case involved an industrial action between a hotel and the staff union with regards to the implementation of the minimum wage in Malaysia. The issue at hand was whether the management of the hotel could include the component of service tax which was disbursed among its staff members in addition to their basic wages when calculating the minimum wage amount.

As such, the Court had to determine the components that made up the minimum wage amount. The Court sought guidance from the ILO Convention No.131: Minimum Wage Fixing Convention 1970, noting that the government introduced a minimum wage in Malaysia following its ratification to the above Convention. While the 1970 Convention defined minimum wage, it did not provide the wage components i.e. what could be considered when calculating the minimum wage. Similarly, the Malaysian legislation – the National Wages Consultative Council Act 2011 is silent on the component.

The Court held that the component constituting service tax could form part of the minimum wage (in addition to the basic wages). The decision was made considering the intention of the wage guidelines issued by the government and further felt that if decided otherwise, it would cause enormous industrial disharmony.

Law of the Sea – Maritime Delimitation – UNCLOS – Port Limit

Malaysia/Singapore Overlapping Maritime Boundary Claims

Given the proximity between Malaysia and Singapore, both countries are faced with various overlapping maritime zones. Some of which have been resolved, others remain in negotiation. In 1979, Malaysia declared the Johor Port limit, leaving a gap area between the Singapore port and the Johor port limit – the gap area has been claimed by both States as their territorial sea.

On 25 October 2018, the Minister of Transport, Malaysia effected changes to the Johor port limits (State bordering Singapore) by way of gazette, an authority granted by the Merchant Shipping Ordinance 1952. The Marine department

issued the port circular informing of the change on 11 November 2018 and a notice to mariners on 22 November 2018. The change expands the Johor port limits until it meets the Singapore port limits. On 4 December 2018, the Malaysian Marine Department issued a port circular asserting that the Johor port limits are within Malaysian territorial waters.

Singapore asserted that the new limits were done unilaterally and arbitrarily beyond the territorial waters claim made by Malaysia in 1979 (through a map published by Malaysia in the same year). It underlined that it does not accept both claims (1979 and present) of the territorial water limits made by Malaysia and that the move constitutes a serious violation of Singapore's sovereignty and international law.

In view of the developments, on 6 December 2018, Singapore extended the Singapore Port Limits off Tuas by way of Port Authority of Singapore (Port Limits) (Amendment) Notification 2018, an extension which Singapore believes to be within its territorial waters. This resulted in an overlap of the port limits of both Johor and Singapore. Both States have also sent vessels to patrol the area concerned.

On 8 January 2019, the Minister of Foreign Affairs of both State agreed to set up a working group on maritime issues to study and discuss legal and operational matters and to de-escalate the situation within the area, which resulted in 5 recommendations announced on 14 March 2019. In February 2019, a Malaysian vessel, operated by the Marine Department, Malaysia collided with a Greece flagged vessel, Pireas within the disputed area. Singapore underscores that the incident may have resulted from the confusion for the international shipping community, threatening navigational safety in the area.

In April 2019, both countries announced the formation of a new committee to begin negotiations to delimit all outstanding maritime boundaries; pending any agreement, both States have agreed to reverse their port limits to status quo i.e. before 25 October 2018. The parties also agreed to operate in the area concerned in accordance with international law, including the United Nations Convention on the Law of the Sea.

State Practice of Asian Countries in International Law

Nepal

Amritha V. Shenoy, Ravi Prakash Vyas** and Rachit Murarka****

Air Law – Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), 1999

Nepal acceded to the Convention on 16 October 2018. The Convention amended the Warsaw Convention. It also consolidates the Warsaw convention and related treaties dealing with civil aviation. The convention applies to international carriage of passengers, baggage and cargo. Article 17 of the Convention provides for the liabilities of the international carriage. Article 21 makes provisions for "compensation in case of death or injury of passengers." The compensation provided is mentioned in Special Drawing Rights that is described in Article 23.

Criminal Law – Crime Victim Protection Act, 2018

Article 21 of the Constitution of Nepal, 2015 provides the right of victims to justice. Right to victims is elucidated in the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power and under Article 25 of the United Nations Convention against Transnational Organised Crime. In this regard, the Act is a comprehensive one that provides various rights to crime victims like the right to fair treatment under Section 4, right against discrimination according to Section 5, right to privacy under Section 6, right to information relating to investigation under Section 7 and other rights for crime victims.

* Assistant Professor, Kathmandu School of Law, Bhaktapur, Nepal.
** Assistant Professor, Kathmandu School of Law, Bhaktapur, Nepal.
*** Assistant Professor, Kathmandu School of Law, Bhaktapur, Nepal.
We acknowledge our research assistant, Rasmi Regmi, for assisting us to come up with this comprehensive piece on Nepal's State practice.

Criminal Law – Participation in International Programs

Nepal participated in the eighth session of the Working group in Trafficking in Persons as an observer. It was the first time Nepal participated in the session. Nepal has ratified the United Nations Transnational Organized Crime Convention, the parent convention of Trafficking in Persons and Smuggling of Migrants Protocols. The protocols are not ratified by Nepal yet.

Environmental Law – Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, 2010

Nepal acceded to the Protocol on 28 December 2018. The protocol aims at implementing the objective of "fair and equitable sharing of benefits arising from the utilization of genetic resources" set by the Convention on Biological Diversity. Article 4 of the Protocol provides for access to genetic resources with the prior informed consent of the State party (the country of origin). The State party shall take steps to ensure involvement or consent of the indigenous and local communities. Article 7 provides for access to traditional knowledge associated with genetic resources held by the indigenous and local communities with their "prior and informed consent or approval". Mutually agreed terms are to be established in this regard. Article 10 calls for creating a global multilateral benefit-sharing mechanism "to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources and traditional knowledge associated with genetic resources". Article 23 provides for technology transfer to the developing country parties, especially the least developed country and small island developing countries.

Environmental Law – Right to Healthy Environment – Right to Life – *Parens Patriae* Principle to Protect Biodiversity and Environment

Adv. Bhagwati Paharo et al.* v. *Prime Minister and the Council of Ministers **[NKP 2075 Vol. 9 Decision No. 10087, Dated 29 April 2018]**

The Ministry of Physical Infrastructure and Transport has entered into a contract with Manakamana Darshan Private Ltd., J.V. Doppelmayr Silevan, Austria and Chitwan Co-E Nepal Pvt. Ltd. to establish cable cars from Basundhara Park to Bouddha Peace Stupa and other physical structures in the name of development within Basundhara Park. The contract has provision to use Basundhara Park for twenty years. The area is swampy and consists of a dense forest, Raniban which is a biodiversity park. The World Peace Biodiversity Park in Raniban area is the only biodiversity park in the west and a prominent tourist area. The applicant claims that the contract made by the government is harmful for the environment and beauty of the area. It violates the right to life guaranteed under international law and national laws. The property granted under the contract for twenty years is also claimed to be unlawful.

The issues highlighted before the Court were, what are the effects of construction of cable car station in Batam in Basundhara Park via Raniban to the Buddisht Stupa? If the land acquired by the government for a particular purpose is being used for another purpose, is it legal? The decision made by the Pokhara Valley City Development Committee to give consent to the Ministry of Physical Infrastructure and Transport and detailed project report for the Memorandum of Understanding of Pokhara Cable Car between the Ministry and Manakamana shall be dismissed or not?

The apex Court held that Nepal is a party to the Convention on Wetlands of International Importance, 1971. Due to this international obligation to protect the swampy areas and wetlands arises. Establishing cable cars and other physical infrastructure in the area would lead to cutting of trees and consequently, hamper the biodiversity of that area. Nepal is a party to the Convention on Biological Diversity, 1992. The Convention specified the responsibility of establishing a protected area or area system, establishing necessary guidelines for conservation, establishing guideline for conservation, promoting natural conservation, including ecosystem, in order to preserve biodiversity. However, the Batam station cable car stoppage at Basudhara Park via Raniban to the Buddhist Stupa would lead to deforestation and thereby, violate State's obligations under the Convention. Therefore, the Court directed not to conduct activities that affect biodiversity.

The Court in its *ratio decidendi* held, "While the State may be able to obtain private property for the benefit of the public on the basis of the concept of eminent domain and our existing legal system. However, by virtue of such rights of the State to use the private property for the private interest of a private company or individual of power cannot be done." Further, the Court observed that "the adverse effects on a person's health because of being in a polluted environment leads to violation of right to environment linked to the right to life of a person. To assure this right, healthy environment is necessary. Healthy environment consists of ponds, rivers, forests, fresh climate and environmental balance. By virtue of being a protector of citizens and as per the principle of *Parens Patriae*, the responsibility to protect its citizens is of the State."

Environmental Law – Climate Change – Writ of mandamus

***Adv. Padam Bahadur Shreshta* v. *Office of Prime Minister and Council of Ministers* [NKP 2076 Vol. 3, Decision No. 10210, Dated 25 December 2018]**

Climate change is a global threat today. With regard to Nepal, increasing temperature (0.06% every year) is a major concern. Concerned authorities have formulated policies like National Adaptation Programme of Action (NAPA), 2010, National Framework for Local Adaptation Plan for Action (LAPA), 2011, Climate Change Policy emphasising on conservation of forests and biodiversity, agriculture and food security, climate disaster, urban living and infrastructure, water resources and energy and public health. The policies are not implemented properly. The applicant submitted an application to the respondent requesting to make laws to address the issue of climate change. The respondent failed to frame laws on addressing climate change. Therefore, the applicant filed the writ of mandamus. The following prayers were addressed by the Supreme Court:

1. Since there is no legal provision for mitigating climate change in the Environment Protection Act, a separate climate change law is necessary. Therefore, it is incumbent on the respondent to formulate a law on climate change and implement it.
2. Until the Climate Change Mitigation Act is enacted, the existing climate change policies should be implemented immediately and effectively.
3. Since the implementation of aforementioned policies is very slow, a unit for climate change mitigation in all municipalities and villages in

all districts of all seven provinces should be established. There is a need to make and implement an action plan to prevent the effects of climate change immediately.

4. Climate change affects the Himalayan region to lower reaches of the Terai. Therefore, it is imperative to create an effective implementation plan to protect its direct and indirect impact on livelihoods.
5. Until the policies are implemented or relevant laws are formulated to address climate change, the applicant prays to the Court to grant an interim order.

The Supreme Court held that environmental justice can be achieved by ensuring right to a clean environment, including safety of human lives without causing destruction to humanity. Nepal is a party to the Convention on Biological Diversity, 1992, the United Nations Framework Convention Climate Change, 1992, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1982. These conventions aim at mitigating climate change, protection of forests and bio-diversity. Apart from signing these international agreements, it is imperative to have a conscientious or promotional arrangement in addition to the regulatory arrangement by national laws on environment protection including punitive and compensatory arrangements. The Court issued a writ of mandamus to the respondent. The Court ordered the respondent to make laws relating to climate change as soon as possible and implement the policies formulated so far. The Court applied the principle of *parens patriae* to highlight the responsibility of the state in mitigation of climate change by the protection of the environment.

Human Rights – Privacy Act, 2018

The primary aim of the Privacy Act is to ensure right to privacy guaranteed under Article 28 of the Constitution of Nepal. The preamble of the Act mentions "privacy of the matters relating to body, residence, property, document, data, correspondence and character of every person, to manage the protection and safe use of personal information remained in any public body or institution". Article 12 of the Universal Declaration of Human Rights recognises the right to privacy as a human right. Nepal ratified the International Covenant on Civil and Political Rights in 1991. Article 17 of ICCPR states, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and

everyone has the right to the protection of the law against such interference or attacks." Thus, the Act is passed to fulfil Nepal's international obligations as well as to elucidate the rights granted in the Constitution.

Human Rights – Public Health Service Act, 2018

The Public Health Service Act is passed to give details to Article 35 of the Constitution of Nepal that guarantees right to get free basic health service and emergency health. Article 3 (1) of the Act describes the right as "Every citizen shall have the right to obtain quality health service in an easy and convenient manner." Section 50 of the Act obliges creation of National Public Health Committee. One of the functions of the Committee enumerated in Section 51 is "to cooperate, coordinate and monitor to apply international policy, strategy and commitment related to public health in the national interest of Nepal." Nepal became a party to the World Health Organization Constitution on 2 September 1953. One of the major principles of the WHO Constitution is "the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and States". The Public Health Service Act is one of the steps towards complying with these international obligations.

Human Rights – Right to Employment Act, 2018

The Act was passed to provide right to employment mentioned in Article 33 of the Constitution. The Act is passed "in order to ensure the right of every citizen to employment, provide every citizen with an opportunity to choose employment according to his or her capacity, and in relation to the terms and conditions of employment and unemployment support". Section 6 of the Act prohibits discrimination and states, "except for a special provision made by the prevailing law for any particular class or community with respect to the provision of employment to the unemployed, no person shall make discrimination on the ground of one's origin, religion, colour, caste, ethnicity, sex, language, region, ideology or similar other ground". The Act is a positive step towards ensuring international obligations under Convention Concerning Discrimination in Respect of Employment and Occupation or Discrimination Convention, 1958 (ratified on 19 September 1974), Minimum Wage Fixing Convention, 1970 (ratified on 19 September 1974), Convention Concerning Forced or Compulsory

Labour, 1930 (ratified on 3 January 2002) and Convention Concerning the Abolition of Forced Labour, 1957 (ratified on 30 August 2007).

Human Rights – Right to Food and Food Sovereignty Act, 2018

Article 36 of the Constitution of Nepal provides for fundamental right related to food, food security and food sovereignty of the citizens. The Act explains this provision. Furthermore, the Universal Declaration on Human Rights mentions in Article 25 about right to food as part of an adequate standard of living. As per the international obligations, Article 11 of the International Covenant on Economic, Social and Cultural Rights mentions, "The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

Human Rights – Right to Safe Motherhood and Reproductive Health Act, 2018

Article 38 (2) of the Constitution of Nepal guarantees fundamental right to safe motherhood and reproductive health of women. Right to safe motherhood and reproduction falls under the broader framework of right to health. ICESCR provides right to health in Article 12. ICCPR General Comment 14, paragraph 44(a) states that "basic reproductive, maternal (pre-natal as well as post-natal) and child health care" is a part of the core content. Article 16 of the Convention on Elimination of Discrimination against Women guarantees women equal rights to decide "freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." Section 3(3) of the Act states the same principle, "Every woman shall have the right to safe motherhood and reproductive health. Every woman shall have the right to determine the gap between births or the number of children." CEDAW Committee's General Recommendation 24 provides that States shall prioritise the "prevention of unwanted pregnancy through family planning and sex education."

Human Rights – Social Security Act, 2018

Article 43 of the Constitution of Nepal provides for right to social security. The Act has been passed to ensure this fundamental right. According to Section 3 of the Act, right to get social security allowance is granted to senior citizens, indigent, incapacitated and helpless persons, helpless single women, citizens with disabilities, children and citizens unable to take care of themselves. The enactment addresses the human rights of the vulnerable in the society.

Human Rights – Act Relating to Children, 2018

The Act aims at "respecting, protecting, promoting and fulfilling the rights of the child guaranteed under Article 39 of the Constitution. This enactment is towards ensuring the fulfilment of international obligations of Nepal under the Convention on the Rights of the Child 1989 (ratified on 14 September 1990). Similar to the provisions in the convention, the Act provides for right to life in Section 3, right to name, nationality and identity in Section 4, right against discrimination in Section 5 and other rights specific to child.

Human Rights – Act Relating to Compulsory and Free Education, 2018

Article 31 of the Constitution provides for fundamental right to acquire education. The Act is passed to make this right effective. Under international human rights instruments, right to education is enunciated in Article 26 of UDHR, Articles 13 and 14 of ICESCR, Articles 28 and 29 of Convention on the Rights of Child, Article 10 of CEDAW, Article 5 of Convention on Elimination of all forms of Racial Discrimination, and Article 24 of the Convention on the Right of Disabled. Thus, through these international instruments obligations are created for Nepal and this legislation is towards complying with them.

Human Rights – Freedom to Live with Dignity – Freedom of Movement

***Adv. Parasmani Bhattrai and Others* v. *Prime Minister and Office of Council of Ministers* [NKP 2075 Vol. 60, Decision No. 9984, Date 29 January 2018]**

During the blockade, there was hindrance at customs points at Nepal-India border. During these times, transport of goods was hampered. The hindrance in transportation of goods resulted in affecting supply of essential goods like food, medicine, fuel, clothes etc. Nepal is a party to international treaties and agreements that confer rights to a landlocked State. Furthermore, as far as bilateral relations between India and Nepal are concerned, there exists the Nepal-India Transport Treaty that further facilitates trade and movement of goods.

The contention raised by the applicant was that the defendant has created hindrance in the basic fundamental rights conferred in the Constitution. The question before the court was whether an interim order should be granted or not.

The apex Court held that Article 16(1) of the Constitution ensures right to live with dignity. Article 6 of the International Covenant on Civil and Political Rights, 1966 sets obligations for the State to protect the right to live with dignity. After the promulgation of the Constitution in 2015, Nepal sent a team under the Minister of Foreign Affairs to India to negotiate with the Government of India. Nepal's Embassy in India took diplomatic steps to solve the issue. The reply in writing explained that the Minister of Foreign Affairs informed the international community about the crisis hindering movement across the Indo-Nepal border. The impact was explained at the UN Human Rights Council's World Periodical Conference in Geneva. The Court dismissed the writ because the lives of people in Nepal had attained normalcy with guarantee of right to live with dignity. The Court also held that Nepal's government is trying to fulfil its international obligations under the treaties ratified.

The *ratio decidendi* of the case is that freedom is never absolute and it has some restrictions. Moreover, with regard to the international agreements and the obligations set forth by them, implementation is expected from the civilised nations. However, there is no dispute that the international agreements can be applied in the national sphere according to the needs, resources and capabilities of State parties.

Human Rights – Right to Vote – Freedom of Speech and Expression – Citizens in Foreign Employment to be Facilitated with Voting Rights during Elections

***Managing Director of Law and Policy Forum for Social Justice, Adv. Prem Chandra Rai* v. *Government of Nepal, Office of the Prime Minister and the Council of Ministers* [NKP 2075 Ashoj Vol. 6, Decision No. 10039, Date 21 March 2018]**

The Constitution guarantees the right to vote to every citizen. The international laws also ensure this right. However, citizens who are abroad (as migrant workers) are deprived of the right to vote. According to the Election Commission, the total number of voters is more than 14 million. Whereas, according to the data published by the Government of Nepal in 2008/2009, the total number of persons with labour permit during this period is 2.7 million. However, since there is no provision for nationals in foreign country to vote, more than 3 million Nepalese citizens abroad appear to be excluded from the voting rights. Some other States have the provision for external voting but Nepal lacks it.

The issue brought before the Court was should citizens staying abroad for foreign employment to be allowed to vote from outside Nepal during elections? The Court held that "the character of democratic governance is to act in accordance with the wishes of the people and election is a means of expressing their wishes. The right to vote for citizens should be interdependent with the freedom of thought and expression because the citizens express their views on the basic questions such as whom to elect and what laws and policies are to be formed in a democracy." The Court opined that in the light of various national laws and international law regarding the voting rights of citizens, the Nepali sovereign people would exercise their sovereignty through adult franchise.

The Court decided in accordance with Article 11, UDHR that ensures the freedom of thought and expression. Article 21(3) of UDHR enunciates that the will of the people to be expressed through elections is the basis of government's authority. Similarly, freedom of speech and expression is elucidated in Article 19 of ICCPR and Article 25 of the Covenant talks about citizen's right to participate in the matter of public interest either by himself or his freely elected representative by exercising adult franchise. Human Rights Committee's General Comment 25 paragraph 11 mentions that the State should adopt effective measures to ensure that all citizens have access to voting rights. Article 41 of the Convention on the Protection of Migrant Workers, 1990 states

that persons and their families in foreign employment shall have the right to vote and to be elected in the election of their country as prescribed by law. Even though Nepal has not ratified the Convention, it appears that international law recognises the right of citizens of foreign employment to participate in elections in their own country. Therefore, the Court ordered to take necessary steps to make arrangement to ensure the right of voting for all citizens of foreign countries for various purposes without limiting the right to vote of Nepali citizens in foreign employment.

Human Rights – Right to Education – Lack of Nepali Citizenship

***Om Prakash Sah* v. *Nepal Government, Home Ministry and Others* [NKP 2076 Jeshta Vol. 2, Decision No. 10195, Date 14 April 2018]**

Om Prakash Sah, the applicant has attained the School Leaving Certificate and completed his Higher Level Education. He cleared the entrance exam for Mechanical Engineering Department of Purbanchal Campus, Dharan. During enrolment, he was asked to submit a copy of his citizenship. He applied for the citizenship card to the concerned authorities. They denied to grant him one on various reasons. Hence, the applicant filed the writ petition requesting the Court to order the authority to grant him the citizenship card as soon as possible. He also prayed to the Court to order the University not to quash his enrolment and not to curtail the right to education because of lack of citizenship.

The issues brought before the Court were on the right to education and right to citizenship. The apex Court decided that the applicant has approached the wrong authority to grant citizenship and hence, the Court could not order on that regard. However, the Court held that the cancellation of enrolment of the applicant on not possessing the citizenship card is unjust. The Court opined that right to education is guaranteed under the Constitution as well as under various international conventions. Article 26(1) of the UDHR guarantees right to education. Article 13 of the ICESCR, 1966 also guarantees right to education. The Constitution of UNESCO, 1945, signed by Nepal also mentions right to education. The *ratio decidendi* of the decision is that deprivation of natural rights such as right to education based on the reason that the student does not possess Nepali citizenship was held to be unconstitutional.

Human Rights – Children's Rights – Death of Children Due to Low Quality of Vaccines under Government's Program

***Adv. Dal Bahadur Dhami et al* v. *Prime Minister and Office of Council of Ministers* [NKP 2075 Shrawan Vol. 4, Decision No. 9997, Date 28 June 2018]**

The government of Nepal under the Children Immunization Program vaccinated children of Doti district for measles. Pursuant to immunization, four children passed away. Health Ministry, the respondent to the case took responsibility towards formation of a committee, investigation and submission of a report in this regard. However, the ministry failed to submit a report. Therefore, the applicant filed a writ petition praying for certiorari or mandamus.

The issue before the Court is with regard to the violation of right to life of children due to the careless act of government. It is questioned whether the government has taken necessary measures regarding the vaccination or not.

The Court held that under international instruments, right to health is guaranteed under Article 25(1) of the UDHR, Article 12(1) of the ICESCR, and Article 24 of the Child Rights Convention. General Comment 14 of the ICESCR interprets right to health as including the freedom of health and entitlement of health. Thus, under international laws and the interim constitution of Nepal, the Nepal government has accepted the responsibility to guarantee the right to health of its citizens. Therefore, the distribution of vaccines is one of the primary duties of the government. The evidence adduced before the Court proves that vaccines were not tested properly and death of children was caused due to the carelessness of the government. The Court decides to grant Rs. 10,000,000 to the family of the deceased children. It also orders to provide free service to those who had wrong effect of the vaccine. The Court also ordered the government to check the quality of vaccines for its international standards. The Court held "right to health is under economic, social and cultural rights. For the implementation of these rights, the State should take necessary measures to progressively utilise the available resources. Since the rights related to the basic needs of human life such as food, housing, basic education and health are under the State's core minimum obligations. Thus, for the implementation of these rights the economic conditions and issues, including the availability of resources are irrelevant. The State shall take immediate steps to implement these rights."

International Organizations – Consumer Protection Act, 2018

The Consumer Protection Act came into effect on 18 September 2018. Article 44 of the Constitution of Nepal provides the right of consumers. To elucidate the right therein, this Act was passed. Section 24 of the Act provides for duties of the Consumer Protection Council. One of the duties is "to draft necessary policies to cooperate with national and international organizations or institutions related to the rights of consumers".

Terrorism – Convention on Cooperation in Combating International Terrorism, Transnational Organized Crime and Illicit Drug Trafficking, 2009

The Convention was framed under the Bay of Bengal Initiative for Multi-sectoral Technical and Economic Cooperation (BIMSTEC). Nepal ratified the Convention on 19 August 2018. As suggested from the name of the convention, Article 1 obliges the State parties to cooperate in combatting international terrorism, transnational organized crime and "illicit trafficking in narcotic drugs and psychotropic substances including their precursor chemicals" by "mutual assistance in the prevention, investigation, prosecution and suppression of such crimes."

Treaties – International Agreement for the Establishment of the University for Peace, 1980

Nepal acceded the International Agreement for the Establishment of the University for Peace on 27 September 2018. The Agreement was adopted by the United Nations General Assembly by resolution 35/55 dated 5 December 1980. Article 2 of the Agreement provides that the headquarters would be in Costa Rica. Article 3 confers certain privileges and immunities and legal capacity for the smooth functioning of the university. Article 4 makes provision for financial contribution voluntarily by the State parties. However, Nepal has made reservations to Article 4. Article 2 of the Charter of the University for Peace elucidates the aims and purposes of the University as "the university shall contribute to the great universal task of educating for peace by engaging in teaching, research, post-graduate training and dissemination of knowledge fundamental to the full development of the human person and societies through the interdisciplinary study of all matters relating to peace."

State Practice of Asian Countries in International Law

Philippines

*Jay L. Batongbacal**

Criminal Law – Cybercrimes

Resolution Concurring in the Accession to the Convention on Cybercrime, Senate Resolution No. 89, 19 February 2018

The Senate concurred in the ratification of the 2001 Convention on Cybercrime, citing it as the sole binding international mechanism to address the threats of cybercrime, by enhancing the effectiveness and efficiency of investigations, proceedings, and evidence-gathering for criminal offenses relating to computer systems and data.

Criminal Law – International Criminal Court

Note Verbale No. 000181-2018 from the Philippine Mission to the United Nations to the Secretary-General of the United Nations, 18 March 2018

The Philippines sent a notice of withdrawal from the Rome Statute of the International Criminal Court in accordance with the relevant provisions of the Statute. While the Government of the Philippines affirmed its commitment to fight against impunity for atrocity crimes notwithstanding its withdrawal, citing its own punitive legislation, it justified its withdrawal as "a principled stand against those who politicize and weaponize human rights, even as its independent and well-functioning organs and agencies continue to exercise jurisdiction over complaints, issues, problems, and concerns arising from its efforts to protect its people." The withdrawal takes effect after one year.

* Associate Professor, University of the Philippines College of Law.

 | doi:10.1163/9789004437784_018

International Economic Law – Free Trade Agreements

Resolution Concurring in the Ratification of the Free Trade Agreement between the EFTA States and the Philippines, Senate Resolution No. 93, 05 March 2018

The Senate concurred in the ratification of the Free Trade Agreement between the European Free Trade Association States and the Philippines, which covers trade in goods, services, investment, government procurement, intellectual property rights, competition, and sustainable development. The Agreement will provide the Philippines with preferential treatment and duty-free market access to all industrial and fisheries products to the EFTA Member States.

International Organizations – ASEAN+3

Resolution Concurring in the Ratification of the Agreement Establishing ASEAN+3 Macroeconomic Research Office (AMRO), Senate Resolution No. 87, 19 February 2018

The Philippine Senate concurred with the ratification of the Agreement establishing the ASEAN+3 Macroeconomic Research Office (AMRO), which constitutes AMRO as an international organization and grants legal personality, privileges, and immunities to AMRO's principal office, officials, staff, and country experts. This enables AMRO to conduct objective surveillance as a credible international organization and contribute to regional financial stability by carrying out its principal functions to monitor, assess, and report on the macroeconomic status and financial soundness of the members of the ASEAN+3; identify macroeconomic financial risks and vulnerabilities in the region and assist them, if requested, in the timely formulation of risk-mitigating policy recommendations; support members in the implementation of regional financial arrangements; and conduct other activities as determined by the AMRO Executive Committee.

Law of the Sea – Marine Pollution

Resolution Concurring in the Accession of the International Convention on the Control of Harmful Anti-fouling Systems on Ships 2001, Senate Resolution No. 94, 05 March 2018

The Philippine Senate concurred in the accession to the International Convention on the Control of Harmful Anti-Fouling Systems on Ships (AFS 2001 Convention) that aims to prohibit the use of harmful organotins in anti-fouling paints used on ships, and to establish a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems. The resolution cited scientific studies and investigations by Governments and competent international organization showing that certain AFS used on ships pose a substantial risk of toxicity and other chronic impacts to ecologically and economically important marine organisms, as well as to human health that may be harmed due to consumption of affected seafood. The Senate recognized that the use of AFS to prevent organism build-up on the surface of ships is critically important to efficient commerce, shipping, and impeding the spread of harmful aquatic organisms and pathogens, and that there was a need to continue to develop effective and environmentally safe AFS as well as to promote the substitution of harmful systems by less harmful, or preferably harmless, systems.

Resolution Concurring in the Accession to the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto. Senate Resolution No. 95, 05 March 2018

The Philippine Senate concurred in the accession to the 1997 Protocol to amend the International Convention for the Prevention of Pollution from Ships of 1973, as modified by the Protocol of 1978 relating thereto, or MARPOL Annex VI. The protocol establishes emissions controls and requires emissions control areas for ship exhaust gases, particularly sulphur dioxides (SO2x) and nitrogen oxides (NOx) emissions; prohibits the deliberate emission of ozone depleting substances, regulates shipboard incineration and emission of volatile organic compounds from tankers.

Resolution Concurring in the Accession to the Protocol of 1988 Relating to the International Convention on Load Lines, 1966. Senate Resolution No. 96, 05 March 2018

The Philippine Senate concurred in the accession to the 1988 Protocol relating to the International Convention on Load Lines of 1966, which seeks to ensure watertight integrity of ships bulls below the freeboard deck through regulations that take into account the potential hazards present in different zones and seasons, and includes a technical annex containing additional safety measures concerning doors, freeing ports, hatchways, and other items.

Resolution Concurring in the Accession to the Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, 1974. Senate Resolution No. 97, 05 March 2018

The Philippine Senate concurred in the accession to the 1978 Protocol relating to the International Convention for the Safety of Life at Sea of 1974, that requires the fitting of inert gas systems, high capacity fixed washing, and radars on ships depending their dead weight tonnage. It noted that new crude carriers and product carriers of 20,000 DWT and above must be fitted with an inert gas system, while crude carriers of 20,000–40,000 DWT may be exempted by flag States where it is considered unreasonable or impracticable to fit an inert gas system and high capacity fixed washing. Also, all ships of 1,600 to 10,000 GRT are required to be fitted with radar, and ships of 10,000 GRT and above must have two radars each capable of independent operation.

Resolution Concurring in the Accession to the Protocol of 1988 Relating to the International Convention for the Safety of Life at Sea, 1974. Senate Resolution No. 98, 05 March 2018

The Philippine Senate concurred in the Accession to the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea 1974, or the SOLAS Protocol 88, which introduced a new Harmonized System of Survey and Classification to harmonize the International Convention on Load Lines and the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973. This is to lessen the problems caused by the variations in the requirements under the two instruments for the survey

and certification of ships, and to reduce costs to shipowners and administrations by enabling the required surveys to be carried out at the same time. The Protocol also enables the Philippines to apply a single and uniform system of survey and certification of all types of domestic ships.

Instrument of Accession to the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, 06 June 2018

The Philippines, through its Embassy in London, United Kingdom, deposited an Instrument of Accession to the International Convention for the Control and Management of Ships' Ballast Water and Sediments, which prescribes regulations to control the transfer of potentially invasive species and harmful aquatic organisms found in ships' ballast water, and requires all ships to manage their ballast water and sediments according to prescribed standards, and have on-board ballast water treatment systems. All States Parties are also obligated to ensure that ports and terminals have adequate facilities for the reception of sediments.

Law of the Sea – High Seas

Resolution Concurring in the Acceptance of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. Senate Resolution No 99, 05 March 2020

The Philippine Senate concurred in the acceptance of the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, which establishes flag State responsibility over fishing vessels entitled to fly the flag of a State Party, by ensuring that such vessels to not engage in activities that undermine the effectiveness of international conservation and management measures.

Law of the Sea – Conservation and Management of Living Resources

Resolution Concurring in the Accession to the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing. Senate Resolution No. 100, 05 March 2020

The Philippine Senate concurred in the accession to the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing, which promotes the long-term conservation and sustainable use of living marine resources and marine ecosystems through the implementation of effective port State measures against IUU fishing. The Agreement applies to foreign-flag vessels seeking entry into or found in Philippine ports, except for vessels of neighboring States engaged in artisanal fishing for subsistence and container vessels no carrying fish, or if carrying, only fish that have been previously landed.

State Practice of Asian Countries in International Law

Singapore

Elisabeth Liang and Jaclyn L. Neo***

Arbitration – Public Policy and Issue Estoppel in Setting-Aside Proceedings – International Commercial Arbitration

The Singapore High Court in ***BAZ v BBA and others and other matters*** [2018] SGHC 275 set aside an ICC award as against the parties which were minors, as it violated Singapore's most basic notion of justice to find them liable for fraudulent misrepresentation for an amount exceeding S$720 million. It clarified that it was this determination that went against the principle of protecting the interests of minors in commercial transactions, which was part of the public policy in Singapore, rather than the failure to appoint a litigation representative for the minor parties in the arbitration.

The High Court also held that the doctrine of issue estoppel, though not expressly provided for in the New York Convention or Model Law, may be applied as part of the residual domestic law applicable in setting-aside or enforcement proceedings. In particular, where the setting-aside application is based on grounds attracting *de novo* review by the seat court, and is not concerned with arbitrability or public policy, the seat court would be slow to recognise the determination of a foreign enforcement court as giving rise to issue estoppel. The determination of the seat court should be given primacy.

However, the extended doctrine of *res judicata* would not apply – setting-aside or enforcement proceedings are a review of the outcome of the arbitration proceedings, and unlike the multiple sets of litigation proceedings envisaged in the extended doctrine of *res judicata*, unconcerned with the merits of the dispute.

* Associate, WongPartnership LLP.

** Associate Professor, National University of Singapore Faculty of Law, and Director of the Centre for Asian Legal Studies, National University of Singapore.

 | DOI:10.1163/9789004437784_019

Arbitration – Enforcement of Arbitral Award Pending Challenge at the Seat – International Commercial Arbitration

Skaugen, the applicant in ***Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd*** [2018] SGHC 132, sought to adjourn enforcement of the arbitral award on grounds that its setting-aside application in the seat court had "good prospects", the length of delay would not be substantial, and Man Diesel would not suffer prejudice resulting from the adjournment. The Singapore High Court refused this and chose to uphold the *ex parte* order granting leave for immediate enforcement of the award, noting that Skaugen had only filed its setting-aside application in the seat court after Man Diesel had commenced enforcement proceedings in Singapore. The SGHC found it contradictory that Skaugen had in fact started new arbitration proceedings against Man Diesel predicated on the validity of the arbitral award, whilst later attempting to set aside the same award in the seat court for invalidity.

Further, a delay of one to two years before the setting-aside application would be disposed of would be too long and prejudicial to Man Diesel.

Arbitration – Review of Jurisdiction of Arbitral Tribunal in the Singapore Courts – International Commercial Arbitration

The Court of Appeal in ***Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)*** [2018] SGCA 63 held that the commencement of litigation proceedings in breach of an arbitration agreement was indicative of the claimant's intention to repudiate the arbitration agreement. In *dicta*, it considered it "strongly arguable" that the mere commencement of litigation proceedings was itself a *prima facie* repudiation of the arbitration agreement, especially where the commencement of litigation proceedings is not explained nor qualified in scope.

Where the defendant to these litigation proceedings then engages the court's jurisdiction on the merits – in this case, by applying for summary judgment in its favour or to strike out the action – it will be deemed to have submitted to the court's jurisdiction and thus accepted the claimant's repudiation of the arbitration agreement. Accordingly, the arbitral tribunal would not have jurisdiction to hear the dispute.

Arbitration – Review of Jurisdiction of Arbitral Tribunal in the Singapore Courts – International Commercial Arbitration

In ***Sinolanka Hotels & Spa (Private) Limited v Interna Contract SpA*** [2018] SGHC 157, the Singapore High Court confirmed that parties cannot apply for the curial review of an arbitral tribunal's jurisdiction under either Section 10(3) of the International Arbitration Act or Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration if the tribunal had decided the issue of jurisdiction in the final award (or in an award which also deals with the merits of the dispute), and not as a preliminary question. The statutory language in this regard is clear that the courts have no power to determine the arbitral tribunal's jurisdiction at such stage.

Arbitration – Review of Jurisdiction of Arbitral Tribunal in the Singapore Courts – International Commercial Arbitration

In ***Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*** [2018] SGHC 78, the Singapore High Court held that where jurisdiction had been decided as a preliminary question, a failure to challenge it within 30 days (pursuant to Section 10(3) of the International Arbitration Act and Article 16(3) of the UNCITRAL Model Law) had a preclusive effect on subsequent setting-aside proceedings at the seat. This would apply even if the challenging party had not participated in the arbitration, and especially, would amount to an abuse of process where the challenging party had deliberately allowed the arbitration to proceed and only raised a jurisdictional challenge at the seat court in blatant disregard of the 30-day time limit. However, the challenging party would not lose its passive remedy of resisting enforcement whether in another jurisdiction or at the seat.

Dispute Resolution – Memorandum of Guidance – Supreme People's Court of the People's Republic of China

China and Singapore signed the Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme

Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases on 31 August 2018. It applies to both international and non-international cases of which recognition and enforcement of judgments requiring a natural or legal person to pay a fixed or ascertainable sum of money to another natural or legal person in commercial cases is sought in the other party's courts, including judgments issued by the Singapore International Commercial Court.

This Memorandum is significant as there was no pre-existing treaty for reciprocal enforcement of judgments between both countries. *Kolmar Group AG v Jiangsu Textile Industry* (*Group*) *Import & Export Co Ltd* (2016) Su 01 Xie Wai Ren No 3 was the first case in which a Chinese court enforced a judgment in Singapore, but it is not a binding precedent. The Memorandum now sets out various procedural and substantive conditions for the enforcement of Singapore judgments in China. Most importantly, it stipulates that Chinese courts will not review the merits of a Singapore judgment. A Singapore judgment may only be challenged on limited procedural and jurisdictional grounds, or as contrary to public policy. The Memorandum sets out the same conditions for the enforcement of Chinese judgments in Singapore courts.

Treaty – Ratification of Treaties

Singapore ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) on 19 July 2018 and the agreement entered into force on 30 December 2018. The CPTPP is a regional free trade agreement between eleven countries which represent 14% of the global economy. It is also Singapore's first preferential trade agreement that involves Canada and Mexico. Notably, the CPTPP provides for investor-State dispute resolution under the ICSID Convention Arbitration and Additional Facility Rules or UNCITRAL Arbitration Rules (including the UNCITRAL Transparency Rules) if an investment dispute has not been resolved after six months of consultations and negotiations, and includes a Code of Conduct for arbitrators.

Treaty – Free Trade Agreement – Singapore and Sri Lanka

Sri Lanka and Singapore signed the Sri Lanka-Singapore Free Trade Agreement on 23 January 2018. The agreement has been ratified and entered into force on 1 May 2018. The Free Trade Agreement is Sri Lanka's first modern

and comprehensive free trade agreement and provides Singapore companies with another avenue to venture into the larger South Asia market. It is also Sri Lanka's first treaty commitment on government procurement, and lists the Singapore International Arbitration Centre as an institution under which investor-State disputes can be brought, promoting Singapore as an arbitration hub.

Treaty – Bilateral Investment Treaty – Singapore and Kenya

Singapore and Kenya signed the Singapore-Kenya Bilateral Investment Treaty and an Agreement for the Avoidance of Double Taxation on 12 June 2018. The Bilateral Investment Treaty grants investors protection such as Most-Favoured-Nation treatment, fair and equitable treatment, and protection from illegal expropriation. The Agreement for the Avoidance of Double Taxation stipulates the taxing rights of both jurisdictions on all forms of income flows arising from cross-border business activities and minimizes the double taxation of such income.

Treaty – Bilateral Investment Treaty and Air Services Agreement – Singapore and Rwanda

Singapore and Rwanda signed the Rwanda-Singapore Bilateral Investment Treaty and Air Services Agreement on 15 June 2018. The Bilateral Investment Treaty grants investors protection such as Most-Favoured-Nation treatment, fair and equitable treatment, and protection from illegal expropriation. It is complemented by the Air Services Agreement, which will enhance connectivity, enabling wider economic benefits through increased investment, tourism and trade between the countries.

Treaty – Bilateral Investment Treaty – Singapore and Indonesia

Singapore and Indonesia signed an Agreement on the Promotion and Protection of Investments, also known as the Bilateral Investment Treaty, on 11 October 2018. This replaced the previous Bilateral Investment Treaty which expired on 20 June 2016. The Bilateral Investment Treaty will complement

the ASEAN Comprehensive Investment Agreement to promote greater investment flows between both countries, by providing investor protection such as Most-Favoured-Nation treatment, National Treatment, fair and equitable treatment and full protection and security based on customary international law, and protection from illegal expropriation.

Treaty – Free Trade Agreement – Singapore and the European Union

The European Union (EU) and Singapore signed the EU-Singapore Free Trade Agreement (EUSFTA) and EU-Singapore Investment Protection Agreement (EUSIPA) on 19 October 2018. The agreements will be sent to the European Parliament for approval before the EUSFTA can be ratified and entered into force. The EUSIPA must be ratified by both the EU and its individual member states and will additionally be sent to the regional and national parliaments of the EU member states for approval before it enters into force. This is expected to take around two to three years after signing.

Key benefits of the EUSFTA include tariff elimination, reduced non-tariff barriers, greater market access for service providers, professionals and investors, enhanced government procurement opportunities, and enhanced intellectual property rights.

The EUSIPA will replace the twelve existing bilateral investment treaties between Singapore and various EU member states. It notably clarifies investment protection standards and obligations, prescribes shorter timelines for consultations between parties and for the tribunal to issue an award, and adopts similar requirements to the UNCITRAL Transparency Rules. It also establishes a new standing international and fully independent dispute resolution system, comprising a First Instance Tribunal and an Appeals Tribunal with permanent members. The latter will hear challenges to tribunal members in-house. These features, as the European Commission has announced, are indicative of the EU's new approach to investment protection and its enforcement mechanisms.

Treaty – Free Trade Agreement Upgrade Protocol – Singapore and the People's Republic of China

Singapore and China signed the China-Singapore Free Trade Agreement Upgrade Protocol on 12 November 2018. It will enter into force upon ratification.

The upgraded Free Trade Agreement enhances market access for goods, improves Singapore companies' access into China's legal, maritime and construction services sectors and Chinese companies' access into Singapore's air transport, courier, environment and financial services sectors. It also enhances investment protection for Singapore investors in China, surpasses existing commitments in the World Trade Organisation Trade Facilitation Agreement in Release of Goods, Advance Rulings and Express Shipments, and introduces new chapters on Trade Remedies, Economic Cooperation, Competition, Environment, E-commerce and Manpower.

Treaty – Bilateral Investment Treaty – Singapore and Kazakhstan

Singapore and Kazakhstan signed the Singapore-Kazakhstan Bilateral Investment Treaty on 21 November 2018. Kazakhstan is Singapore's most significant economic partner among the five Central Asian states and also part of the Eurasian Economic Union, which Singapore is in the process of negotiating a Free Trade Agreement with. The signing of the Bilateral Investment Treaty will serve as a good foundation to the ongoing negotiations. The Treaty also provides for an investor's submission of a claim to arbitration under the ICSID Convention Arbitration and Additional Facility Rules or UNCITRAL Arbitration Rules (including the UNCITRAL Transparency Rules) if an investment dispute has not been resolved after six months of consultations and negotiations.

Treaty – United Nations Convention on International Settlement Agreements Resulting from Mediation

The United Nations General Assembly adopted the Convention on International Settlement Agreements Resulting from Mediation on 20 December 2018. It shall be open for signature by all States in Singapore, on 7 August 2019. The Convention is the first UN treaty to be named after Singapore and will be known as the "Singapore Convention on Mediation".

Playing a similar role as the New York Convention does for arbitration, the Convention is the first multilateral treaty to provide for the cross-border enforcement of mediated settlement agreements, and will give businesses greater certainty that their mediated settlement agreements can be relied upon in cross-border commercial dispute resolution. Singapore's role in the

negotiations, drafting of the treaty, and as the host of the treaty signing serve to consolidate its position as a leading international dispute resolution centre.

Treaty – Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

Singapore deposited the Instrument of Ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting on 21 December 2018. The Convention was signed by Singapore on 7 June 2017 and will enter into force for Singapore on 1 April 2019. The key benefits include minimum standards for preventing treaty abuse such as the adoption of the Principal Purpose Test, minimum standards for enhancing dispute resolution with assistance from the Inland Revenue Authority of Singapore, and mandatory binding arbitration provisions to provide certainty and specified timeframes for parties in treaty-related disputes.

Human Rights – Submission of First Report on International Convention on the Elimination of All Forms of Racial Discrimination to Committee on the Elimination of Racial Discrimination

Singapore submitted its first report to the United Nations Committee on the Elimination of Racial Discrimination on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 24 December 2018. Singapore signed the ICERD in October 2015 and ratified it in November 2017. The Committee has not yet provided its concluding observations on Singapore's Report.

The Report emphasises Singapore's commitment to racial harmony, anchored on the principles of the secular state, multi-racialism and meritocracy. Singapore highlighted three pillars on which the Government's approach to building social cohesion was anchored: (*i*) legislation that safeguards racial and religious harmony; (*ii*) policies that foster social integration; and (*iii*) programmes that mobilise the community to build mutual respect and understanding, and to work together for the common good. Specific measures include the Presidential Council for Minority Rights which acts as a safeguard against the implementation of discriminatory laws; the Group

Representation Constituency to ensure Parliament's multi-racial composition; the Ethnic Integration Policy to ensure a balanced ethnic mix across public housing estates and to prevent the formation of racial enclaves; five ethnic-based Self-Help Groups to assist low-income persons and families; and Community Programmes in place to foster social cohesion.

International Economic Law – Review of Investor-State Awards in the Singapore Courts – Investment Treaty Law

Swissborough Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81 is Swissborough's appeal against the Singapore High Court's decision to set aside a partial final award on jurisdiction and merits by a Permanent Court of Arbitration tribunal on grounds that the PCA Tribunal lacked jurisdiction over the parties' dispute.

The Court of Appeal dismissed the appeal, finding that the SGHC did have jurisdiction to hear the setting-aside application pursuant to Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (*i.e.*, an award dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration), even if the Kingdom had been contesting the very existence of the PCA Tribunal's jurisdiction to hear the claims submitted to it. In *dicta*, the Court of Appeal further stated that even if it had no jurisdiction to hear the setting-aside application on Article 34(2)(a)(iii) grounds, it would have allowed the Kingdom to amend the grounds for setting-aside in its originating summons to Article 34(2)(a)(i) (*i.e.,* the arbitration agreement was invalid) – highlighting, once again, the Singapore courts' extremely pro-arbitration approach.

This decision also affirmed the Singapore courts' willingness to engage in extensive treaty interpretation, with the Court of Appeal reviewing, in its appellate position, the SGHC's *de novo* analysis of the PCA Tribunal's jurisdiction.

State Practice of Asian Countries in International Law

Thailand

*Kitti Jayangakula**

Treaties – Agreements Concurred by Thailand in 2018 – International Agreements on Peaceful Use of Nuclear Energy

In 2018, Thailand became a party to four key international agreements on the peaceful use of nuclear energy. This includes the Convention on the Physical Protection of Nuclear Material; the Amendment to the Convention on the Physical Protection of Nuclear Material; the Convention on Nuclear Safety; and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, respectively.

On June 19, 2018, the country acceded to the Convention on the Physical Protection of Nuclear Material (CPPNM) and the Amendment to the Convention on the Physical Protection of Nuclear Material (Amendment). These two main conventions entered into force for Thailand on July 19, 2018. To be a party to the CPPNM and its Amendment demonstrates that Thailand has committed to strengthening nuclear security in the country and also promoting international cooperation in this respect.

Subsequently, on July 3, 2018, Thailand acceded to another two key conventions: the Convention on Nuclear Safety (CNS) and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Joint Convention). Both conventions have been effective for Thailand since October 1, 2018. The accession to the CNS and the Joint Convention proves the country's strong commitment to the safety of its nuclear facilities, installations, and operations.

According to the series of those conventions, the peaceful use of nuclear energy constitutes the use of nuclear energy for research and development for the sake of making technological advances that can be applied to various fields, such as agriculture, public health, and the environment. These advances

* Professor, Eastern Asia University, Thailand.

 | DOI:10.1163/9789004437784_020

can contribute to raising people's quality of life, adding more value to their business endeavors, and driving progress in industry and other related sectors.

As a member of the international community, Thailand has always cooperated with other countries to establish the standards of control for the peaceful use of nuclear energy that is transparent, effective, and truly ensure peaceful benefits.

Treaties – Agreements Concurred by Thailand in 2018 – Labour's Rights – ILO Forced Labour Protocol of 2014

Thailand has ratified a number of the International Labour Organisation (ILO) Conventions in recent decades. This reflects the view of the country to ensuring worker rights and safety.

On June 4, 2018, Thailand has ratified to the Protocol of 2014 to the Forced Labour Convention of the International Labour Organisation (ILO). The Protocol adopted by an overwhelming majority by the International Labour Conference in 2014, reinforces the international legal framework for combating all forms of forced labor, including trafficking in persons, and calls on states parties to take measures to prevent and suppress forced labor, create significant penalties for violators, implement and enforce the policies, and protect victims and ensure their access to remedies and compensation.

Regarding this, Thailand is the 24th country to ratify and the first country in Asia to ratify the ILO Forced Labor Protocol. The ratification of the Protocol of the country demonstrates the Government's commitment to improving and aligning its national legislative framework with international labor standards to ensure the elimination of forced labor and further guarantee decent employment opportunities for all workers in Thailand.

Treaties – Agreements Concurred by Thailand in 2018 – Banning of Nuclear explosions – Comprehensive Nuclear-Test-Ban Treaty of 1996

Thailand has become a party to the Comprehensive Nuclear-Test-Ban Treaty of 1996 (CTBT) on September 25, 2018. This demonstrates the commitment of the country to banning all nuclear explosions, for both civilian and military purposes, in all environments.

The CTBT requires each state party to undertake not to carry out any nuclear weapon test explosion or any other nuclear explosion, to prohibit and prevent

any such nuclear explosion at any place under its jurisdiction or control, and to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion. To comply with this, each state party is under an obligation to establish the Comprehensive Nuclear-Test-Ban Treaty Organization to achieve the object and purpose of the CTBT, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among states parties.

Treaties – Agreements Concurred by Thailand in 2018 – War and Armed Conflict – Protection of the Operation of the Comprehensive Nuclear-Test-Ban Treaty Organization Act, B.E. 2561 (2018)

Thailand signed the Comprehensive Nuclear-Test-Ban Treaty of 1996 (CTBT) and since November 12, 1996, it requires member countries to enact the law on the protection of the operation of the Comprehensive Nuclear-Test-Ban Treaty Organization (Organization).

On July 25, 2018, the National Legislative Assembly of Thailand enacted the Protection of the Operation of the Comprehensive Nuclear-Test-Ban Treaty Organization Act, B.E. 2561 (2018). The main purpose of this Act is to provide legal status of the Organisation under Thai law and necessary privileges and immunities will be extended to such an organization and persons who perform an operation related to such Organization for enhancing its operation within areas, jurisdiction and control of member countries. This law became effective on July 28, 2018.

This Act defines the terms of 'Treaty' and 'Organization' in Section 3 and ensures the interests of protecting the operation of the Organization in Thailand. The Organization is recognized as a juristic person and be deemed to have a domicile in Thailand (Section 4(1)). In addition, the Organization, delegates of States Parties, together with their alternates and advisers, delegates of State Parties being representatives of members elected to the Executive Council, together with their alternates and advisers, Director-General, inspectors, inspection assistants, members of the staff of the Organization and observers, as well as the living quarters, office premises, papers, correspondence, records, samples and equipment approved by the Conference of the states parties, of the inspection team shall be accorded privileges and immunities as set forth in the Treaty and the Protocol thereto, only to the extent of the provisions thereof which are accepted and applied by the Government, and an

agreement that the Government may further conclude with the Organization, during the performance of duties in Thailand or the entry into Thailand to perform duties or in performing missions in connection with the Organization (Section 4(2)).

Human Rights – Conflict of Laws – LGBT Rights – Same-Sex Civil Partnership – Recognition of Foreign Civil Partnership

Chatwut Wangwon [Court of Appeal, Black Case No. 1017/2561, Red Case No. 18776/2561, December 27, 2018]

The claimant, Mr. Chatwut Wangwon, filed his claim, seeking a court order appointing him to be in charge of the estate of his deceased partner, a British national. The claimant and his partner, a same-sex couple registered a civil partnership under English law at a British embassy in Hanoi, Vietnam.

In order to determine whether the claimant could be in charge of the estate, the Court needed to consider whether the civil partnership status between the two same-sex individuals under the British Civil Partnership Act 2004 is valid under the laws of Thailand. In this regard, the recognition of this civil parentship status must be not contrave the public order or good morals recognized under the laws of Thailand.

Later, the Court of the First Instance rejected the claim filed by the claimant on the ground that Thailand does not recognize same-sex marriage and therefore the same-sex civil partnership registration could not be treated as a legal marriage under Thai law which is only reserved for a man and a woman according to article 1435 of the Civil and Commercial Code of Thailand. The claimant appealed the judgment of the Court of the First Instance. The Court of Appeal was to determine whether the civil partnership registration is valid under the Act of Conflict of Laws B.E. 2481.

On December 27, 2018, the Court of Appeal, with the resolution passed at its General Assembly, delivered its judgment, ruling that the registration of a same-sex civil partnership was not contrary to the public order and good morals of Thailand under Section 5 of the Act of Conflict of Law B.E. 2481.

The Court further stated that the registration of a civil partnership between the same-sex couple was recognized under the Universal Declaration of Human Rights that all human beings could not be discriminated against on the ground of sex. Moreover, the Constitution of the Kingdom of Thailand B.E. 2017 also recognizes that human dignity, rights, and liberties and equality of the people

shall be protected and all persons are equal before the law accordance with the provisions of Sections 4 and 27 of the 2017 Constitution.

With this regard, the Court further stated that the application of the foreign law that provides for a same-sex couple to share their lives without prejudice or unfair treatment on the ground of sex by birth is in line with the Universal Declaration of Human Rights and core human rights treaties to which Thailand is a party. Also, the Court ruled that such an application of foreign law is in line with Section 4 and Section 27 of the Constitution of Thailand.

State Practice of Asian Countries in International Law

Vietnam

*Tran Viet Dung**

Environmental Law – Water Security – Management of Mekong River Basin – Regional Cooperation

Vietnam has taken efforts to push the development of the Mekong River Commission (MRC) in the capacity of the MRC Chair in 2018. Prime Minister Nguyen Xuan Phuc, in his capacity as the MRC chairman, called upon the participants at the MRC Leaders' Meeting held in Phnom Penh on 4–5 April 2018 to pay special attention toward the issue of security of water resource and to increase cooperation between MRC members and its dialogue partners (including China and Myanmar) as the MRC cannot fulfils its mission without the active collaboration with them. The international relations issue of the Mekong River needs to be expanded beyond the four MRC member countries.

Vietnam's Prime Minister also emphasized the necessity for the countries to observe the MRC Guidelines for conducting Transboundary Environmental Impact Assessment (TbEIA). It is argued that the balanced and flexible approach of TbEIA would help countries to promote the sustainable development, utilisation, conservation and management of the Mekong River Basin water and related resources.

The security of water resources from international rivers is highly dependent on international cooperation between the countries involved in the exploitation and use of this water resource. The Mekong River is a "transnational resource" exploited and managed by six countries, including Cambodia, China, Laos, Myanmar, Thailand and Vietnam. However, the national vision and interests of the countries are different, leading to instability in security for water resources from this river, causing impacts on the national security of Vietnam: China and Laos are making the most of hydropower exploitation for economic development; Thailand has extensively developed and exploited their irrigation infrastructure to serve its northeastern region; Cambodia wants

* Associate Professor, Dean of International Law Faculty, Ho Chi Minh City University of Law, Vietnam.

to maintain great water level in Tonle Sap Lake to keep the seafood source; Vietnam is the country which has the last flow before exposing sea, is strongly affected by security of water resources. Vietnam does not want saltwater intrusion to be more serious, affecting food and seafood in the Mekong Delta, which shows that adjustment for exploitation and management activities of any country that the river crosses has impacts on the national security for the remaining countries.

The Mekong Delta of Vietnam is the last region of the Mekong basin, which is Vietnam's rice basket, providing rice and export aquatic resources. However, 95% of the water flow to the Mekong Basin is from the upstream region of the Mekong River. Due to great dependence on external sources, security of water resources in Vietnam may be threatened by neighboring countries, especially those in the upstream region of Mekong. The thorough exploitation of resources from the Mekong River without the close cooperation between countries has led the Mekong Delta in Vietnam to a serious reduction in water flow, sediment residue, aquatic resources and threatens food security that is an important source of national security. Given the current development, arguably, upstream countries may use water source as a "weapon" against Vietnam. For Vietnam, water resources of the Mekong River has a direct impact on its national security and therefore, the government is very active in seeking and developing appropriate international cooperation mechanism amongst the countries that share the Mekong River for socio-economic development.

Vietnam has been advocating the use of an international legal mechanism to facilitate the cross-boundary collaboration in managing the water resource of the Mekong River. It signed the UN Convention on the Law of the Non-Navigational Uses of International Watercourses (which officially came into force in August 2014) and became the first MRC member to accede to the Convention. Currently, it is actively discussing with other ASEAN members to access the Convention, thereby contributing to strengthening international legal mechanisms, facilitating the sustainable management and development of Mekong River water resources. Since 2014, Vietnam has been strongly supporting the MRC Basin Development Strategy 2016–2020 which focuses on strengthening international cooperation on the Mekong River not only through the MRC framework and but also through the Greater Mekong Sub-region (GMS) with the participation of the six countries sharing the Mekong River (despite the fact the later only prioritizes the economic cooperation rather than water security in the Mekong River). Arguably, strengthening the six-party contact between the countries of the Mekong River will bring the two upstream countries of China and Myanmar into the MRC mechanism.

Human Rights – Treaties and Covenants – Vietnam's First National Report on the Implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

On November 14 and November 15, in Geneva, Switzerland, Vietnam's intersector delegation led by Senior *Lieutenant General Le Quy Vuong*, Member of the Party Central Committee and Deputy Minister of Public Security, delivered a presentation and made defense in the discussion session on the initial Report on Vietnam's implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/VNM/1). The report was adopted at the 1708th meeting (CAT/C/SR.1708), held on 29 November 2018.

The published materials by Vietnam are included: (1) Plan for implementing the Convention against Torture by the Prime Minister (issued together with Decision No. 364/QD-TTg dated on March 17, 2015); (2) The first national report of Vietnam on the implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture") with 14 appendices attached; (3) Speech by Senior *Lieutenant General Le Quy Vuong* and annexes attached. These are documents that have been approved by competent authorities, directly related to the implementation of the Convention against Torture in Vietnam and showing the State's policies and laws against torture and other cruel, inhumane or humiliating treatment or punishment.

Of which, between 2017 and 2018, Vietnam had adopted three new laws in order to better implement the Convention against Torture: the amended Law on Legal Aid, the amended Law on State Compensation Liability, and the Law on Denunciations. The Government of Vietnam has promulgated a Project on disseminating the content of the Convention and Vietnamese law on anti-torture to cadres, civil servants, officials and the people. The objective is to raise the awareness and understanding of officials, public servants, officials and people on the contents of the Convention and relevant Vietnamese laws on torture prevention and combat. In addition, *the Ministry of Public Security* had *piloted* a project of *audio-video recording in criminal procedure* in *45 facilities*. Vietnam has continued to actively cooperate with foreign partners in the prevention and control of torture, through the exchange of information and experience on the organization and implementation of the Convention as well as practical measures, means and effective use of equipment to

prevent torture; to participate in and organize international conferences and seminars related to anti-torture, contributing to strengthening the capacity of Vietnamese officials, especially the police force, in implementing the Convention against Torture.

The Vietnamese government delegation answered questions raised by members of the Anti-Torture Committee in the dialogue and also highlighted difficulties in implementing the Convention; seriously noting the recommendations to have better directions for implementing the Convention.

In its concluding observations on the initial report of Vietnam, amongst the other proposals, the UN Committee against Torture suggested the Government to amend national legislation, including the 2015 Criminal Code, in order to introduce and explicitly criminalize acts of torture, to ensure that both the crime of torture and the attempt to commit such a crime are punishable with appropriate penalties that are commensurate with the gravity of their nature compliant with the applicable Convention, to acknowledge and publicly and unequivocally condemn at the highest level all acts of torture and ill-treatment of any persons deprived of their liberty, as well as to take urgent measures to render the material conditions of detention of persons sentenced to death equivalent to those of other prisoners.

International Economic Law – International Economic Cooperation – the EU-Vietnam Free Trade Agreement Split into Two Specific Agreements

In June 2018, the EU and Vietnam officially concluded the EU-Vietnam Free Trade Agreement (EVFTA) and the EU-Vietnam Investment Protection Agreement (*EVIPA*), which were initially negotiated as a single EU-Vietnam Free Trade Agreement. The parties completed the negotiation of the FTA since 2015, but could not conclude due to disagreement amongst the EU members about the scope of the EU free trade agreement with its external trading partners. To overcome the issues, the EU and Vietnam have agreed to split the investment protection content and the mechanism of investor-state dispute settlement (ISDS) from the EVFTA to form a separate agreement, following the approach chosen by the EU for the trade and investment agreements with Singapore.

The EVFTA, upon the time it becomes effective, will facilitate the tariff reductions on 99% of goods between the European Union and Vietnam. The agreement is seen as a comprehensive, high quality and balanced agreement of interests for both Vietnam and the EU, as well as compliant with the provisions

of the World Trade Organization (WTO). The FTA consists of 17 Chapters, 2 Protocols and a number of memorandum of understanding attached with the main contents: trade in goods (including general provisions and market access commitments), rules of origin, customs and trade facilitation, food safety and hygiene measures (SPS), technical barriers to trade (TBT), trade in services (including general provisions and market access commitments), investment, trade remedies, competition, state-owned enterprises, government procurement, intellectual property, trade and sustainable development, cooperation and legal institution.

Regarding trade in goods, for Vietnamese exports, as soon as the FTA comes into effect, the EU will eliminate import duties on 85.6% of tariff lines, equivalent to 70.3% of Vietnam's exports to the EU. After seven years from the date of entry into force of the Agreement, the EU will eliminate import duties on 99.2% of tariff lines, equivalent to 99.7% of Vietnam's exports. So far, this is the highest level of commitment a partner gives to Vietnam through signed FTAs. This benefit is especially meaningful when the EU is one of the two largest export markets of Vietnam. For EU exports, Vietnam commits to eliminate tariffs as soon as the Agreement comes into effect with 48.5% of tariff lines (accounting for 64.5% of import turnover). Subsequently, after seven years, 91.8% of tariff lines equivalent to 97.1% of EU exports were removed from Vietnam by import taxes.

For other issues related to trade in goods, Vietnam and EU also agree on contents related to customs procedures, SPS, TBT, trade remedies, etc., creating a legal framework for the two sides to cooperate. Regarding trade in services and investment, Vietnam's commitments go beyond those within the WTO, so are the EU's commitments. Notably, the EU's commitments are equivalent to the highest EU commitments under the recent EU FTAs. EVFTA also includes chapters related to competition, state-owned enterprises, sustainable development, cooperation and capacity building, legal and institutional. These contents are in line with Vietnam's legal system, creating a legal framework for both sides to strengthen cooperation and to promote the development of mutual trade and investment.

The EVIPA, meanwhile, regulates the investments between the parties, including both direct and non-direct, and investor-state dispute settlement mechanisms. Under EVFTA, both the EU and Vietnam pledge to accord national treatment and most favored nation treatment to the investments of investors of the other Party, with a few exceptions, as well as to apply fair and equitable treatment, to allow the free transfer of capital and profits from investment abroad, as well as to not expropriate and to compensate appropriate damages for investors. Most importantly, the parties have agreed to

establish an International Investment Court, with two levels of settlement (Panel and Appellate Body), to resolve investor-state disputes. The EVIPA's dispute settlement mechanism possesses most distinctive trait learning from the WTO quasi-judicial dispute settlement model, which is the establishment of a semi-permanent adjudicatory body similar to an investment court in replacement of the arbitration model envisaged by the vast majority of investment treaties over the past decades.

It is expected that the EVFTA and EVIPA will help not only to promote the trade and investment relationship between the signing parties, but also create a premise towards the discussion of an FTA between the EU and ASEAN in the future. Vietnam and Singapore, the two ASEAN members having FTAs with the EU, have brought the issue to discussion at the ASEAN ministerial meetings and received positive responses from other ASEAN members.

International Economic Law – Asia-Pacific Mega Trade Deal – Regional Comprehensive Economic Partnership

On 14 November 2018 in Singapore, on the occasion of the 2nd RCEP Summit, Vietnam, together with the ASEAN Member States and ASEAN's free trade agreement (AFTA) partners: Australia, China, India, Japan, Korea, and New Zealand, delivered the Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP) Negotiations (Joint Statement).

The Joint Statement reflects "the task to conclude the RCEP negotiations is becoming more urgent and significant given the current headwinds faced by the global economy" and describes the status of the RCEP negotiations in November 2018, mainly including market access negotiations and rules negotiations. Although a few gaps remain, concluding market access negotiations are considered to be "within reach" to meet the goals in the Guiding Principles and Objectives for Negotiating the RCEP. Furthermore, Chapters on Customs Procedures and Trade Facilitation (CPTF); Government Procurement; Institutional Provisions; Sanitary and Phytosanitary (SPS) Measures; and Standards, Technical Regulations, and Conformity Assessment Procedures (STRACAP); which, added to the earlier concluded chapters on Economic and Technical Cooperation (ECOTECH) and on Small and Medium Enterprises, bring the total number of concluded chapters in RCEP to seven.

Launched in 2012 with the goal to deepen economic relationship among the 16 Asia-Pacific nations, the RCEP talks were originally planned to be finished by 2015 but the parties have not been able to complete the negotiation in accordance with the set deadline. The talks encountered many difficulties including

a lack of an existing comprehensive economic agreement among some participating nations, a wide gap in political and economic conditions between the negotiating nations and some countries' conservative attitude towards market access. A total of 28 rounds of talks have been held up to 2018 since the leaders of the 16 countries declared the start of negotiations on the sidelines of the 21st ASEAN Summit in Phnom Penh, Cambodia in November 2012.

Once signed, the RCEP will form a free-trade area covering about half of the world's population, and accounting for 32.2 percent of global GDP, 29.1 percent of global trade and 32.5 percent of global investment inflows.

International Economic Law – Import-Export – Trade Remedies – WTO Dispute Settlement

Decision No. 3877 on Investigation into the Imposition of Anti-Dumping Measures for Products of Chinese and Korean Origins (Case No. AD04)

On October 15, 2018, the Vietnamese Ministry of Industry and Trade issued Decision No. 3877/QD-BCT on the investigation and imposition of anti-dumping measures on flat-rolled alloy or non-alloy steel products, varnish painted or scanned or coated with plastics or other covers originated from the People's Republic of China and the Republic of Korea (case number AD04).

The petitioners are four colored steel manufacturers representing the domestic manufacturing industry, which include: Dai Thien Loc Joint Stock Company, Ton Phuong Nam Corporation, Nam Kim Steel Joint Stock Company and Steel Joint Stock Company. Goods alleged to be dumped are colored steel products classified by the following HS codes: 7210.70.11, 7210.70.19, 7210.70.91, 7210.70.99, 7212.40.11, 7212.40.12, 7212.40.19, 7212.40.91, 7212.40.92, 7212.40.99. Dumping rate of investigated goods from China is 25.5% and that from Korea is 19.25%. The alleged dumping of goods is proved to be the main cause leading to significant losses of domestic manufacturing industry, which is reflected by the decline in such indicators as utilization, output, revenue, profit and inventory. After initial analyses on the dossier submitted by the petitioners, the Investigation Authority recommended the Minister of Industry and Trade to proceed the investigation. The details of investigation are conducted pursuant to Article 80 of the Law on Foreign Trade Management on contents of an anti-dumping measures imposition investigation and Article 32 of the Decree No. 10/2018/ND-CP on deciding to conduct anti-dumping measures imposition investigation.

Vietnam Investigates the Application of Anti-Customs Evasion Measures of Trade Remedies (Case No. AC01.SG04)

On July 26, 2018, the Ministry of Industry and Trade of Vietnam issued a decision to initiate an investigation to apply *prevention measures* of *trade remedies evasion* for wire/rolled steel products with HS codes 7213.91.90, 7213.99.90, 7217.10.10, 7217.10.29, 7229.90.99, 9839.10.00 and 9839.20.00, which are imported into Vietnam from other countries.

This is the first anti-customs evasion investigation for imports into Vietnam. This case is based on suspicion of evading trade remedies from the original case code SG04 after Vietnam applied an official safeguard measure on steel and long steel products imported into Vietnam. After the 6-month investigation period, on May 13, 2019, the Ministry of Industry and Trade issued Decision No. 1230/QD-BCT on the application of measures to avoid evasion of trade remedies for wire and rolled steel products imported into Vietnam. Measures against evading trade remedies are applied in the form of additional import duties with a tax rate of 10.9% from May 28, 2019 to the end of March 21, 2020.

Evading trade remedy measures is an action of businesses to avoid part or all of the obligation to enforce trade remedies measures, mostly relating to evading the trade remedy tariffs. According to the Vietnam's Trade Remedies Authority, in recent years, many forms of customs evasion have taken place in Vietnam, of which, the most common is the activity of transporting goods to a third country to obtain a new source of origin, misrepresenting the origin, and re-labeling goods. The fraudulent acts of origin, illegal goods transportation from other countries to Vietnam may seriously distort the trade remedy measures applied by Vietnam against foreign imports and cause increased losses for domestic producers. Until recently, due to a lax legal framework, Vietnam has yet to initiate an investigation into customs-evasion by foreign firms. However, Vietnamese exports have been faced increasingly with anti-customs evasion investigations, mainly by the EU, US, Turkey and Brazil.

With the introduction of the Law on Foreign Trade Management in 2017, Vietnamese authorities now have a legal basis for the initiation of action against the evasive behavior by foreign firms. The trade authorities of Vietnam shall strengthen inspection and verification of the origin of goods, and coordinate with competent authorities of the importing country to control imported goods.

Literature

∵

Book Review

∵

Annalisa Ciampi (ed.). *History and International Law: An Intertwined Relationship* (Edward Elgar, 2019). Hardcover: 232pp.

There are a variety of different reasons to take an interest in history when dealing with international law since there is a deep and multifaceted relationship between international law and history. Analyzing this intertwined relationship, *History and International Law: An Intertwined Relationship* edited by Annalisa Ciampi, Professor of International Law at the University of Verona, Italy features contributions from leading scholars and practitioners in international law, history and diplomacy. *History and International Law: An Intertwined Relationship* covers topics ranging from Part I, History and International Law: An Introduction (1. Creative Forces and Institution Building in International Law; 2. Eastern Europe's Imprint on Modern International Law); to Part II, History and International Human Rights Law (3. History, Isolation and Effectiveness of International Human Rights Law; 4. EU Human Rights Law and History: A Tale of Three Narratives); and Part III, History, International Humanitarian Law and International Criminal Law (5. 'Treaty after Trauma': 'Protection for All' in the Fourth Geneva Convention; 6. History and Core International Crimes: Friends or Foes?; 7. 'Imaginary Trials': The Legacy of the ICTY in Croatia, Bosnia and Serbia; 8. The Rise and Demise of the ICC Relationship with African States and the AU).

As many of the titles of the chapters indicate, this book focuses on particular reference to international human rights and humanitarian and criminal law rather than general international law. The term "history" that this book adopts is how each relevant treaty was made, not historical facts utilized as evidence for international judicial bodies. From the perspective of international legal historians, first usage is important, but for practicing international lawyers working on dispute settlement and public international law litigation, the latter usage is more important.

The debates within international judicial institutions show vivid examples as to why international lawyers should understand the very nature of history as having probative value as evidence. For example, in the separate opinion of the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*

case, Judge Kooijmans stated that, "[Only] by taking into account the full spectrum of the Parties' history, can their present rights be properly evaluated. By not giving the full historical context its due, however, the Court has … unnecessarily curtailed its scope for settling the dispute in a persuasive and legally convincing way[;]"[1] and in the separate opinion of the *Land and Maritime Boundary between Cameroon and Nigeria* case, Judge Ranjeva stated that, "The inequality and denial of rights inherent in colonial practice in relation to … colonies is currently recognized as an elementary truth; there is a resultant duty to memorialize these injustices and at the same time to acknowledge an historical fact."[2] These judges emphasized the need to understand the historical context of a territorial dispute before reaching a sovereignty determination. The historical criticism approach, first mentioned in the *Case Concerning the Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, provided direction for the development of future decisions with regard to colonial issues. Though not stated in the actual judgment, the reference to the historical criticism approach in these separate opinions contributes greatly to the expansion of the international legal perception regarding colonial settlement.[3] These views provide an opportunity for theorization of the historical criticism approach, which would help diminish the force of current international jurisprudence founded upon European imperialism and elevate the status of the historical perspectives of former colonies.

Though *History and International Law: An Intertwined Relationship* is not able to address all interests and while this book may require a second subtitle so that readers will be able locate this book for their own purposes without confusion, international lawyers and academics will find this book both useful and insightful, in particular, if they are specially interested in international human rights and humanitarian and criminal law.

Seokwoo Lee
Co-Editor-in-Chief

1 Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001 I.C.J. 40 (Mar. 16), (separate opinion of Judge Koojimans), para. 4.

2 Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), 2002 I.C.J. 303 (Oct. 10), (separate opinion of Judge Ranjeva), para. 3.

3 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), 2008 I.C.J. 12 (May 23), (declaration by Judge Ranjeva), para. 5.

International Law in Asia: A Bibliographic Survey – 2018

Soyeon Moon

Introduction

This bibliography provides information on books, articles, notes, and other materials dealing with international law in Asia, broadly defined. Only English language publications that are newly published in 2018 or those that were previously published but had updated editions in 2018 are listed in this survey. Please refer to earlier editions of Asian Yearbook of International Law for earlier bibliographies.

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. Boundary Delimitation and Sovereignty
3. International Dispute Settlement
4. Arbitration
5. Development
6. Commercial Law
7. Economic and Business Law
8. Intellectual Property and Technology
9. Environmental Law
10. Human Rights
11. Migration and Refugees
12. International Humanitarian Law, Criminal Law, and Transnational Crime
13. Law of the Sea
14. Maritime Law
15. Watercourses
16. Air and Space
17. Miscellaneous

1 General Theories and Asian Culture

Donna Brunero & Stephanie Villalta Puig (eds.), Life in Treaty Port China and Japan (2018).

Alessandro Chechi, *Non-State Actors and the Implementation of the World Heritage Convention in Asia: Achievements, Problems, and Prospects*, 8(2) Asian Journal of International Law 461–489 (2018).

Moeen H. Cheema, *Two Steps Forward One Step Back: The Non-Linear Expansion of Judicial Power in Pakistan*, 16(2) International Journal of Constitutional Law 503–526 (2018).

Qi Chen, Governance, Social Control and Legal Reform in China: Community Sanctions and Measures (2018).

Tai-uk Chung et al. (eds.), On the Asian and European Origins of Legal and Political Systems: Views from Korea, Kazakhstan and France (2018).

Ralph Cossa & Brad Glosserman, *The Pivot is Dead, Long Live the* (*Indo-Asia-Pacific*) *Pivot*, 20(2) Comparative Connections: A Triannual E-Journal of Bilateral Relations in the Indo-Asia-Pacific 1–13 (2018).

Renato Cruz De Castro, *The Obama Administration's Strategic Rebalancing to Asia: Quo Vadis in 2017?*, 33(2) Pacific Focus 179–208 (2018).

Arnab Dey, *Diseased Plantations: Law and the Political Economy of Health in Assam, 1860–1920*, 52(2) Modern Asian Studies 645–682 (2018).

Hiroshi Fukurai, *Fourth World Approaches to International Law* (*FWAIL*) *and Asia's Indigenous Struggles and Quests for Recognition Under International Law*, 5(1) Asian Journal of Law and Society 221–231 (2018).

Terence C. Halliday, *Legal Freedoms: Struggle in the Theory of Legal Change in Asia*, 5(1) Asian Journal of Law and Society 233–246 (2018).

Andrew Harding, *Multi-level, Recursive Law and Development: Singapore's Legal Role in ASEAN*, 5(2) Asian Journal of Law and Society 251–269 (2018).

Herman Hidayat et al., *Forests, Law and Customary Rights in Indonesia: Implications of a Decision of the Indonesian Constitutional Court in 2012*, 59(3) Asia Pacific Viewpoint 293–308 (2018).

J.L. Kaul & Anupam Jha (eds.), Shifting Horizons of Public International Law: A South Asian Perspective (2018).

Saloni Khanderia, *The Hague Judgments Project: Assessing its Plausible Benefits for the Development of the Indian Private International Law*, 44(3) Commonwealth Law Bulletin 452–475 (2018).

Sung Won Kim, *Eastphalia Revisited: The Potential Contribution of Eastphalia to Post-Westphalian Possibilities*, 33(3) Pacific Focus 434–454 (2018).

Koesrianti, *Book Review: History and Theory of International Law – From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN by Simon Chesterman*, 8(1) Asian Journal of International Law 293–294 (2018).

Teilee Kuong, *Legal Assistance in the Japanese ODA: The Spark of a New Era*, 5(2) Asian Journal of Law and Society 271–287 (2018).

Katherine Lemons, *Sharia Courts and Muslim Personal Law in India: Intersecting Legal Regimes*, 52(3) Law & Society Review 603–629 (2018).

Jianhong Liu & Setsuo Miyazawa (eds.), Crime and Justice in Contemporary Japan (2018).

Nengye Liu, *Book Reviews: History and Theory of International Law – China, State Sovereignty and International Legal Order. By CHAN Phil C.W.-ERRATUM*, 9(2) Asian Journal of International Law 399 (2018).

Michael Loney, *Comparing the Doctrine of Equivalents Across Asia*, Managing Intellectual Property (2018).

Madeleine Martinek, Experimental Legislation in China Between Efficiency and Legality: The Delegated Legislative Power of the Shenzhen Special Economic Zone (2018).

Mark Massoud, *The Futility of Law and Development: China and the Dangers of Exporting American Law*, 5(1) Asian Journal of Law and Society 213–215 (2018).

Hiromichi Matsuda, *Book Reviews: History and Theory of International Law* – Globalization and Constitution: Tensions and Coordination with Supranational Legal Order by Yamada Satoshi, 8(2) Asian Journal of International Law 490–491 (2018).

Alastair McClure, *Sovereignty, Law, and the Politics of Forgiveness in Colonia India, 1858–1903*, 38(3) Comparative Studies of South Asia, Africa, and the Middle East 385–401 (2018).

Evelyn Moser & Anna Skripchenko, *Russian NGOs and Their Struggle for Legitimacy in the Face of the* 'Foreign Agents' *Law: Surviving in Small Ecologies*, 70(4) Europe-Asia Studies 591–614 (2018).

Seung Jin Oh, *Historical Injustice and its Implications on International Law in East Asia*, 33(3) Pacific Focus 390–413 (2018).

Si-Jin Oh, *Historical Injustice in East Asia: A Case for Interspatial Law*, 33(3) Pacific Focus 414–433 (2018).

Asif H. Qureshi, Contextualizing International Law in Northeast Asia (2018).

Siavash Rahbari, *From Normative Pluralism to a Unified Legal System in Afghanistan?*, 5(2) Asian Journal of Law and Society 289–314 (2018).

Saumya Saxena, 'Court'*ing Hindu Nationalism: Law and the Rise of Modern Hindutva*, 26(4) Contemporary South Asia 378–399 (2018).

Guo-Quan Seng, *The Gender Politics of Confucian Family Law: Contracts, Credit, and Creole Chinese Bilateral Kinship in Dutch Colonial Java (1850s–1900)*, 60(2) Comparative Studies in Society and History 390–414 (2018).

Takao Suami et al. (eds.), Global Constitutionalism from European and East Asian Perspective (2018).

Raeesa Vakil, *Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights*, 16(2) International Journal of Constitutional Law 475–502 (2018).

Dimitri Vanoverbeke et al. (eds.), Developing EU-Japan Relations in a Changing Regional Context: A Focus on Security, Law and Policies (2018).

Ingo Venzke, *What if? Counterfactual (Hi)Stories of International Law*, 8(2) Asian Journal of International Law 403–431 (2018).

Bijun Xu, *The Triple Invention: A Forgotten Memory in the Discourse of the Nineteenth Century's International Law*, 11(2) Journal of East Asia and International Law 375–376 (2018).

2 Boundary Delimitation and Sovereignty

Monika Chansoria, China, Japan, and Senkaku Islands: Conflict in the East China Sea Amid an American Shadow (2018).

Anna Costa, The China-Japan Conflict Over the Senkaku/Diaoyu Islands: Useful Rivalry (2018).

Huiyun Feng & Kai He (eds.), us-China Competition and the South China Sea Disputes (2018).

Seokwoo Lee & Leonardo Bernard, *South China Sea Arbitration and its Application to Dokdo*, 8(1) Asian Journal of International Law 24–35 (2018).

Laurent Mayali & John Yoo, *Resolution of Territorial Disputes in East Asia: The Case of Dokdo*, 36(3) Berkeley Journal of International Law 504–550 (2018).

Kentaro Serita, The Territory of Japan: Its History and Legal Basis (Alex Meyer trans., 2018).

Farid Shafiyev, Resettling the Borderlands: State Relocations and Ethnic Conflict in the South Caucasus (2018).

Nianshen Song, Making Borders in Modern East Asia: The Tumen River Demarcation, 1881–1919 (2018).

Tim Summers, *The Hong Kong Special Administrative Region at 20: Evaluating the Sino-British Joint Declaration*, 7(1) Asian Education and Development Studies 89–101 (2018).

3 International Dispute Settlement

Diane A. Desierto, *Enforcement Options and Paths to Compliance: Disputants and Global Stakeholders in Philippines v. China*, 8(1) Asian Journal of International Law 64–75 (2018).

Lan Ngoc Nguyen, *The UNCLOS Dispute Settlement System: What Role Can it Play in Resolving Maritime Disputes in Asia?*, 8(1) Asian Journal of International Law 91–115 (2018).

Umar A. Oseni et al., *The Feasibility of Online Dispute Resolution in the Islamic Banking Industry in Malaysia: An Empirical Legal Analysis*, 60(1) International Journal of Law and Management 34–54 (2018).

Julia Y. Yang, *Lessons from the South China Sea Ruling: Med-ARB as the Recommended Dispute Resolution Method for Asia's Maritime Disputes Under UNCLOS*, 19(3) Cardozo Journal of Conflict Resolution 783–808 (2018).

4 Arbitration

Gary F. Bell (ed.), The uncitral Model Law and Asian Arbitration Laws: Implementation and Comparisons (2018).

Vijay K. Bhatia et al. (eds.), International Arbitration Discourse and Practices in Asia (2018).

Julien Chaisse & Rahul Donde, *The State of Investor-State Arbitration: A Reality Check of the Issues, Trends, and Directions in Asia-Pacific*, 51(1) The International Lawyer 47–67 (2018).

Julien Chaisse & Luke Nottage (eds.), International Investment Treaties and Arbitration Across Asia (2018).

Liz (Kyo-Hwa) Chung, *International Arbitration in South Korea: A New Push Forward*, 112 Proceedings of the American Society of International Law Annual Meeting 98–100 (2018).

Yuka Fukunaga, *International Arbitration and Japan: Stagnant, but Signs of Change?*, 112 Proceedings of the American Society of International Law Annual Meeting 100–102 (2018).

David Hope, *Making the Best of Arbitration*, 26(1) Asia Pacific Law Review 1–13 (2018).

M.C.W. Pinto, *Arbitration of the Philippine claim Against China*, 8(1) Asian Journal of International Law 1–11 (2018).

Anselmo Reyes & Weixia Gu (eds.), The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific (2018).

Huawei Sun, *Emerging Investment Treaty Arbitration Practice in China*, 112 Proceedings of the American Society of International Law Annual Meeting 103–105 (2018).

Ling Yang, *Best International Arbitration Practice in Hong Kong*, 112 Proceedings of the American Society of International Law Annual Meeting 105–108 (2018).

5 Development

Julien Chaisse & Jedrzej Gorski (eds.), The Belt and Road Initiative: Law, Economics, and Politics (2018).

Armand de Mestral et al. (eds.), Sustainable Development, International Aviation, and Treaty Implementation (2018).

Yong Deng, *How China's Belt and Road is Reordering Asia*, 39(4) Harvard International Review 30–35 (2018).

Weixia Gu, *China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia*, 51(5) Vanderbilt Journal of Transnational Law 1305–1352 (2018).

Maha S. Kamel, *China's Belt and Road Initiative: Implications for the Middle East*, 31(1) Cambridge Review of International Affairs 76–95 (2018).

Pu Niu & Hendrik Wagenaar, *The Limits of Authoritarian Rule: Policy Making and Deliberation in Urban Village Regeneration in China*, 19(4) Japanese Journal of Political Science 678–693 (2018).

Jan Ott, *Law and Development in Asia – Editor's Note to Special Issue*, 5(2) Asian Journal of Law and Society 249–250 (2018).

Wenhua Shan et al. (eds.), Normative Readings of the Belt and Road Initiative: Road to New Paradigms (2018).

Poomintr Sooksripaisarnkit & Sai Ramani Garimella (eds.), China's One Belt One Road Initiative and Private International law (2018).

Yaodong Yu & Yen-Chiang Chang, *The 'One Belt One Road' Initiative and its Impact on Shipping Law in China*, 87 Marine Policy 291–294 (2018).

6 Commercial Law

Julien Chaisse & Luke Nottage (eds.), International Investment Treaties and Arbitration Across Asia (2018).

Holger Fleischer et al. (eds.), Issues and Challenges in Corporate and Capital Market Law: Germany and East Asia (2018).

Yuka Fukunaga, *Abuse of Process Under International Law and Investment Arbitration*, 33(1) Foreign Investment Law Journal 181–211 (2018).

Umair Ghori, *The International Investment Court System: The Way Forward for Asia?*, 21 International Trade and business Law Review 205–229 (2018).

Olly Jackson, *Regulators will be Tougher on Antitrust Enforcement*, International Financial Law Review (2018).

Karry Lai, *Chinese Businesses Feel the Bite of New Bribery Law*, International Financial Law Review (2018).

Mel Marquis & Jingyuan Ma, *Confucian Bureaucracy and the Administrative Enforcement of Competition Law in East Asia*, 43(1) North Carolina Journal of International Law 1–71 (2018).

Hans Micklitz et al., *Dissemination of Consumer Law and Policy in Africa, Asia, the Americas, and Australia*, 41(4) Journal of Consumer Policy 303–307 (2018).

Ploykaew Porananond, Competition Law in the asean Countries: Regional Law and National Systems (2018).

Devi Lucy Y. Siadari & Koki Arai, *International Enforcement of ASEAN Competition Law*, 9(5) Journal of European Competition Law & Practice 328–335 (2018).

7 Economic and Business Law

Saidatul Aziz & Salawati Basir, *ASEAN Economic Community 2015: Restrictions on Malaysian Foreign Investment Law and Policy in Realizing ASEAN Comprehensive Investment Agreement (ACIA)*, 19(S3) International Journal of Business and Society 414–425 (2018).

Julien Chaisse & Luke Nottage (eds.), International Investment Treaties and Arbitration Across Asia (2018).

Salvador del Rey & Robert J. Mignin (eds.), International Labour and Employment Compliance Handbook (4th ed. 2018).

Mark Fenwick & Stefan Wrbka, International Business Law: Emerging Fields of Regulation (2018).

Pasha L. Hsieh, *Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law*, 51(3) Cornell International Law Journal 683–729 (2018).

Eon Kyung Kim & Taegil Kim, *Historical Injustice in Asia and the Role of International Economic Law: How is Fair Trade for Implementation of a 'Level Playing Field' Realized?*, 6(1) The Korean Journal of International and Comparative Law 94–98 (2018).

Tuan Minh Le, *Tax Trends and Tax Reforms in the Developing East Asia and Pacific Region*, 90(7) Tax Notes International 751–756 (2018).

Catherine Li, *The EU's Proposal Regarding the Establishment of the Investment Court System and the Response from Asia*, 52(6) Journal of World Trade 946–966 (2018).

Nengye Liu, *Book Reviews: International Economic Law – China, State Sovereignty and International Legal Order by Phil C.W. Chan*, 8(2) Asian Journal of International Law 491–492 (2018).

James Ransdell, *Institutional Innovation by the Asian Infrastructure Investment Bank*, 9(1) Asian Journal of International Law 125–152 (2018).

John Riley, *The Legal and Policy Implications of the US Steel Tariffs on East Asia*, 11(1) Journal of East Asia and International Law 193–204 (2018).

Anna G. Tevini, Regional Economic Integration and Dispute Settlement in East Asia: The Evolving Legal Framework (2018).

Sakda Thanitcul & Amonwalai Ninpanich, *Does Thailand Fulfill the ASEAN Requirements for Foreign Direct Investment under Partial Liberalization in Electricity Industry?*, 11(2) Journal of East Asia and International Law 293–313 (2018).

Ernst-Ulrich Petersmann, *International Economic Law Without Human and Constitutional Rights? Legal Methodology Questions for my Chinese Critics*, 21(1) Journal of International Economic Law 213–231 (2018).

Yun Zhao (ed.), International Governance and the Rule of Law in China Under the Belt and Road Initiative (2018).

8 Intellectual Property and Technology

Anupam Chander & Madhavi Sunder, *The Battle to Define Asia's Intellectual Property Law: From TPP to RCEP*, 8(3) uc Irvine Law Review 331–361 (2018).

Chia-Yi Liu et al., *The Relationship Between Patent Attributes and Patent Litigation: Considering the Moderating Effects of Managerial Characteristics*, 23(2) Asia Pacific Management Review 121–129 (2018).

Michael Loney, *The Latest IP Moves in the US, Europe, and Asia*, Managing Intellectual Property (2018).

Michael Loney, *The Week in IP – Federal Circuit's Converse Ruling, US Indicts China Entity for Trade Secret Theft, and More*, Managing Intellectual Property (2018).

Abu Bakar Munir et al., Data Protection Law in Asia (2d ed. 2018).

Kholis Roisah, *Emloyee-Inventor's Right to Compensation in Patent Law System in Indonesia and Some Countries*, ix 7(37) Journal of Advanced Research in Law and Economics 2415–2424 (2018).

Belinda Townsend et al., *Japan's Emerging Role in the Global Pharmaceutical Intellectual Property Regime: A Tale of Two Trade Agreements*, 21(1–2) The Journal of World Intellectual Property 88–103 (2018).

Fan Yang & Jian Xu, *Privacy Concerns in China's Smart City Campaign: The Deficit of China's Cybersecurity Law*, 5(3) Asia & The Pacific Policy Studies 533–543 (2018).

Yang Yu, *Is the US Method of Challenging China's IP-related Practices Legally Tenable from an International Legal Perspective?*, 11(2) Journal of East Asia and International Law 413–433 (2018).

9 Environmental Law

Bridie Butterfield, *The Potential Role of Climate Change Litigation in Furthering the Mitigation Objectives of the Paris Agreement*, 21(1) Asia Pacific Journal of Environmental Law 29–49 (2018).

Alan Chong & Jun Yan Chang, *The International Politics of Air Disasters: Lessons for Aviation Disaster Governance from Asia, 2014–2015*, 31(3–4) Cambridge Review of International Affairs 249–271 (2018).

Andrés Bautista-Hernáez, *A Comparative Study on International Disaster Law Applicable to Spain and the Philippines*, 66(1) Estudios De Deusto: Revista De La Universidad De Deusto 235–252 (2018).

Seokwoo Lee & Lowell Bautista, *Part XII of the United Nations Convention of the Law of the Sea and the Duty to Mitigate Against Climate Change: Making Out a Claim, Causation, and Related Issues*, 45(1) Ecology Law Quarterly 129–155 (2018).

Takako Morita & Christina Pak, *Legal Readiness to Attract Climate Finance: Towards a Low-Carbon Asia and Pacific*, 12(1) Carbon & Climate Law Review 6–14 (2018).

Rafael M. Plaza, *A Blue Energy Option for the Mekong River Basin. An International Law Analysis on Asian Regional Cooperation in Pioneer Osmotic Power Projects*, 25 Sustainable Energy Technologies and Assessments 75–98 (2018).

Gabrielle Simm, *Disaster Response in Southeast Asia: The ASEAN Agreement on Disaster Response and Emergency Management*, 8(1) Asian Journal of International Law 116–142 (2018).

Fanny Thornton, Climate Change and People on the Move: International Law and Justice (1st ed. 2018).

10 Human Rights

Rehan Abeyratne, *Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia*, 54(1) Texas International Law Journal 1–37 (2018).

Deepa Das Acevedo, *Gods' homes, Men's Courts, Women's Rights*, 16(2) International Journal of Constitutional Law 552–573 (2018).

Buhm-Suk Baek, *Partially Right, Partially Wrong: Rethinking the Implementation of International Human Rights Law in Countries with Gross Human Rights Violations*, 33(2) Pacific Focus 352–375 (2018).

Mary Buckley, The Politics of Unfree Labour in Russia: Human Trafficking and Labour Migration (2018).

Saltanat Childress & Darald Hanusa, *"All the System is Simply a Soap Bubble": Legal Help-Seeking for Domestic Violence Among Women in Kyrgyzstan*, 33(2) Journal of Family Violence 147–160 (2018).

M. Christian Green & Monica Duffy Toft, *Freedom of Religion or Belief Across the Commonwealth: Hard Cases, Diverse Approaches*, 16(4) The Review of Faith & International Affairs 19–33 (2018).

Jamal Greene & Madhav Khosla, *Constitutional Rights in South Asia: Introduction*, 16(2) International Journal of Constitutional Law 470–474 (2018).

Abdul Hamid & Zaleha Kamaruddin, *International Parental Child Abduction in the Malaysian Legal Context: Addressing Issues and the Way Forward*, 26(2) IIUM Law Journal 275–306 (2018).

Lalu Husni & Ani Suryani, *Legal Protection for Woman Domestic Workers Based on the International Convention*, 21(2) Journal of Legal, Ethical, and Regulatory Issues 1–7 (2018).

Tauqeer Hussain, *Pre-Trial Detention and its Compensation in International and Pakistani Law*, 15(3) Policy Perspectives 47–66 (2018).

Pranoto Iskandar, *Indigenizing Constitutionalism: A Critical Reading of "Asian Constitutionalism"*, 5(1) The Indonesian Journal of International & Comparative Law: Socio-Political Perspectives 3–42 (2018).

Pranoto Iskandar, *Non-Citizen Rights in ASEAN: The Need to Chart a New Course*, 27(2) Social & Legal Studies: An International Journal 180–199 (2018).

Ridoan Karim et al., *Human Rights-Based Approach to Science, Technology and Development: A Legal Analysis*, 11(1) Journal of East Asia and International Law 163–181 (2018).

Mirjam Künkler, *The Bureaucratization of Religion in Southeast Asia: Expanding or Restricting Religious Freedom?*, 33(2) The Journal of Law and Religion 192–196 (2018).

Tomas Larsson, *Buddhist Bureaucracy and Religious Freedom in Thailand*, 33(2) The Journal of Law and Religion 197–211 (2018).

Flavia Lattanzi & Emanuela Pistoia (eds.), The Armenian Massacres of 1915–1916 A Hundred Years Later: Open Questions and Tentative Answers in International Law (2018).

Mara Malagodi, *Challenges and Opportunities of Gender Equality Litigation in Nepal*, 16(2) International Journal of Constitutional Law 527–551 (2018).

Deepak Mehta & Rahul Roy (eds.), Violence and the Quest for Justice in South Asia (2018).

Jeaneé C. Miller et al., *Accusatorial and Information-Gathering Interview and Interrogation Methods: A Multi-Country Comparison*, 24(9) Psychology, Crime & Law 935–956 (2018).

Elizabeth Mills, *Gender, Sexuality and the Limits of the Law*, 8(3) Global Discourse 473–484 (2018).

Fait Muedini, LGBTI Rights in Turkey: Sexuality and the State in the Middle East (2018).

YUMIKO NAKANISHI (ED.), CONTEMPORARY ISSUES IN HUMAN RIGHTS LAW: EUROPE AND ASIA (2018).

Joel E. Oestreich, *Sexual Orientation and Gender Identity in Nepal: Rights Promotion Through UN Development Assistance*, 17(2) JOURNAL OF HUMAN RIGHTS 265–279 (2018).

Pascale Hancart Petitet, *Abortion Politics in Cambodia Social History, Local Forms and Transnational Issues*, 13(6) GLOBAL PUBLIC HEALTH: AN INTERNATIONAL JOURNAL FOR RESEARCH, POLICY AND PRACTICE 692–701 (2018).

Azmi Sharom, *Law and the Judiciary: Divides and Dissent in Malaysia*, 7(3) SOUTHEAST ASIAN STUDIES 391–413 (2018).

Rajnesh Singh, *Mapping Online Child Safety in Asia and the Pacific*, 5(3) ASIA & THE PACIFIC POLICY STUDIES 651–664 (2018).

Edmond J. Smith, *Reporting and Interpreting Legal Violence in Asia: The East India Company's Printed Accounts of Torture, 1603–24*, 46(4) THE JOURNAL OF IMPERIAL AND COMMONWEALTH HISTORY 603–626 (2018).

Elizabeth Zuccala & Richard Horton, *Addressing the Unfinished Agenda on Sexual and Reproductive Health and Rights in the SDG Era*, 391(10140) THE LANCET 2581–2583 (2018).

11 Migration and Refugees

Te-Yuan Chien, *Differentiated Human Rights of Migrant Spouses Based on Nationalities in Taiwan*, 19(2) ASIA-PACIFIC JOURNAL ON HUMAN RIGHTS AND THE LAW 81–112 (2018).

MARY CROCK & LENNI B. BENSON (EDS.), PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE (2018).

Bilal Dewansyah & Irawati Handayani, *Reconciling Refugee Protection and Sovereignty in ASEAN Member States: Law and Policy Related to Refugee in Indonesia, Malaysia and Thailand*, 12(4) CENTRAL EUROPEAN JOURNAL OF INTERNATIONAL & SECURITY STUDIES 473–485 (2018).

Zuraini Ab Hamid et al., *Rights of Migrant Workers under Malaysian Employment Law*, 11(2) JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 359–374 (2018).

Lauri Kai, *Embracing the Chinese Exclusion Case: An International Law Approach to Racial Exclusions*, 59(6) WILLIAM AND MARY LAW REVIEW 2617–2662 (2018).

Ruchi Lal, *Social and Economic Rights of Refugees Under International Legal Framework: An Appraisal*, 58(3) INDIAN JOURNAL OF INTERNATIONAL LAW 467–488 (2018).

Jera Lego, *Making Refugees (Dis)Appear: Identifying Refugees and Asylum Seekers in Thailand and Malaysia*, 11(2) AUSTRIAN JOURNAL OF SOUTHEAST ASIAN STUDIES 183–198 (2018).

Zezen Zaenal Mutaqin, *The Rohingya Refugee Crisis and Human Rights: What Should ASEAN Do?*, 19(1) Asia-Pacific Journal on Human Rights and the Law 1–26 (2018).

Natasha Raheja, *Neither Here nor There: Pakistani Hindu Refugee Claims at the Interface of the International and South Asian Refugee Regimes*, 31(3) Journal of Refugee Studies 334–352 (2018).

Christopher Rossi, *The Nomos of Climate Change and the Sociological Refugee in a Sinking Century*, 50(3) The George Washington International Law Review 613–652 (2018).

Saskia Sassen, A Third Emergent Migrant Subject Unrecognized in Law: Refugees From 'Development' (2018).

Executive Committee of the High Commissioner's Programme, *Note on International Protection*, 30(1) International Journal of Refugee Law 140–159 (2018).

12 International Humanitarian Law, Criminal Law, and Transnational Crime

Rebecca Barber, *Legal Preparedness for the Facilitation of International Humanitarian Assistance in the Aftermath of Vanuatu's Cyclone Pam*, 8(1) Asian Journal of International Law 143–165 (2018).

Bonhoefer Bernardez, *Book Reviews: International Criminal Law – Trials for International Crimes in Asia* by Kirsten Sellars, 8(1) Asian Journal of International Law 295–296 (2018).

W.L. Cheah & Moritz Vormbaum, *British War Crimes Trials in Europe and Asia, 1945–1949: A Comparative Study*, 31(3) Leiden Journal of International Law 669–692 (2018).

David Cohen & Yuma Totani, The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence (2018).

Mark D. Kielsgard & Tam Hey Juan Julian, *Autocatalytic Models of Counter-Terrorism in East and Southeast Asia: An International Comparative Analysis of China, Indonesia, and Thailand*, 50(3) The George Washington International Law Review 461–522 (2018).

Jingyuan Ma & Mel Marquis, *Moral Wrongfulness and Cartel Criminalization in East Asia*, 35(3) Arizona Journal of International and Comparative Law 377–434 (2018).

Xiao Mao, *Substantive or Jurisdictional? The Tokyo Charter and the Legality Challenge at the International Military Tribunal for the Far East*, 11(2) Journal of East Asia and International Law 435–451 (2018).

Melinda Rankin, *Australia's Responsibility to Prosecute? Bridging the Gap of International Criminal Law in Syria and Iraq*, 72(4) Australian Journal of International Affairs 322–328 (2018).

Will smiley, From Slaves to Prisoners of War: The Ottoman Empire, Russia, and International Law (2018).

A.K. Syahmin & Fidelia Fidelia, *The International Cooperation to Eradicate Illicit Firearms Trafficking in Southeast Asian Region*, 2(2) Sriwijaya Law Review 183–192 (2018).

Emma van Santen, *Combatting Organized Crime and Terrorism in Central Asia*, 25(2) Journal of Financial Crime 309–319 (2018).

Kerstin von Lingen (ed.), Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946–48 (2018).

Andrew Wolman, *Humanitarian Protection Advocacy in East Asia: Charting a Path Forward*, 37(1) Refugee Survey Quarterly 25–43 (2018).

13 Law of the Sea

Abdullah Al Arif, *Legal Status of the Precautionary Principle in International Fisheries Law and its Application in the Marine Fisheries Regime of Bangladesh*, 3(1) Asia-Pacific Journal of Ocean Law and Policy 95–114 (2018).

Tara Davenport, *Island-Building in the South China Sea: Legality and Limits*, 8(1) Asian Journal of International Law 76–90 (2018).

Bruce A. Elleman, China's Naval Operations in the South China Sea: Evaluating Legal, Strategic and Military Factors (2018).

Huiyun Feng & Kai He (eds.), us-china Competition and the South China Sea Disputes (2018).

Douglas Guilfoyle, *The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?*, 8(1) Asian Journal of International Law 51–63 (2018).

Paul Hallwood & Thomas Miceli, *Piracy and Privateers in the Golden Age: Lessons for Today*, 49(3) Ocean Development and International Law 236–246 (2018).

Nong Hong, *The South China Sea Arbitration: A Test for the Efficacy of Compulsory Mechanism of UNCLOS and Implications for Dispute Management in the Region*, 10(2) Asian Politics & Policy 219–246 (2018).

Hyun Jung Kim, *Governing Fishing Stocks in Northeast Asia's Disputed Waters: Preventing a 'Tragedy of the Commons'?*, 33(3) The International Journal of Marine and Coastal Law 495–527 (2018).

Nehginpao Kipgen, *ASEAN and China in the South China Sea Disputes*, 49(3) Asian Affairs 433–448 (2018).

Kei Koga, *Japan's Strategic Interests in the South China Sea: Beyond the Horizon?*, 72(1) Australian Journal of International Affairs 16–30 (2018).

Whiejin Lee, *The Law of the Sea Regime in Northeast Asia: Issues and the Way Forward*, 32(1) The Journal of East Asian Affairs 45–70 (2018).

Xinmin Ma, *Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal*, 8(1) Asian Journal of International Law 12–23 (2018).

Wim Muller, *Book Reviews: Law of the Sea – Recent Developments in the South China Sea Dispute: The Prospects of a Joint Development Regime* edited by Wu Shicun and Nong Hong, *The South China Sea Disputes and Law of the Sea* edited by S. Jayakumar, Tommy Koh, and Robert Beckman, *The South China Sea Arbitration: A Chinese Perspective* edited by Stefan Talmon and Bing Bing, *The China-Japan Border Dispute: Islands of Contention in Multidisciplinary Perspective* edited by Tim F. Liao, Kimie Hara, and Krista Wiegand, *Arbitration Concerning the South China Sea: Philippines Versus China* edited by Wu Shicun and Keyuan Zou, 8(1) Asian Journal of International Law 296–299 (2018).

Christine Sim, *Book Reviews: Law of the Sea – Unresolved Border, Land and Maritime Disputes in Southeast Asia: Bi- and Multilateral Conflict Resolution Approaches and ASEAN's Centrality* edited by Alfred Gerstl and Maria Strasakova, 8(2) Asian Journal of International Law 495–496 (2018).

Jonathan Spangler et al. (eds.), Enterprises, Localities, People, and Policy in the South China Sea: Beneath the Surface (2018).

Peter Vandergeest, *Law and Lawlessness in Industrial Fishing: Frontiers in Regulation Labour Relations in Asia*, 68 (229–230) International Social Science Journal 325–341 (2018).

Keyuan Zou (ed.), global Commons and the Law of The Sea (2018).

14 Maritime Law

Jesse Greene, *The Glenn Defense Marine Asia Problem: The Role of Ethics in Procurement Reform*, 48(1) Public Contract Law Journal, 16–34 (2018).

Gordon Houlden & Nong Hong (eds.), Maritime Order and the Law in East Asia (2018).

Abul Kalam, Bangladesh's Maritime Policy: Entwining Challenges (2018).

Suk Kyoon Kim, *The Expansion of and Changes to the National Coast Guards in East Asia*, 49(4) Ocean Development & International Law 313–334 (2018).

Seokwoo Lee & Eonkyung Park, *Maritime Law Enforcement by the Republic of Korea Concerning Proliferation of Weapons of Mass Destruction: Search and Interdiction*, 33(3) Pacific Focus 478–496 (2018).

Jinxing Ma, *A Chinese Perspective of Treaty Interpretation on the Status of Maritime Features: In Response to the South China Sea Arbitration Award*, 11(1) JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 99–120 (2018).

Brian McGarry, *The Settlement of Maritime Boundary Disputes in Southeast Asia and Oceania: A Synthesis in Light of Indonesian Practice*, 5(2) JOURNAL OF TERRITORIAL AND MARITIME STUDIES 24–45 (2018).

Giacomo Morabito & Bruno Sergi, *How did Maritime Piracy Affect Trade in Southeast Asia?*, 18(2) JOURNAL OF EAST ASIAN STUDIES 255–265 (2018).

Rebecca Strating, *Maritime Territorialization, UNCLOS and the Timor Sea Dispute*, 40(1) CONTEMPORARY SOUTHEAST ASIA 101–125 (2018).

CHONGWEI ZHENG ET AL., 21ST CENTURY MARITIME SILK ROAD: A PEACEFUL WAY FORWARD (2018).

15 Watercourses

Maxat Kassen, *Understanding Foreign Policy Strategies of Kazakhstan: a Case Study of the Landlocked and Transcontinental Country*, 31(3–4) CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 314–343 (2018).

Salman M.A. Salman & Kishor Uprety, *Shared Watercourses and Water Security in South Asia: Challenges of Negotiating and Enforcing Treaties*, 3(3) BRILL RESEARCH PERSPECTIVES IN INTERNATIONAL WATER LAW 1–100 (2018).

NILANTHI SAMARANAYAKE ET AL., RAGING WATERS: CHINA, INDIA, BANGLADESH, AND BRAHMAPUTRA RIVER POLITICS (2018).

PATRICIA WOUTERS ET AL. (EDS.), TRANSBOUNDARY WATER COOPERATION: PRINCIPLES, PRACTICE AND PROSPECTS FOR CHINA AND ITS NEIGHBOURS (2018).

Aibek Zhupankhan et al., *Water in Kazakhstan, a key in Central Asian Water Management*, 63(5) HYDROLOGICAL SCIENCES JOURNAL 752–762 (2018).

Aigerim Zhunusbekova et al., *International Legal Aspects of Regulating the Use of Transboundary Rivers in Central Asia*, 9(5(35)) JOURNAL OF ADVANCED RESEARCH IN LAW AND ECONOMICS 1856–1862 (2018).

16 Air and Space

ARMAND DE MESTRAL ET AL. (EDS.), SUSTAINABLE DEVELOPMENT, INTERNATIONAL AVIATION, AND TREATY IMPLEMENTATION (2018).

Shengli Jiang & Yun Zhao, *The Aftermath of the US Space Resource Exploration and Utilization Act: What's Left for China?*, 11(1) JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 9–34 (2018).

Han Taek Kim, *Fundamental Principles of Space Resources Exploitation: A Recent Development of International and Municipal Law*, 11(1) Journal of East Asia and International Law 35–52 (2018).

Sinead Spencer, *The Demand for a Single International Search and Rescue Agreement Template Flexible for Mutl-regional Use as Disseminated by the International Civil Aviation Organisation*, 3 Perth International Law Journal 115–157 (2018).

Amad Sudiro, *Regulating Ballistic Missile Usage for Ensuring Civil Aviation Safety: As a Matter of Urgency*, 11(2) Journal of East Asia and International Law 453–464 (2018).

17 Miscellaneous

Itty Abraham, *Decolonizing Arms Control: the Asian African Legal Consultative Committee and the Legality of Nuclear Testing, 1960–1964*, 26(3) Asian Journal of Political Science 314–330 (2018).

Muralee Das, *International Regulation of Fantasy Sports: Comparative Legal Analysis of United States, Australian, and Asian Laws*, 8(2) unlv Gaming Law Journal 93–120 (2018).

Nader Entessar & Kaveh l. Afrasiabi, Iran Nuclear Accord and the Remaking of the Middle East (2018).

Stewart Fenwick, *Eat, Pray, Regulate: The Indonesian Ulama Council and the Management of Islamic Affairs*, 33(2) Journal of Law and Religion 271–290 (2018).

Jae Woon Lee, *Book Reviews: Other Areas of International Law – A Level Playing Field for "Open Skies": The Need for Consistent Aviation Regulation* by Peter Paul Fitzgerald, 8(1) Asian Journal of International Law 300 (2018).

Erik Mobrand, *Limited Pluralism in Liberal Democracy: Party Law and Political Incorporation in South Korea*, 48(4) Journal of Contemporary Asia 605–621 (2018).

Hong Thao Nguyen, *Asia-Pacific Moving Towards the Ratification of the Treaty on the Prohibition of Nuclear Weapons*, 11(2) Journal of East Asia and International Law 465–475 (2018).

K. Nick, *International Nuclear Law Essentials in Singapore*, 35(2) nea News 19 (2018).

Saumya Saxena, *Commissions, Committees, and Custodians of Muslim Personal Law in Postindependence India*, 38(3) Comparative Studies of South Asia, Africa, and the Middle East 423–438 (2018).

Lee Edson Yarcia & Allan Chester Nadate, *Redesigning Government Regulations Towards a Tobacco Endgame Strategy: A Comparative Law Approach*, 16(1) Tobacco Induced Diseases 37 (2018).

Ting-Fai Yu, *Contextualising the National Anthem Law in Mainland China and Hong Kong: Football as a Field of Political Contention*, 2018 (3) China Perspectives 79–82 (2018).

DILA Events

∵

2018 DILA International Conference and 2018 DILA Academy & Workshop

The 2018 DILA International Conference entitled "Historical Injustice and Islamic Views on International Law & the Making of International Law in Indonesia" and the 2018 DILA Academy and Workshop on "State Practice in International Law in Asian States in the Year of 2017" was held on April 21–22, 2018 at the Islamic University of Indonesia (UII) in Yogyakarta, Indonesia.

The conference opened in the morning of April 21 with welcome addresses by Nandang Soetrisno, Rector of UII; 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 Seokwoo Lee, Co-Editor-in-Chief of the Asian Yearbook of International Law and Professor of International Law at Inha University Law School in Korea. This was followed by the kenote address given by Ko Swan Sik, who was a co-founder of DILA and Professor of International Law (emeritus) of Erasmus University at Rotterdam.

Session one of the conference was entitled "Historical Injustice and International Law – Part 1" and was chaired by Hikmahanto Juwana with presentations made by Korean scholars. The first presenter, Professor Seokwoo Lee presented his paper "Territorial Settlements in Peace Treaties". The second presenter, Seung-Jin Oh of Dankook University, presented on "Historical Injustice and Dispute Settlement in Asia". The final presenter of the session, Buhm-Suk Baek of Kyung Hee University, presented on the "State Practice in International Law in Korea in 2017".

Session two was the second part of "Historical Injustice and International Law" and was chaired by Christopher Cason of the Islamic University of Indonesia and also included presentations from Korean scholars. The first presenter, Sung-Won Kim of Wonkwang University, presented on "The Eastphalian Project Revisited". The second presenter, Seryon Lee of Jeonbuk National University School of Law, discussed the "Refugee and Humanitarian Crisis: Paving the Way for Refugee Protection in East Asia". Next, Sangmin Shim of the Korea National Diplomatic Academy explained "The North-South Divide on Sustainable Development and the Recent Developments in the Asian Context". Lastly, Eon Kyung Park and Tea-Gil Kim of Kyung Hee University discussed the "Historical Injustice in Asia and the Role of International Economic Law: How is Fair Trade for Implementation of a 'Level Playing Field' Realized?"

Session three was the first part of "Islamic Views on International Law and the Making of International Law in Indonesia" and was chaired by Tae-Hyun Choi of Hanyang University School of Law, Korea. The first presenter was Melda Kamil Ariadno of the Universitas Indonesia who examined the "Indonesian Practices on

the Law of the Sea". Agus Triyanta of the Islamic University of Indonesia followed with a discussion of "Ihya Al-Mawat: An Islamic Perspective on the Concept of Land Occupation in International Law". The third presenter, Dodik Setiawan Nur Heriyanto of the Islamic University of Indonesia, followed with a presentation on "Increasing ASEAN's Role in Settling Regional Refugee Problems". Finally, Christopher Cason of the Islamic University of Indonesia presented on "Forward, Reverse, or Neutral: A Look Back on Ten Years' Development of Women's Employment Rights in Indonesia and South Korea".

Session four was the second part of "Islamic Views on International Law and the Making of International Law in Indonesia" and was chaired by Seokwoo Lee. First, Jawahir Thontowi of Islamic University of Indonesia examined "The Role of Indonesia in Making ASEAN International Law: The Helsinki Agreement on Aceh as a Model Adopted by The Philippines and Thailand Governments to Peacefully Settle Muslim Rebellions". Then, Sefriani of the Islamic University of Indonesia presented on "A New Bilateral Investment Treaty Model for Indonesia". The third presenter, Sri Wartini of the Islamic University of Indonesia discussed the "Implementation of the RAMSAR Treaty in Indonesia". Lastly, Nandang Sustrino of the Islamic University of Indonesia presented on "Indonesia and the Word Trade Organization".

The conference then came to a close with final remarks by chairpersons Hikmahanto Juwana and Seokwoo Lee with support from Lowell Bautista of University of Wollongong School of Law, Australia.

The following day, April 22, the 2018 DILA Academy and Workshop was convened with welcome addresses by Nandang Soetrisno, Hikmahanto Juwana, and Seokwoo Lee. The first session of the Academy and Workshop was entitled, "State Practice in International Law in Northeast Asian States in the Year of 2017 – Part 1" and chaired by Hikmahanto Juwana. Next, Si Jin Oh of Sahmyook University, Korea spoke on the "Relevance of History and Theory in the Historical Injustice Issues of East Asia". Lastly, Seokwoo Lee and Hee Cheol Yang of the Korea Institute of Ocean Science and Technology followed with presentations on the "State Practice in International Law in Korea in 2017".

The second session of the day was "State Practice in International Law in Northeast Asian States in the Year of 2017 – Part 2" and chaired by Daesong Hyun of the Korea Maritime Institute. Presentations were made by Dustin Kuan-Hsiung Wang of National Taiwan Normal University on the "State Practice in International Law in Taiwan in 2017"; Kanami Ishibashi of Tokyo University of Foreign Studies on the "State Practice in International Law in Japan in 2017"; and finally by Jay Batongbacal of the University of the Philippines on "State Practice in International Law in the Philippine in 2017".

The last full session of the Academy and Workshop, "State Practice in International Law in Southeast Asian States in the Year of 2017", was chaired by Ko Swan Sik.

Hikmahanto Juwana and Arie Afriansyah of Universitas Indonesia presented on the "State Practice in International Law in Indonesia in 2017".

Hikmahanto Juwana and Seokwoo Lee then offered their final remarks and closed the 2018 DILA Academy and Workshop.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief